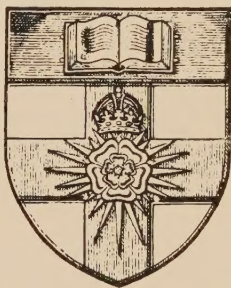


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1926



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THE ALL ENGLAND LAW REPORTS REPRINT

Being a selection from the
LAW TIMES REPORTS
1843-1935

REVISED AND ANNOTATED

1926

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LONDON
BUTTERWORTH & CO. (PUBLISHERS) LTD.
1959

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[1926] All E.R. Rep.

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1959

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THE ALL ENGLAND LAW REPORTS REPRINT

KINGSTON UNION ASSESSMENT COMMITTEE *v.* METROPOLITAN WATER BOARD

E [HOUSE OF LORDS (Viscount Cave, L.C., Lord Atkinson, Lord Buckmaster, Lord Carson and Lord Blanesburgh), November 23, 24, 26, 1925, January 29, 1926]

[Reported [1926] A.C. 331; 95 L.J.K.B. 605; 134 L.T. 483;
90 J.P. 69; 42 T.L.R. 275; 24 L.G.R. 105; 1 B.R.A. 111]

F *Rates—Assessment—Profits basis—Water undertaking.*

G
H
I In the absence of special circumstances rendering it inapplicable in a particular case, a water undertaking, the rateable hereditaments belonging to which are scattered over many parishes and include indirectly productive assets (such as intakes, filter beds, reservoirs, pumping stations, and carrying or pumping mains) and assets directly productive in the parish in which the undertaking is to be assessed to rates (such as the service pipes which carry water to the consumers), should be rated on the "profits basis," that is to say, the net annual value of the whole undertaking should first be ascertained by deducting from the gross receipts of the undertaking for the previous year working expenses, an allowance for tenant's profit, and the cost of repairs, insurance, and other statutable deductions, treating the balance remaining as the rateable value of the whole undertaking, and distributing this rateable value among the various parishes into which the undertaking extends, apportioning to each parish a sum arrived at by deducting from the net annual value of the whole undertaking the net annual value of the indirectly productive portion thereof, dividing the remainder (the net annual value of the directly productive hereditaments) among the various parishes in the proportion of the water revenue arising in each parish to the total revenue of the undertaking, and adding a percentage of the structural value of the indirectly productive assets in the particular parish.

Decision of Court of Appeal, [1925] 2 K.B. 509, affirmed.

Notes. Considered: *Manchester Corpn. v. Bolton Area Assessment Committee and Little Hulton U.D.C.* (1930), 144 L.T. 570; *Manchester Corpn. v. Bolton Assessment Committee and Westhoughton U.D.C.* (1930), 144 L.T. 618; *St. James' and Pall Mall Electric Light Co., Ltd. v. Westminster Assessment Committee*, [1933] All E.R.Rep. 98; *Metropolitan Electric Supply Co. v. Buckingham County*

Valuation Committee, [1939] 1 All E.R. 36; *Barking Borough Rating Authority v. Central Electricity Board*, [1940] 3 All E.R. 477; *Croydon Gas Co. v. Croydon Borough Rating Authority*, [1946] 1 All E.R. 384; *Clayton v. British Transport Commission*, [1955] 2 All E.R. 274; *Lee (Valuation Officer) v. Mid-Northamptonshire Water Board*, [1956] 2 All E.R. 59. Referred to: *Railway Assessment Authority v. Southern Rail. Co., L.C.C. v. Southern Rail. Co.*, [1936] 1 All E.R. 26; *Racecourse Betting Control Board v. Brighton County Borough Rating Authority*, [1941] 2 All E.R. 595; *Yeovil R.D.C. v. South Somerset and District Electricity Co.*, [1947] 1 All E.R. 669; *Amalgamated Relays, Ltd. v. Burnley Rating Authority*, [1950] 1 All E.R. 253; *Surrey County Valuation Committee v. Chessington Zoo, Ltd.*, [1950] 1 All E.R. 154; *Metropolitan Water Board v. Hertford Corpn., Hertford Corpn. v. Metropolitan Water Board*, [1953] 1 All E.R. 1047; *Sandown Park, Ltd. v. Castle* (1954), 52 L.G.R. 361; *Mid-Northamptonshire Water Board v. Lee (Valuation Officer)*, [1957] 2 All E.R. 143.

As to the rating of water undertakings, see 27 HALSBURY'S LAWS (2nd Edn.) 417 et seq.; and for cases see 38 DIGEST 547-552.

Cases referred to:

- (1) *R. v. Mile End Old Town (Churchwardens and Overseers)* (1847), 10 Q.B. 208; 2 New Mag. Cas. 240; 3 New Sess. Cas. 13; 16 L.J.M.C. 184; 9 L.T.O.S. 312; 11 J.P. 505; 11 Jur. 988; 116 E.R. 80; 38 Digest 552, 925.
- (2) *R. v. West Middlesex Water Works* (1859), I.E. & E. 716; 28 L.J.M.C. 135; 32 L.T.O.S. 388; 23 J.P. 164; 120 E.R. 1078; sub nom. *West Middlesex Waterworks Co. of Proprietors v. Hampton Overseers*, 5 Jur.N.S. 1159; 38 Digest 548, 908.
- (3) *Sheffield United Gas Light Co. v. Sheffield Overseers* (1863), 4 B. & S. 135; 8 L.T. 692; 27 J.P. 439; 9 Jur.N.S. 623; 122 E.R. 410; sub nom. *R. v. Sheffield United Gaslight Co.*, 32 L.J.M.C. 169; 11 W.R. 1064; 38 Digest 553, 932.
- (4) *Mersey Docks v. Cameron, Jones v. Mersey Docks* (1865), 11 H.L.Cas. 443; 20 C.B.N.S. 56; 6 New Rep. 378; 35 L.J.M.C. 1; 12 L.T. 643; 29 J.P. 483; 11 Jur.N.S. 746; 13 W.R. 1069; 11 E.R. 1405, H.L.; 38 Digest 466, 286.
- (5) *Worcester Corpn. v. Droitwich Assessment Committee* (1876), 2 Ex.D. 49; 46 L.J.M.C. 241; 36 L.T. 186; 41 J.P. 355; 25 W.R. 336, C.A.; 38 Digest 550, 916.
- (6) *Peterborough Corpn. v. Stamford Union* (1883), 31 W.R. 949; affirmed sub nom. *Peterborough Corpn. v. Wilsthorpe Overseers*, 12 Q.B.D. 1, C.A.; 38 Digest 550, 917.
- (7) *Port of London Authority v. Orsett Union Assessment Committee*, [1920] A.C. 273; 89 L.J.K.B. 481; 122 L.T. 722; 84 J.P. 69; 36 T.L.R. 233; 18 L.G.R. 153; 2 B.R.A. 709, H.L.; 38 Digest 563, 1017.
- (8) *R. v. London School Board* (1886), 17 Q.B.D. 738; 55 L.J.M.C. 169; 55 L.T. 384; 50 J.P. 419; 2 T.L.R. 633; *Ryde, Rat. App.* (1886-90), 235; sub nom. *London School Board v. St. Leonard, Shoreditch Assessment Committee*, 34 W.R. 583, C.A.; 38 Digest 635, 1536.
- (9) *R. v. South Staffordshire Waterworks Co.* (1885), 16 Q.B.D. 359; 55 L.J.M.C. 88; 54 L.T. 782; 50 J.P. 20; 34 W.R. 242; 2 T.L.R. 193, C.A.; 38 Digest 551, 920.
- (10) *Metropolitan Water Board v. Chertsey Assessment Committee*, [1916] 1 A.C. 337; 85 L.J.K.B. 296; 114 L.T. 380; 90 J.P. 137; 32 T.L.R. 168; 60 Sol. Jo. 208; 14 L.G.R. 217; 1 B.R.A. 408, H.L.; 38 Digest 551, 919.
- (11) *Liverpool Corpn. v. Llanfyllin Assessment Committee*, [1899] 2 Q.B. 14; 68 L.J.Q.B. 762; 80 L.T. 667; 63 J.P. 452; 15 T.L.R. 349, C.A.; 38 Digest 551, 921.
- (12) *L.C.C. v. Erith Parish (Churchwardens, etc.) and Dartford Union Assessment Committee, West Ham Parish (Churchwardens, etc.) v. L.C.C., St. George's Union Assessment Committee v. L.C.C.*, [1893] A.C. 562; 63

- A L.J.M.C. 9; 69 L.T. 725; 57 J.P. 821; 42 W.R. 330; 10 T.L.R. 1; 6 R. 22; sub nom. *L.C.C. v. Erith Overseers*, *L.C.C. v. West Ham Union*, *L.C.C. v. Woolwich Union*, *L.C.C. v. St. George's Union*, Ryde Rat. App. (1891-93) 382, H.L.; 38 Digest 429, 42.
- (13) *West Kent Main Sewerage Board v. Dartford Union Assessment Committee, etc.*, [1911] A.C. 171; 80 L.J.K.B. 805; 104 L.T. 357; 75 J.P. 305; 55 Sol. Jo. 363; 9 L.G.R. 511; Konst. & W. Rat. App. 168, H.L.; 38 Digest 440, 112.
- B (14) *Metropolitan Water Board v. St. Marylebone Assessment Committee*, [1923] 1 K.B. 86; 92 L.J.K.B. 161; 128 L.T. 358; 86 J.P. 225; 20 L.G.R. 832; 38 Digest 547, 903.

Appeal from an order of the Court of Appeal (BANKES, L.J., and LAWRENCE, J., C ATKIN, L.J., dissenting) reported [1925] 2 K.B. 509, upon a Special Case stated by Middlesex Quarter Sessions, for the opinion of the King's Bench Division.

The Case stated as follows: 1. This was an appeal by the Metropolitan Water Board against a rate made on Oct. 11, 1920, for the relief of the poor of the parish of Teddington, and for other purposes chargeable thereon according to law, and was determined by the Middlesex Quarter Sessions on June 4, 1924. 2. On the hearing of the said appeal the following facts were admitted or proved: (a) The Metropolitan Water Board was constituted by the Metropolis Water Act, 1902, under which there was vested in the board, as one undertaking, the water supply of the metropolis and adjoining districts within the area defined in Sched. II to that Act, subject to certain alterations since made, which are not material to this case. The board (hereinafter called "the appellants") has been, and now was, carrying on the said undertaking as a whole, and their charges for water were, at the date of the said rate, regulated by the Metropolitan Water Board (Charges) Act, 1907. (b) The appellants were occupiers of hereditaments in the parish of Teddington, in the county of Middlesex, consisting of mains, pipes, and other apparatus for the conveyance and supply of water which were referred to in the assessment appealed against. (c) The appellants' undertaking in the said parish consisted of service pipes (directly productive) which were tapped to afford a supply of water to consumers, and carrying and pumping mains (indirectly productive), which passed through the said parish, but were not tapped to afford a supply of water to consumers in the said parish. Both classes of pipes and mains were laid under the roads and streets, and there were no works above the surface of the ground in the said parish. (d) The capital value of the said hereditaments in the parish had been agreed between the parties and the question which the court of quarter sessions was asked to determine and determined resolved itself into one of principle, viz.: What was the proper method or basis for assessing in the year 1920 the portion within the parish of Teddington of the undertaking of the appellants—whether it should be (a) the profits basis system or (b) upon a percentage on structural value. 3. The appellants contended that the proper method upon which to estimate the rent at which the said hereditaments might reasonably be expected to let from year to year was to ascertain the rateable value of the entire water undertaking upon the basis of the appellants' revenue account (for which purpose the accounts for the material year, viz., that ending March, 1920—the financial year next preceding the date of the said rate—were taken by the appellants) and to distribute the rateable value so arrived at by the method more particularly shown in paras. 7 and 8 of the appellants' statement of facts. 4. The respondents contended (a) That the method of valuation contended for by the appellants took no account of the rents at which the hereditaments in question might reasonably be expected to let from year to year and did not comply with the provisions of the Parochial Assessments Act, 1836, s. 1; (b) that the appellants being a public body and occupying the hereditaments in question for the purpose of carrying out their statutory duties and not for the purpose of earning profits, the profits earning basis contended for by the appellants was not the true test of the rateable value of the hereditaments in their occupation; (c) that the true method of ascertaining the

rateable value of the hereditaments in question was that of applying a reasonably remunerative rate of interest to the capital value of the hereditaments; (d) that where, as the case of this parish, the hereditaments in question consisted entirely of pipes and mains, 5 per cent. upon the agreed capital value was a reasonable rate of interest to take for the purpose of ascertaining the rateable value. 5. It was admitted or proved that, if the method of assessment for which the appellants contended was applied, the assessment appealed against should be reduced to the amounts claimed by them, and that if the method of assessment contended for by the respondents was applied, the assessment appealed against was right. No other method was suggested by either side for the purpose of the rateable value of the said hereditaments. 6. The court of quarter sessions was of opinion that the contentions of the respondents were correct, and, accordingly, upheld the gross estimated rental of £2,484 and the rateable value of £2,114 and dismissed the appeal with costs. 7. The question for the opinion of the King's Bench Division was whether the said determination was right in law.

Paragraphs 7 and 8 of the appellants' statement of facts were as follows: 7. The appellants contend that the proper method of ascertaining the value of the water undertaking in the said parish is that usually followed in arriving at the rateable value of the part of a water undertaking in a parish where the undertaking extends into several parishes. This was the method followed by the appellants and adopted by London Quarter Sessions in recent appeals by the appellants against the quinquennial valuation of their undertaking in the several parishes and boroughs of the metropolis under the Valuation (Metropolis) Act, 1869. The total rateable value of the entire water undertaking is first ascertained upon the basis of the board's revenue account of the year ended March, 1920. From the gross receipts are deducted working expenses, allowances to the tenant, and the cost of repairs, renewals, &c., the balance remaining being the rateable value of the entire undertaking. It is then necessary to distribute this rateable value among the various parishes into which the undertaking extends and again the usual method of distributing this rateable value has been followed as was adopted in the other rating areas referred to. The rateable value of the indirectly productive portion—consisting of land, works (including intakes, filter beds, reservoirs, pumping stations, &c., also carrying and pumping mains)—is ascertained upon what is known as the "contractors' principle" by applying a percentage to the structural value thereof. This sum is deducted from the rateable value plus rates of the entire undertaking and the balance remaining is the rateable value plus rates of the directly productive portion of service pipes. This rateable value is distributed among the several parishes in proportion to the revenue derived from supplies in each particular parish. By this means the sum of the rateable value of the board's undertaking in each parish approximates to the total rateable value of the entire undertaking based upon the said revenue account. 8. The appellants rely upon the following figures to ascertain the rateable value of the entire undertaking:

	£	
Gross receipts	3,105,649	
Working expenses ex rates	1,598,287	
Net receipts plus rates	1,512,362	
Tenant's share 7 per cent. of gross receipts	217,395	
Gross value plus rates	1,294,967	
Statutable deductions	287,701	
Rateable value plus rates	1,007,266	
Deduct rates on rateable value here found at 13s. in the £ ...	396,802	
Rateable value of the entire undertaking	£610,464	

A The distribution of the proper proportion of the total rateable value of the board's undertaking in the said parish of Teddington is as follows :

	£	£
Revenue derived from supplies in the parish for year ending		
March 31, 1920	6,366	
B Directly productive—		
Rateable value plus rates of service pipes calculated at $6\frac{1}{2}$ per cent. of the revenue		413
Deduct rates at 14s. 8d. in the £ on the rateable value here found, viz., £238		175
C Indirectly productive—		238
Add rateable value of the indirectly productive portion in the parish, calculated at $2\frac{1}{2}$ per cent. of the structural value, as agreed, viz., £23,755		594
D Total rateable value of the Board's undertaking in the parish		832
Add statutables		416
Gross estimated rental of the Board's undertaking in the parish ...	£1,248	

E The board also appealed against rates made in respect of their property in the parishes of Hampton and Hampton Wick. The Cases Stated were identical with that in the *Teddington Case*, except that in the *Hampton Case* it was stated that there were also works of very great value above the surface of the ground, which were used for the general purposes of the appellants' undertaking both within and without the said parish, and in that case it was suggested that 4 per cent. on the agreed capital value of the land was a reasonable rate.

F The Court of Appeal held (ARKIN, L.J., dissenting), affirming the decision of the Divisional Court, that the rating authority had no option where the hereditaments to be rated were occupied by a public authority to decide whether it would adopt the profits basis or the contractors' basis upon which to arrive at the gross and rateable value of the property of the undertaking situate within its area. The basis or method contended for by the water board as the one for ascertaining the rent which the hypothetical tenant might reasonably be expected to give for the hereditaments in question was the true method. The assessment committee appealed.

G *Mitchell-Innes, K.C., Sir Malcolm Macnaghten, K.C., and Walter Hedley* for the assessment committee.

Tyldesley Jones, K.C., and S. O. Henn Collins for the water board.

The House took time for consideration.

H Jan. 26. The following opinions were read.

I **VISCOUNT CAVE, L.C.**—These appeals are concerned with the method in which the Metropolitan Water Board should be assessed for rating purposes in the Kingston union. The board was incorporated by the Metropolis Water Act, 1902, for the purpose of taking over, either for cash or for water stock to be issued by the board, and carrying on the undertakings of eight metropolitan water companies. The board was to provide, by the creation of a sinking fund, for the redemption of the water stock within a period of 100 years from Mar. 31, 1903, and was to pay interest on such stock until redemption. It was to supply water for domestic purposes within the limits of supply at a rate per annum which (under an amending Act of 1907) was not to exceed 5 per centum of the rateable value of the premises supplied; and any deficiency in its funds, whether for meeting the expenses of the undertaking or for paying or providing for the interest and sinking fund of the water stock, was to be levied by a deficiency rate. The Act of 1902

was further amended by the Metropolitan Water Board (Charges) Act, 1921; but as that statute did not apply to the assessment now in question, it is unnecessary further to refer to it. The board in due course took over the undertakings of the water companies and issued the necessary stock; and it now supplies water for domestic purposes throughout the limits of supply, which include not only the administrative county of London but also considerable parts of the counties of Middlesex, Surrey, Kent, Essex, and Hertford.

From the establishment of the board down to the year 1920 the rateable hereditaments belonging to the board, which are scattered over many parishes and include waterworks, reservoirs, filter beds and main and service pipes, were assessed throughout the area of supply on what is known as the "profits basis," that is to say, upon a calculation based (in a manner to which I will refer later) on the profits earned by the whole undertaking; but in October, 1920, the assessing authorities in the Kingston union became dissatisfied with that method of assessment and claimed to make the assessments upon what is known as the "contractors' basis," that is to say, upon an estimate of what would be an adequate annual remuneration to a contractor for providing the rateable hereditaments of the board in each parish without regard to the profits of the undertaking as a whole. The board objected, contending that the profits basis should be adhered to, and in respect of the three Middlesex parishes in the Kingston union (Hampton, Teddington, and Hampton Wick) appealed against the rate to the Middlesex Quarter Sessions. The justices in quarter sessions confirmed the rate, subject to a Special Case which they stated for the opinion of the High Court; but on the argument of the Case a Divisional Court of the King's Bench Division upheld the contention of the board and reduced the assessments accordingly, and that decision has been affirmed by the Court of Appeal. Hence the present appeal. It may be added that the question to be determined is one of principle only and not of figures; for it is expressly stated in the Special Case that

"it was admitted or proved that if the method of assessment for which the appellants (the board) contended was applied, the assessment appealed against should be reduced to the amounts claimed by them, and that if the method of assessment contended for by the respondents [the assessment committee] was applied, the assessment appealed against was right."

But the figures at issue are large, for the effect of the decision of the High Court is to reduce the assessment of the board (to take an example) in the parish of Hampton from £85,446 gross and £67,862 rateable to £52,220 gross and £34,220 rateable.

The cardinal principle upon which hereditaments are by law assessable for rating purposes is still that set out in s. 1 of the Parochial Assessments Act, 1836, which requires the rate to be made

"upon an estimate of the net annual value of the several hereditaments rated thereunto—that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rentcharge (if any), and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses (if any) necessary to maintain them in a state to command such rent."

But in applying that principle, so simple in appearance, to certain classes of hereditaments, great difficulties were encountered, and it was found necessary for rating experts and the courts to have recourse to hypotheses of a more or less violent character. In particular, there was an obvious difficulty in applying the general principle laid down in s. 1 of the Act to a water company or other body supplying water in a number of different parishes and possessed in those parishes of reservoirs, mains, and other property necessary for the purposes of its undertaking. The mains and other works in any particular parish, taken by themselves, might conceivably produce no rent at all, for it is almost impossible to suppose that any person would wish to become the tenant of them; but the same hereditaments, if looked upon as part of a great undertaking extending over a large and populous

A area, might be quite indispensable to the undertakers (who must be regarded as possible tenants) and so might command an extortionate rent. In these circumstances it was desirable in order that a fair assessment might be arrived at, to devise some formula which, while allowing a fair value to the hereditaments in each parish, would not compel the undertakers to pay rates on an aggregate sum exceeding the whole yearly value of their undertaking; and accordingly rating surveyors, soon after the passing of the Act of 1836, began to assess waterworks and other like concerns, such as railways, canals, gasworks [as to the rating of gas boards, see now the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 6, Sched. 3], &c., upon the basis of the profits earned by the whole undertaking. From the gross receipts of the undertakers for the preceding year they deducted working expenses, an allowance for tenant's profit, and the cost of repairs and other

C statutable deductions, and treated the balance remaining (which would presumably represent the rent which a tenant would be willing to pay for the undertaking) as the rateable value of the entire concern. It was then necessary to distribute this rateable value among the various parishes into which the undertaking extended, and this was effected by dividing the hereditaments in each parish into indirectly productive assets (such as intakes, filter-beds, reservoirs, pumping stations, and

D carrying or pumping mains) and directly productive assets (such as the service pipes which actually carried the water to the consumers), and by allowing to the parish a percentage on the structural (or contractors') value of property of the former class contained in the parish, and a proportion of the remainder based on the water revenue arising there. Thus, a series of assessments was reached which, while giving to each individual parish a fair proportion based upon the hereditaments which it contained and the revenue which it produced, of the total rateable value, did not in the aggregate exceed the rental which the undertakers or any other possible tenants might be expected to pay for the whole undertaking in any year. The precise date at which the profits basis was first devised and the name of its first inventor do not clearly appear; but it is plain from the reported cases that its adoption was immediate and enduring.

F The method was approved by the courts in *R. v. Mile End Old Town (Churchwardens and Overseers)* (1); and that case was followed in *R. v. West Middlesex Water Works* (2), where the method was explained in a lucid judgment by WIGHTMAN, J., who laid stress on the duty of the court to protect the occupier of an apparatus extending over a number of parishes from being rated beyond the rateable value of the whole taken together. In *Sheffield United Gas Light Co. v. Sheffield Overseers* (3) the method was applied to a gas company and enforced by BLACKBURN, J., and a strong court. Since that time the method has been followed in innumerable assessments throughout the country, and has been constantly approved by the courts and by this House; and to quote a statement of LAWRENCE, J., in the Court of Appeal ([1925] 2 K.B. at p. 584):

H "It is common ground between the parties that, ever since the year 1847, the profits basis and no other has been applied in ascertaining the rateable value of the parochial portions of all waterworks in this country, whether occupied by trading companies or by public bodies."

I In the case of the Metropolitan Water Board the same basis has, as I have said, been adopted in all the unions down to the year 1920. It is still adopted in all the unions over which the system of the board extends other than the Kingston union; and its application to the hereditaments of the board in the several parishes and boroughs in the metropolis has recently been approved by the quarter sessions for the county of London.

It is obvious that, in view of this long practice favourable to the profits basis, those who contend for the application of a different rule undertake a difficult task. But they have in their favour, not only the opinion of an author of acknowledged skill and experience (RYDE ON RATING (5th Edn.), p. 386), but also the dissenting judgment of ATKIN, L.J., in the present case; and it is necessary, therefore, to

examine carefully the arguments advanced on the appellants' behalf. First, it is said that the decision in favour of the present appellants pronounced by the Middlesex Quarter Sessions was a finding of fact and not of law; that the justices had before them the alternative of adopting either the profits basis or the contractors' basis and preferred the latter as better enabling them to ascertain the yearly rent which a hypothetical tenant would pay for the hereditaments to be assessed; and, accordingly, that their decision was not open to review by the Divisional Court. If this were wholly true, it would be difficult to understand why the justices stated a Case for the opinion of the High Court; but in fact the Case itself negatives any such inference. The Case states the main contentions of the assessing authorities (the present appellants) as follows:

"(b) That [the Metropolitan Water Board], being a public body and occupying the hereditaments in question for the purpose of carrying out their statutory duties and not for the purpose of earning profits, the profits earning basis contended for by the board was not the true test of the rateable value of the hereditaments in their occupation; (c) that the true method of ascertaining the rateable value of the hereditaments in question was that of applying a reasonably remunerative rate of interest to the capital value of the hereditaments."

The Case then proceeds:

"We were of opinion that the contentions of the respondents were correct. We accordingly upheld the gross estimated rental of £2,484 and the rateable value of £2,114, and dismissed the appeal with costs. The question for the opinion of the court is whether our said determination was right in law."

From this it is evident that the justices were of opinion that in law the profits basis was inapplicable to an undertaking such as that of the Metropolitan Water Board, that is to say, to an undertaking carried on in performance of a statutory duty and not for profit, and that the contractors' basis was in principle the only proper method to apply to such a case, and on that ground affirmed the assessment of the overseers. It would have been difficult for them to indicate more clearly that the question which they intended to submit was one of rating law and not of fact; and it was, therefore, plainly open to review.

But secondly, it was argued that the justices were right, and that the profits basis is applicable only to companies carrying on their business for profit, and not to a body which, like the Metropolitan Water Board, occupies the hereditaments to be assessed for the purpose of carrying on its statutory duties and not for the purpose of earning profits. To this argument one answer is that the statement as applied to the Metropolitan Water Board is inaccurate. The board must and does aim at earning a profit, for without a very large profit it could not provide for payment of the interest and sinking fund on its stock. But apart from this observation the argument appears to me to lose sight of the foundation upon which the profits formula rests and of the purpose which it is intended to serve. The object of the assessing authorities must be that laid down in s. 1 of the Act of 1836, viz., to find the rent at which the hereditament to be assessed might reasonably be expected to let from year to year upon the conditions prescribed in the section. For this purpose they are entitled, as the courts have held, to regard the actual occupants—in this case the Metropolitan Water Board—as possible tenants, and to consider what rent those occupants might reasonably be expected to pay for the privilege of occupying the hereditaments, having regard to the profits to be derived from such occupation; but in so doing they must take the hypothetical tenants as they are, and with all the limitations and restrictions which are imposed upon them by law and which they could not "reasonably be expected" to leave out of sight. If other tenants can be found who might be expected to give a higher rent, well and good; but it can hardly be doubted that the board, with all its limitations, would pay a better rent for the hereditaments which it occupies than any other

A tenants who could conceivably be found, and the basis of assessment must, therefore, be the rent which *rebus sic stantibus* the board could and would pay.

The above view is supported by a series of decisions in the courts and in this House. In *Mersey Docks v. Cameron, Jones v. Mersey Docks* (4) it was established that property is not exempt from rateability merely because it is occupied for public objects and without the possibility of commercial profit. In *Worcester Corpn. v. Droitwich Assessment Committee* (5), it was held that, where the occupiers of property were prevented by statute from deriving the full pecuniary benefit which it was capable of producing, the land was to be rated with reference to the amount of profit actually made, and not with reference to the amount which might have been earned by the occupiers if they had not been subject to restrictions. In a well-known text-book (RYDE ON RATING (5th Edn.), p. 393) the judgment of MELLISH, L.J., in this case has been criticised on the ground that it substitutes, as the basis for calculating rateable value, the profit or income which the tenant receives for the rent which the tenant might be expected to pay; but if the whole judgment is read, I think it will appear that the learned lord justice did not intend to lay down any such proposition, and referred to the profit which the tenant received only as indicating the rent which, having regard to that profit, he might reasonably be expected to pay. In *Peterborough Corpn. v. Stamford Union* (6) it was held that, where waterworks were occupied by a sanitary authority which was precluded by law from making any profit out of the works, the works had no rateable value. This decision has been treated as reducing the principle to an absurdity; and in the present case LORD HEWART, C.J., appears to have regarded it with a certain amount of scepticism. It appears to me that, so far as the court held that the hypothetical tenants—in that case the sanitary authority—could not be expected to pay any rent for the property, they were justified by the principle of law which is now being considered; but it may be that the assessing authority should have considered whether or not some other hypothetical tenants would give something for the privilege of occupation and should have assessed the property accordingly. But any doubt as to the correctness of the decision in the *Droitwich Case* (5) is set at rest by the decision of this House in *Port of London Authority v. Orsett Union Assessment Committee* (7), where the profits formula had been applied to the property of the Port of London Authority—a body which so far as is relevant to this case was very similar in its constitution to the Metropolitan Water Board—and the assessment was approved by this House. The particular point decided in that case, namely, the allowance of a tenant's profit, is not now in question; but the speeches of the learned Lords who took part in the decision are entirely favourable to the principle of the *Droitwich Case* (5).

On the other hand, the reasons which, until this time, have told against the application of the contractors' basis to an undertaking like that of the Metropolitan Water Board are still operative. There are many cases in which that method is applicable: see, for instance, *R. v. London School Board* (8); but to apply it in a particular parish to a part situate in that parish of an undertaking extending into several parishes, and without regard to the returns from the undertaking as a whole, would be to produce that very injustice which the profits formula was designed to prevent. It is true that counsel for the assessment committee in their argument before the House admitted that the rateable value of the water board's hereditaments in the several parishes within their area ought not in the aggregate to exceed the rateable value of the whole undertaking; but they did not suggest any method of ensuring that result other than the adoption of the profits basis, and it is certainly not ensured by the only alternative basis suggested by the appellants. The reasoning which led ATKIN, L.J., to prefer the contractors' basis has, no doubt, considerable force; but the contrary view has prevailed for nearly eighty years, and I venture to think that it is now too late for the courts to adopt a different course.

Upon the whole I conclude that the justices in quarter sessions were wrong in holding that the profits basis did not in the case of the Metropolitan Water Board enable the court to determine the rent which a hypothetical tenant from year to

year might reasonably be expected to pay for the hereditaments in the several parishes concerned in this appeal, and that, on the contrary, that method was applicable and (on the facts stated by quarter sessions) should have been applied to those hereditaments. By this I do not mean that in no case can another method be adopted by a rating authority in assessing waterworks for rating purposes; but in order to justify that course it would be necessary that the authority should be satisfied that there are special circumstances in the case sufficient to make it necessary for them to exclude the recognised formula of assessment and to resort to some other principle, and in the case now under consideration no such circumstances are found. A
B

I mention one point of detail. It is said that at all events the percentage which in the calculations of the Metropolitan Water Board has been allowed to the appellant parishes on the value of the indirectly productive hereditaments of the board in their area is insufficient. That percentage is $2\frac{1}{2}$ per cent., and is based on the relation of the profits of the entire undertaking of the board to the aggregate structural value of its assets; and it is said that the proper percentage to be allowed according to the authorities is 4 per cent. upon the capital value of the land and 5 per cent. upon the capital value of the works and mains. If this point were open to the appellants it would be necessary to consider the bearing upon this case of the decision in *R. v. South Staffordshire Waterworks Co.* (9) and cases of that kind; but in fact the point does not appear to me to be open. It is found by the Case that, if the method of assessment contended for by the respondents is applied, the assessment appealed against was right; and, this being so, no question can now be raised upon the details of the calculation by which that assessment was reached. Upon this point, therefore, I express no opinion. For the reasons which I have given I am of opinion that this appeal fails and should be dismissed with costs, and I move your Lordships accordingly. C
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LORD ATKINSON.—The facts of these cases have, so far as is necessary for the purpose of the decision of this appeal, been already fully stated, and the most important and instructive of the authorities bearing on the points in controversy have been cited in the King's Bench Division, in the Court of Appeal, and in the argument addressed to your Lordships by the counsel for the appellants. The result of these authorities applicable to cases such as this will, I think, be found to be correctly stated in 24 HALSBURY'S LAWS OF ENGLAND, pp. 30, 37, and 38 [see now 27 HALSBURY'S LAWS (2nd Edn.) 391, 418 and 420], and in the judgment of LORD PARKER in *Metropolitan Water Board v. Chertsey Assessment Committee* (10) ([1916] 1 A.C. at p. 359). The method followed in the case of waterworks which run through and supply several parishes is apparently this. The rateable value of the whole undertaking is estimated by the method prescribed, as I shall presently show, in the Parochial Assessment Act, 1836. Then from this sum, in order to ascertain the rateable value of the portion of these works situated in a given parish, the rateable value of the indirectly productive parochial portion of the whole undertaking is deducted. The remainder is the ascertained rateable value of the productive works of the whole undertaking, which sum is then apportioned among the several parishes through which the works of the undertaking run and which they supply. The method of apportionment is apparently this. The sum to be apportioned is divided amongst the different parishes according to the proportion which the gross or net receipts earned in each parish bear to the receipts of the same character, like to like, earned by the whole undertaking. The rateable value of the indirectly productive portion of the undertaking situated in each parish is then separately ascertained and added to the value of the directly productive works so ascertained. The rateable value, however, if ascertained by this method, for all the parishes which the undertaking supplies, and in which portions of its works are situated, must never in the aggregate exceed the amounts of the rateable value assessed upon the undertaking as a whole. F
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LORD PARKER OF WADDINGTON, in *Metropolitan Water Board v. Chertsey Assess-*

A *ment Committee* (10) expresses himself with his accustomed accuracy and clearness in reference to this method thus. He said ([1916] A.C. at p. 359):

B "The problem in all rating cases is to ascertain the rent which a tenant might be fairly expected to pay by the year for the privilege of occupying the hereditaments the subject of the assessment. In some cases this problem may be
C easy of solution, but in others, where the property consists of parts only of an undertaking, such as a railway or water, or gas undertaking, it is extremely hard to solve. The courts have, however, from time to time laid down or approved certain empirical rules to be applied to various classes of case. With regard to water undertakings the practice has been to classify the various hereditaments which, though part of a single undertaking, have to be rated separately in the several parishes where they are situate as either directly or indirectly productive of profit. Those which are only indirectly productive of profit have been generally assessed according to the following rule: The assessment authority has taken 4 per cent. on the price which the company paid for the land, and 5 per cent. on the cost incurred by the company in erecting the buildings or works on the land, and has treated these percentages as a measure of the rent which the hypothetical tenant would be willing to pay."

D LORD PARKER avoids the error, which is so often fallen into in these valuation cases, namely, of confounding the thing to be measured, the reasonable rent which the hypothetical tenant would be willing to pay, with the measure suggested to fix the amount of that rent. He then proceeds to suggest what is the origin and foundation of this rule. He said:

E "The origin of this rule is not very clear, but it may, I think, be explained as follows: In considering what the hypothetical tenant will pay by way of rent the company itself cannot be excluded as a possible tenant. If there are possible tenants other than the company, the annual rent may be estimated on a competitive basis, but if, as is generally the case, the company is the only possible person who would be likely to give any rent at all for the property, the competitive basis is excluded. In such cases, if the company is in fact paying any rent for the hereditaments in question, such rent is evidence of what the company would be willing to pay. If the company is owner as well as occupier, then, inasmuch as it is by reason of its occupation out of pocket to the extent, at least, of interest on its capital expenditure in acquiring and building on the land it occupies, the amount of such interest is good evidence of what the company would be willing to pay for the privilege of continuing its occupation."

G This method of dealing with rateable value on the basis of percentages on the cost of construction has been styled in argument "the contractors' basis" in contradistinction to the "profits basis." In *Liverpool Corpn. v. Llanfyllin Assessment Committee* (11), A. L. SMITH, L.J., in delivering judgment, deals with these percentages precisely as does LORD PARKER, treating them as mere measures, mere helps, to ascertain the reasonable rent a hypothetical tenant would be willing to pay for the occupation of the hereditament to be assessed. He says that the mode of estimating rateable values in this way has been greatly simplified by the decision in *R. v. London School Board* (8) to the effect that the occupying owner of a hereditament may naturally be himself treated as the hypothetical tenant of the hereditament.

I In my view, there is only one method by which the rateable value of a hereditament, the occupation of which is valuable, can be legally ascertained, and that is by the method prescribed by s. 1 of the Parochial Assessments Act, 1836, namely, by the ascertainment of the rent at which the hereditament might reasonably be expected to be let from year to year to a hypothetical tenant, free from the rates and charges, *rebus sic stantibus*. By these three latter words I mean to express the considerations which are expanded in the following passage in the opinion of LORD BUCKMASTER in *Port of London Authority v. Orsett Union Assessment Com-*

mittee (7) ([1920] A.C. at p. 305). He said that the hereditament the reasonable A
rent of which is to be ascertained must be that hereditament

"as it stands, with all its privileges, opportunities and disabilities created or
imposed either by its natural position or by the artificial conditions of an Act
of Parliament."

It is the occupation of the hereditament in respect of which the hereditament is B
assessed. Should that occupation be absolutely worthless to everybody, it will
have no rateable value, but, on the other hand, if the occupation of it may be very
valuable to a hypothetical tenant though that occupation does not secure him any
profit, or bring in to him any income, it may be assessed as by this section pro-
vided. No statement of the law on this point could be more unsound and mis- C
leading than that which I rather thought had been put forward by the appellants'
counsel in argument in this appeal, namely: "No income, no taxable value; no
profits, no taxable value." The following cases clearly establish that this is not
the law. First, the school board case, and secondly, the sewer cases, namely,
L.C.C. v. Erith Parish (Churchwardens, etc.) (12), and *West Kent Main Sewerage
Board v. Dartford Union Assessment Committee* (13). In none of those cases
would the hypothetical tenant have derived any profit, or any income from his
occupation of the hereditament to be assessed. The rent which a hypothetical D
tenant could be reasonably expected to be willing to pay for this occupation is a
difficult matter to ascertain, and, consequently, the authorities only indicate what
may be treated as safeguards to aid in the measuring of it. For instance, the
profits derived or derivable from the occupation of the hereditament are helps to
the measurement of it, because the hypothetical tenant would naturally consider
what rent he could afford to pay to secure the chance of making these profits by
the occupation of it. And the assessing authority, on its side, would naturally E
consider what the chance of realising that profit by the occupation of it was really
worth. In like manner, where the contractors' basis is taken as a help the per-
centages payable by him, as LORD PARKER and A. L. SMITH, L.J., have pointed out,
are only a measure of that rent.

I cannot help thinking that in this case the appellants have been betrayed into F
confounding the measure with the thing to be measured. The thing to be measured
is, in all cases, the reasonable rent which the hypothetical tenant would be willing
to pay. Nothing which can be suggested as a measure of that thing can be substi-
tuted for the thing itself. Again, the appellants admit that the rateable values of
their hereditaments in the several parishes within their area must not in the
aggregate exceed the rateable value of their whole undertaking; but they contend G
that in law it is not necessary for them to ascertain the total rateable value of their
entire undertaking as a first step in ascertaining the rateable value of their here-
ditament in any parish. They make no suggestion, however, as to how, in practice,
the rateable value of the hereditaments in the several parishes in their area, in the
aggregate, is to be kept within the admitted limit, the rateable value of the whole H
undertaking, unless the latter limit is first ascertained. If the rateable value of
half a dozen of the parochial sections of their undertaking were, in ignorance of the
ascertained value of the whole, to be valued at a rate so high that the aggregate of
them would almost equal the rateable value of the whole undertaking when subse-
quently ascertained, then either these six parochial sections should necessarily be
re-valued, or the remainder of the parochial sections should be valued at so low a
sum as would bring the aggregate within the limit; or, lastly, the limit itself I
should ex post facto be deliberately stretched so as to cover this aggregate. It
may be that the assessment committee are not compelled by law to perform this
operation of putting the cart before the horse in the manner they claim to be free
to do, but the attempt to perform it would in practice, in my view, turn out to be
impracticable, expensive, and most unbusiness-like.

The appellants, in the same paragraph of their Case, state that the profits ob-
tained by the water board are not profits in the true sense of the term, and are no

A guide to rateable value, because the board are completely protected from loss by their power to levy a security rate. But to be protected from loss in his occupation of a rateable hereditament is an advantage which would naturally make the hypothetical tenant all the more anxious to become tenant of the hereditament, and all the more willing to pay a higher rent for it than if he had no protection against loss. The appellants set forth in the second paragraph of their Case what, in their view, is the question for decision on this appeal. The paragraph runs thus :

“The question to be determined in this appeal is whether the appellants were obliged in law to assess the annual value of the portions of the respondents’ water undertaking situated in the above parishes by a calculation based on the supposed profits earned by their whole undertaking during the year ending March, 1920, or whether it was open to the appellants in the circumstances of this case to make the assessment upon what is known as the ‘contractors’ basis’ by applying a percentage to the capital value of the hereditaments in question.”

The first question set forth in this paragraph is not very intelligible to me. I do not know whether it is meant to ask if the assessed annual value of the whole undertaking is to be divided between its parochial sections on some principle, and according to some method which is not indicated. The second question apparently is whether it is permissible to assess on the contractors’ basis the whole undertaking irrespective of whether some of its parts are directly productive and some only indirectly productive, or whether in a similar condition of things existing in the several parochial sections of the undertaking they can proceed to assess on the contractors’ basis alone. The answer to these questions would appear to me to be this—that so far as the assessment committee aim at substituting the methods of assessments thus named for those prescribed by s. 1 of the Parochial Assessments Act, 1836, they cannot resort to either of the two methods named. They are bound to proceed on the principle and in the manner by that section prescribed. But as I have already explained, the methods named in this paragraph may furnish the assessment committee with measures of the reasonable rent the hypothetical tenant would be willing to pay for the occupation of the hereditament to be assessed. They are not in any sense substitutes for the statutory methods prescribed by the Act of 1836. The appeal, I think, fails, and should be dismissed with costs.

LORD BUCKMASTER.—I think that this appeal should fail. In my opinion, since the decision in *R. v. Mile End Old Town (Churchwardens and Overseers)* (1) it has been accepted that the ordinary way of determining the rateable value of each part of a water company’s property consists in arriving at the total rateable value of the whole undertaking, and distributing that total among the several parishes which together form the whole area of its activities. It does not follow that it has ever been laid down that such method is exclusive and must be of universal application. No such principle has, in my opinion, resulted from the decisions, but what does result is that a company undertaking the business of supplying water should *primâ facie* be assessed upon this well-known plan, and it would lead to confusion and endless multiplication of difficulty if this were not done, but where there is a company which, either by reason of its special and peculiar statutory restrictions or by reason of any other fact, cannot be regarded in the same light as that of an ordinary water company, it is open to consider whether other methods of valuation may not properly be adopted. The special facts, however, on which any such alternative method is adopted should be found in the Special Case stated by quarter sessions, in order that it may be considered whether they are adequate to entitle a deviation from a well-recognised rule. In the present case it is strongly argued that such special circumstances exist, but I can find nothing in the Special Case setting out such circumstances as those to which I have referred. The nearest is to be found in para. 4 (b), in which it is urged that as the business of the Metropolitan Water Board is done “for the purpose of carrying out their statutory duties and not for the purpose of earning

profits," the profit-earning basis contended for is not the true test of the rateable value, and that contention was upheld by the court of quarter sessions. That conclusion is, in my opinion, unsound. It has been established by more than one authority that, notwithstanding such a fact, the method for which the respondents contend can and should be applied, and if the quarter sessions intended to decide otherwise the decision would be wrong. It is at least open to argument that existing circumstances are such as to render the ordinary method of rating inapplicable, but such circumstances must be set out in a special case and made the subject of substantive argument before the courts. A
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LORD CARSON concurred with the judgment of the Lord Chancellor.

LORD BLANESBURGH.—I have had the advantage of reading the judgment of my noble and learned friend, LORD BUCKMASTER, and I entirely concur in it. It may be that the magistrates in the present case rejected the profits basis as propounded by the respondents for the reason (which they felt to be compelling) that it required them to leave one of the largest reservoirs of the water board rated at £25,000 only, when that reservoir was admittedly, it was said, of the capital value of £1,000,000, and when it had, without change of circumstances in relation to the water board, for twenty years been rated at £50,000. This reduction, so it was said, resulted from two causes. The first was that a deficiency rate levied by the board in aid of water rents and amounting to upwards of £500,000 had in reliance upon the decision of the Divisional Court in *Metropolitan Water Board v. St. Marylebone Assessment Committee* (14) been excluded by the board from their receipts brought into their accounts. The second was that the net rateable value of the entire undertaking as actually ascertained had been apportioned rateably between the directly and indirectly productive hereditaments occupied by the board instead of being applied first in the allowance of a reasonable rate of interest on the value of the indirectly productive hereditaments so occupied. These considerations are each of them important in result, and the first strikes me as raising a question of great moment. I say no more, as counsel for the respondents have not been heard. But however important these questions, or one of them, may be, they are neither of them, I think, on the form of the Special Case open to debate in this case. The important question disclosed in the argument, whether in a year in which this water board levies a deficiency rate large in amount, the decision in the *Marylebone Case* (14), if it be correct, permits of the adoption of the profits basis as the proper method of arriving at the governing figure of rateable value for the entire undertaking of the board, remains, to my mind, for determination in some future case in which it arises and is properly raised. C
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Appeal dismissed.

Solicitors: *Gibson & Weldon*, for *W. Taylor*, Kingston-on-Thames; *C. A. Hunt*.
[Reported by *E. J. M. CHAPLIN*, Esq., Barrister-at-Law.]

MORRIS v. HARRIS

[HOUSE OF LORDS (Viscount Dunedin, Lord Shaw, Lord Sumner, Lord Wrenbury and Lord Blanesburgh), July 5, 6, November 26, 1926]

[Reported [1927] A.C. 252; 96 L.J.Ch. 253; 136 L.T. 587;
[1927] B. & C.R. 65]

Company—Winding-up—Dissolution—Order declaring dissolution void—Effect—Acts done between date of dissolution and avoiding order—Companies (Consolidation) Act, 1908, s. 223 (1).

An order made under s. 223 (1) of the Companies (Consolidation) Act, 1908 (now s. 352 (1) of the Companies Act, 1948), declaring the dissolution of a company to be void does not put the clock back so as to reinstate the position existing before the dissolution as if the dissolution had never taken place. It merely enables the parties concerned to do that which they did not do, and, but for the order under s. 223 could not do, after the dissolution, for instance, to begin proceedings against the company which the dissolution of the company rendered impossible.

Where, therefore, on March 3, 1921, a company was deemed to be dissolved under s. 195 (4) of the Act of 1908 [s. 290 (4) of the Act of 1948], on June 6, 1921, an award against the company was made by an arbitrator, and on Feb. 20, 1923, an order was made under s. 223 (1) declaring the dissolution to have been void, the award was abortive and was not re-constituted by the order of 1923.

So held by VISCOUNT DUNEDIN, LORD SUMNER and LORD BLANESBURGH, LORD SHAW and LORD WRENBURY dissentiente.

Notes. Considered: *Re Dixon, Ltd.*, [1947] 1 All E.R. 279. Distinguished: *Tymans Ltd. v. Craven*, [1952] 1 All E.R. 613. Applied: *Re Lewis and Smart, Ltd.*, [1954] 2 All E.R. 19. Referred to: *Re Donald Kenyon, Ltd.*, [1956] 3 All E.R. 596.

As to the dissolution of a company and the power to declare it void, see 6 HALSBURY'S LAWS (3rd Edn.) 730-733; and for cases see 10 DIGEST (Repl.) 1102 et seq. For Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Cases referred to:

- (1) *Hastings Corpn. v. Letton*, [1908] 1 K.B. 378; 77 L.J.K.B. 149; 97 L.T. 582; 23 T.L.R. 456; 15 Mans. 58; 10 Digest (Repl.) 1104, 7627.
- (2) *Re Woking U.D.C. (Basingstoke Canal) Act, 1911*, [1914] 1 Ch. 300; 83 L.J.Ch. 201; 110 L.T. 49; 78 J.P. 81; 30 T.L.R. 135; 12 L.G.R. 214, C.A.; 10 Digest (Repl.) 1257, 8860.
- (3) *Re Albert Road (Nos. 56 and 58), Norwood*, [1916] 1 Ch. 289; 85 L.J.Ch. 187; 114 L.T. 357; 10 Digest (Repl.) 1104, 7626.

Appeal from an order of the Court of Appeal (SIR ERNEST POLLOCK, M.R., SARGANT, L.J., and ASTBURY, J.), admitting the respondent's proof in the winding-up of Morris, Russell & Co., Ltd., and so reversing an order of ROMER, J., who had affirmed the decision of the liquidator rejecting the proof.

The appellant was the liquidator of the company, which went into voluntary liquidation on Nov. 21, 1919, for the purposes of its reconstruction. The respondent claimed to prove in the winding-up as a creditor of the company.

By the Companies (Consolidation) Act, 1908:

"Section 223 (1).—Where a company has been dissolved, the court may at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the court to be interested, make an order, upon such terms as the court thinks fit, declaring the dissolution to have been void, and

thereupon such proceedings may be taken as might have been taken if the company had not been dissolved." A

Preston, K.C., and Croom-Johnson for the appellant.

Topham, K.C., and Taylour for the respondent.

The House took time for consideration.

Nov. 26. The following opinions were read. B

VISCOUNT DUNEDIN.—In this case I have had the opportunity of perusing the opinion which will shortly be delivered by LORD SUMNER. I agree with that opinion in every particular, and have nothing to add.

LORD SHAW.—The opinion about to be read by my noble and learned friend, LORD WRENBURY, so clearly and distinctly expresses the opinion which, after consideration and re-consideration, I have formed upon this case, that I respectfully and entirely adopt it, and I agree with the course which LORD WRENBURY recommends. C

LORD SUMNER.—In 1917 the respondent was engaged as a commercial traveller by three companies, Morris, Russell & Co., Ltd., Atkey (London), Ltd., and another not now material. These businesses and his duties were separate, but the companies engaged him under a written agreement jointly and severally. Next year they dispensed with his services, whereupon he claimed damages for wrongful dismissal. Atkey (London), Ltd., ultimately went into liquidation, and the respondent, in October, 1921, came to an agreement with the liquidator that he should be placed on the list of creditors in the liquidation for £1,075, but so far nothing has been paid to him. His claim against Morris, Russell & Co., Ltd., called for convenience "the old company," he pressed further. Accordingly, in August, 1919, the old company claimed arbitration under the agreement, and eventually Sir Walter Schwabe, K.C., was appointed arbitrator, and held a first meeting on Dec. 19, 1919. For the purposes of this arbitration the old company had specially retained an eminent firm of commercial solicitors who did not regularly act for them, and when the respondent's solicitor stated that he had heard that the old company had gone into liquidation, that another company, Morris, Russell & Co. (1919), whom I shall call "the new company," had agreed to acquire their assets, and that he wished to know what the position in the arbitration really was, counsel instructed on the other side could only say generally that he did not exactly know how that might be, but there was no desire to take any technical points, and that, if the respondent's claim was established, the new company would discharge it. This was the substance of what passed on this occasion. It was then arranged that the firm instructing him should write a letter to this effect, and this letter was written on Dec. 30, concluding thus: D

"Our clients have instructed us to give you a formal assurance that they are prepared to accept responsibility for any sum awarded to your client either as against the old company or the new company." E

Thereafter meetings in the arbitration were held from time to time and, after delays the cause of which does not now matter, an award was made in favour of the respondent for £5,964 16s. 8d. and costs—taxed at £2,121 5s. 2d.—on June 6, 1921. No change having been made in the parties, who were formally before the arbitrator, the award was naturally against the old company. The old company had, however, already been dissolved. The winding-up resolutions had been duly passed in November, 1919. The only object of the reconstruction was to facilitate the raising of fresh capital, and, accordingly, the new company having been incorporated and having agreed to take over the old company's assets and to make provision for its liabilities on terms agreed in writing, the liquidator, the present appellant, duly prepared the final balance-sheet, and on Dec. 1, 1920, held the final meeting requisite for the conclusion of the winding-up. He lodged with the registrar of companies the necessary documents and they appeared in the F

A "Gazette" in due course. In March, 1921, the old company was formally dissolved, pursuant to s. 182 and s. 195 of the Companies (Consolidation) Act, 1908 [see now Companies Act, 1948, s. 278, s. 290]. Meantime the business went on without change. It was carried on as a going concern throughout. The old board became the new board, with the addition of one director, and it did not occur to anyone that any real change had occurred. The liquidator, acting in perfect good faith, left all current business to the directors, and, though aware of the arbitration, took no part in it and gave no instructions. If the reconstruction had been successful, no one would have been one penny the worse. Unfortunately, the new company got into difficulties, and, on May 31, 1921, proposed a scheme of arrangement to its creditors. A meeting of creditors was held on June 15, 1921, at which the respondent attended. He inquired about his claims, but did not vote. Eventually the scheme was approved and became binding on the unsecured creditors of the new company. Then, some six months later, the respondent claimed to be a secured creditor of the old company, entitled to priority against certain of the new company's assets. Next, he took proceedings to enforce his award, which were dismissed on the ground that the award was against a company which had been dissolved. Afterwards, he issued a writ against the liquidator of the old company, with a personal claim against him for negligence and misfeasance as liquidator, and it was dismissed. On Feb. 20, 1923, ASTBURY, J., made an order, declaring the dissolution of the old company to be void under s. 223 of the Act of 1908, and the respondent claimed to be admitted to prove in its liquidation. The liquidator rejected this proof and his decision was affirmed by ROMER, J. This judgment was reversed by the Court of Appeal. Hence the present appeal is brought to your Lordships.

I agree that the respondent has failed in proving, as he undertook to prove, that "the old company" was, by a tripartite agreement, released from its liability to him, in consideration of the agreement of the "new company" to be bound to him to the same extent as the old company had been bound before. This is not a case in which an inference has to be drawn from the conduct of the parties simply, without any special interview at which a specific agreement can be deemed to have been made. If that were all, the dissolution of the old company, coupled with the conduct of Mr. Harris at the meeting of the creditors of the new company, after it had got into difficulties, might with other similar circumstances have gone some distance to justify the inference of a novation. As the case stands, however, a particular interview on a definite date is vouched as the occasion on which the alleged novation was agreed upon, in the presence of a number of persons, all, or nearly all, of whom were called as witnesses in the action. After carefully considering the notes of their evidence, I think it is clear that they fall short of proving the novation required. Even Mr. Cornwall, whose credit and intelligence are, of course, unimpeached, does not go far enough. If the circumstances then existing had been such as to raise in the mind of any one present any anticipation of the misfortunes that afterwards befell the new company, the advisability of a novation in the interest of the old company might have suggested itself on the one side, but its unwisdom would equally have presented itself on the other. In fact, no one thought of it, or of the materiality, except for formal purposes, of considering the difference between the two companies at all. With every respect to ROMER, J., I think that he has rather considered what contract the old company ought to have made, if its liquidator had been more prescient, than what contract was made in fact. When the new company "assumed" liability for the obligations of the old one to Mr. Harris, that liability was in terms and, so far as it went, was in fact, a cumulative, not a substitutional, liability. I do not think it is correct to say that in that case it was nudum pactum. If consideration had to be proved, I think it could be found in the consent of Mr. Harris to go on with the arbitration proceedings in their existing form instead of stickling for correctness by discontinuing the existing proceedings and putting himself and his de facto opponents to the trouble and expense of beginning the arbitration afresh. As to the supposed advantage to

the new company of being able after a novation to dispose freely of the old company's assets, earmarked for the satisfaction of Mr. Harris's claim, there is no evidence to show that it was of any practical moment, and I do not think it was ever considered. A

The next question turns on the language and effect of s. 223 of the Companies (Consolidation) Act, 1908. It deals with the case of a company which has been dissolved, and that at an ascertained or ascertainable date. It provides for an order, which it empowers a court to make in all such cases, on such terms as the court may think fit (and, therefore, also without terms, if the court so thinks fit) "declaring the dissolution to have been void." Pausing here, I remark that the order is not expressed to be one setting anything aside or declaring that the dissolution is to be deemed not to have taken place and thus reversing the actual language of s. 195, or declaring the dissolution to be void. Nor, again, is the phraseology of s. 242 (5) followed [see now s. 353 (5) of the Companies Act, 1948], whereby, when the registrar has reasonable cause to believe certain things and has taken certain action, ending in the erasure of the company's name from the register and a publication of the fact in the "Gazette," the company thereupon "shall be dissolved." Under this section, when the court intervenes by order to modify this result, B C

"the company shall be deemed to have continued in existence, as if its name had not been struck off," D

and then the court can give directions to replace the company and all parties affected in an "as you were" position. The words "to have been void," in s. 223, appear, it is true, so far as they go, to have some retrospective effect, and tend to some extent to support the respondent's argument. On the other hand, the remaining words, which define the order, point rather to a declaration removing a bar to such action as might otherwise have been taken, than to one validating past proceedings, taken since the dissolution through ignorance or disregard of it and consequently invalid. The remaining words E

"and thereupon such proceedings may be taken, as might have been taken if the company had not been dissolved," F

seem to me to point conclusively in the same direction. They describe an authority given to the parties concerned to do, "thereupon" and accordingly thereafter, things which they might have done but obviously had not done theretofore, and, but for the order, could not have done after the dissolution. I think these words do not affect the validity or the contrary of steps taken during that interval. They must still depend on the facts existing and the rights arising before and independently of the order. It is to be remembered what the scheme of the Act is. The statutory dissolution does not take place till three months have passed from the time when the registrar has registered a return, made to him by the liquidator and stating that, having brought the liquidation to an end, he has embodied the results in a final winding-up account, which he has submitted to a general meeting. If the liquidator here had attended to matters himself, instead of "delegating" them, as he calls it, to the directors of the new company, no doubt the winding-up would have been complete, as the Act intended it to be, and proper provision of some kind would have been made for Mr. Harris's claim. Accordingly, the last three months of the life of the old company would have been, as they ought to have been under the statute, a period during which the company, stripped of its property and discharged from its debts, would have simply awaited dissolution. In case, however, of accidents, there is a provision in s. 195 (4) that the court may make an order deferring the date at which the dissolution is to take effect [see now s. 290 (4) of Companies Act, 1948]. G H I

I think it follows that only in the rarest cases, and always contrary to the contemplation of the Act, is it possible for proceedings to have continued in fact during these three months when the company is moribund, and further that after dissolution, which is an event calculable by anybody from a date, of which public

A notice has been given, whatever is done is done at the actor's peril. The legislature would never have bestowed on the court a power to declare the dissolution void, without imposing terms, as by the section it certainly is empowered to do, if the effect of this order of avoidance might be to undo the reversion of freeholds to an original grantor or the acceleration of a reversioner's immediate title to leaseholds in the case of lands accidentally undisposed of in the winding-up: *Co. Litt.* 136; *Hastings Corpn. v. Letton* (1), *Re Woking U.D.C. (Basingstoke Canal) Act, 1911* (2), *Re Albert Road* (Nos. 56 and 58), *Norwood* (3). Yet such would be the effect of the construction contended for, with a consequent avoidance of all dispositions made by such grantor or reversioner in favour of third parties, wholly innocent of any irregularity. This must be the result, if the judge's order simply puts back the clock and restores things as though the dissolution had never been.

C Accordingly, I see no reason why the legislature should be deemed to have had in its contemplation any intermediate proceedings. They must in any case be so rare and exceptional, that they might well either be passed over unconsidered, or, if considered, be left by the Act to the ordinary operation of the law. The object of the provision was, I think, to give a fresh start to proceedings which, owing to the dissolution, had been impossible and had not been taken, and thereupon it was to be open to those concerned to take them in the future as if the dissolution had not happened. In my opinion, most of the proceedings in the arbitration in this case, and, above all, the award itself, are null, for they were taken and made against a company which did not exist, and no subsequent validity has been or could be given to them. The respondent must, therefore, prove his claim afresh in proceedings to which the appellant will be a party.

E As to the Atkey (London), Ltd., claim, I think on the facts that there was an accord between the respondent and Atkey, Ltd., who were joint and several debtors with the old company, and that the accord is effectual to bind the respondent in so far as it agrees to qualify and limit his claim, but I do not think that the accord has been followed by any satisfaction. The fact that under the accord his name was to be placed on the list of the admitted creditors of Atkey, Ltd., is not a satisfaction, unless and until it is followed by some payment of the agreed debt, and then only to the extent of any sums paid in respect of it. Accordingly, the respondent will be entitled as against the liquidator to prove for such amount, not exceeding £1,075 in all, as may still be due from and unpaid by Atkey, Ltd., as well as for such sums as he can prove in respect of his direct claim on the old company.

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G **LORD WRENBURY.**—The appellant, the liquidator of the old company, contends that on Dec. 19, 1919, before the arbitrator there was a novation whereby the old company was released from liability to the respondent and the liability of the new company was given and taken in substitution. The facts relevant to the decision of this question lie in a small compass. We have been referred to a number of letters which passed between the parties. I do not find it necessary upon this point to refer to any of them. The relevant facts are simply as follows. There were before the arbitrator, as represented by counsel, all three parties if, and only if, the old company was there. Upon this part of the case, therefore, it must be part of the appellant's case that the old company was there by solicitors and counsel representing it. I must presently say something as to whether this was so in fact, but for the moment I will in favour of the appellant assume that it was so. If it was not, then there could be no novation, for upon that hypothesis the old company was not present. As to the other two parties, the one, viz., Mr. Harris, was present by counsel, and the new company was also present if, as I have no doubt was the fact, Messrs. Coward & Co. represented it and were there as representing it.

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The old company was in liquidation—the new company had been formed—the directors were the same as before, and, as it was expressed by the witnesses, there had been no break in the business. It is clear, I think, that the parties, in these

circumstances, largely ignored the fact that the old company and the new company were in law distinct entities. They were indifferent whether the one or the other paid or remained or became liable to pay the debt. But that by no means decides the question of novation. The parties contractually bound by the arbitration clause were Mr. Harris and the old company. The new company was not bound by it. The arbitration, which all parties were treating as valid, whether it was, in fact, valid or not (a question upon which again I will say something presently), was between Mr. Harris and the old company. The new company was not a party to the arbitration clause and was not a party over whom the arbitrator had jurisdiction. In these circumstances the arbitrator, who was called as a witness, says (reading his note):

"Somebody representing Harris—Bartley, I think—called attention to fact that respondent company was in voluntary liquidation for reconstruction and asked how he stood. Discussion ensued between Cornwall of Coward and Hawksley and Jowitt and statement was made to Bartley in my presence coming from respondents to arbitrate: 'You needn't trouble—You can treat them all as one—and if you get anything on your arbitration—new company will see you are paid.' No question of releasing the old company or novation, otherwise I should not have gone on in the absence of new company."

Mr. Jowitt was counsel, instructed by Messrs. Coward & Co. That firm was acting also for the new company. Cornwall was managing clerk of Messrs. Coward. The situation as indicated by the arbitrator is so obviously correctly stated that it is, in my opinion, impossible to do otherwise than accept it. The new company was no party to the arbitration. If there was novation it would be impossible to go on unless the new company was brought under the arbitrator's jurisdiction as a party who by novation had become liable in place of the old company who had been released. Nothing was done to bring them there—"There was no question," says the arbitrator, "of releasing the old company or novation, otherwise I should not have gone on in the absence of new company." Absence here means, of course, absence as a party over whom he had jurisdiction. There may have been presence in fact if as I have no doubt Messrs. Coward who were there represented them. Upon those facts there was, in my opinion, no novation.

For decision of the rest of the case three questions have to be considered. First, was the arbitration duly instituted? The facts are as follows. By letter of Aug. 13, 1919, the old company, writing to Mr. Harris, gave notice to arbitrate and requested Mr. Harris to appoint an arbitrator. They asked him to prepare his case for arbitration. Some negotiations seem to have taken place, but they came to nothing, and on Dec. 1, 1919, Messrs. Gedge & Co., for Mr. Harris, addressed a letter to Messrs. Coward & Co., in which they said they understood that the latter were acting for the old company, and, referring to arbitration as necessary, suggested the appointment of a sole arbitrator. On Dec. 2 Messrs. Coward replied asking Messrs. Gedge to send the names of several King's Counsel and they would take their client's instructions in the matter. On Dec. 3 Messrs. Gedge sent names. On Dec. 4 Messrs. Coward replied. Other letters passed on Dec. 8 and 9, and in the result Mr. Schwabe was agreed upon as arbitrator and it was agreed that the parties should be represented by junior counsel only. In the course of this correspondence the subject cropped up of the old company being in liquidation and of the registration of the new company. On Dec. 1 Gedge & Co. wrote that the old company was the party to the contract which contained the arbitration clause and asking: "Do you suggest that it is the new company, namely, Morris Russell, 1919, Ltd., who would be parties to the arbitration?" On Dec. 11, Messrs. Coward replied: "It would be more convenient if the new company were made parties to the arbitration. However, if you prefer otherwise it does not in the least matter." There the matter rested. The new company were not made parties to the arbitration, and in that state of things the preliminary meeting before the arbitrator took place on Dec. 19. Upon these facts it seems to me that

A the old company by Messrs. Coward & Co. were before the arbitrator on Dec. 19 as the party to the arbitration and that the new company (although present as parties interested) were not before the arbitrator as parties to the arbitration. The liquidator says he was not consulted in the matter. The fact, however, seems to have been that, the directors of the old company and of the new company being the same, the liquidator left in the hands of the directors the conduct of this matter. I hold that there was an arbitration duly constituted between Mr. Harris and the old company and that to this arbitration the new company were not parties.

B The following point arises. The arbitration was postponed from 1919 and was not in fact held until after Mar. 3, 1921. The award was made on June 6, 1921. In the interval between 1919 and 1921 the liquidator had in December, 1920, made his final return under s. 195 of the Companies (Consolidation) Act, 1908. It had C been registered and by virtue of s. 195 (4) the old company on Mar. 3, 1921, was "deemed to be dissolved." However, on Feb. 20, 1923, ASTBURY, J., made, under s. 223 of the Act, an order, declaring the dissolution to "have been void." The award, therefore, was made at a time when the company was to be "deemed to be dissolved," but this dissolution was by subsequent order declared "to have been void." It is not necessary to consider what would have been the result of these D provisions of the Act if during what I may call the suspense period acts had been done which affected third parties. The whole question here is whether the liquidator who, in fact, was a party to the arbitration in 1921, can say that the arbitration does not bind him, and that (looking at the last words of s. 223) such proceedings cannot be taken to enforce the award as might have been taken if the company had not been dissolved. In my opinion, he cannot support that contention. The order made under s. 223 declaring the dissolution "to have been E void" operates to displace the state of facts in June, 1921, as they would have been in the absence of that order and substitutes a state of facts in which there was in June, 1921, no dissolution. The result, in my judgment, is that at the date of the award it must be taken that the dissolution although then existing was then a void dissolution and the award was good—and such proceedings can be taken upon it as F might have been taken if the company had not been dissolved.

Thirdly. A further point arises as to a sum of £1,075, which on Oct. 5, 1921, was agreed as being in settlement of a claim by Mr. Harris in respect of which he was to be placed on the list of creditors of Atkey (London), Ltd., which was then in liquidation. This was a sum due under the agreement of Sept. 26, 1917, in respect of which the three companies of which the old company was one were jointly and severally liable. The agreement of Oct. 5, 1921, was not, I think, G accord and satisfaction of this debt. It remains a debt in respect of which the old company was severally liable and the amount of their liability remains yet to be ascertained. The result, therefore, is that the order of the Court of Appeal reversing the order of ROMER, J., should be affirmed and that a proof should be admitted for the amount of the award, and that as regards the £1,075 a proof H should be admitted for such sum as Mr. Harris can establish, but not exceeding £1,075.

I LORD BLANESBURGH (read by VISCOUNT DUNEDIN).—Left to myself, I confess that, with the learned judge, ROMER, J., I would in this case have reached the conclusion, despite all technical difficulties obstructing the road to it, that there was here effected, on Dec. 19, 1919, an arrangement, endorsed by Messrs. Coward's letter of Dec. 30, 1919, under which the new company assumed direct but sole liability to the respondent for the consequences of his dismissal by the old company. That assumption of liability involved a condition of the first importance to the new company, though of little or no moment, as it then seemed, to the respondent, namely, that the liability to him of the old company should eo instanti disappear. In the case of every other creditor of the old company, including even its bankers after some little delay, this assumption of liability, on these terms, was effected by express novation. Left to myself, I should have reached the conclusion

that, though less formally, the same result was both intended and achieved in relation to the respondent's claim. That result was alone of any value to the new company, its purpose from beginning to end being that as the sequel of its assumption of direct and sole liability for the debts of the old company, an immediate transfer to itself of the entire undertaking of that company might be made possible, the continuance of the business without break and with increased resources be facilitated, the liquidation of the old company, thus reduced almost to a formality, be brought to a speedy close, the way to the dissolution of that company be opened, and the opportunity afforded to the new company of assuming—I had almost said resuming—the old company's name be presented to it at the earliest moment. And it appeared to me, no suggestion of fraud or sharp practice being either open or made, that except on that footing no reasonable explanation was forthcoming either of the complete aloofness of the liquidator of the old company from the arbitration proceedings or of the old company's dissolution, carried out as it was with the new company's knowledge and before these proceedings even reached a hearing. Left to myself I should also have reached the conclusion that the respondent, too, appreciated and accepted the condition. Of the view of the Court of Appeal that the assumption by the new company of a liability additional to the existing liability of the old was all that had taken place, nothing confirmatory is, almost admittedly, to be found in the actions either of the new company or the liquidator; nothing as I thought in those of the respondent. For, inconsistent as has been his attitude at different times in this matter, he has at no time, as it seemed to me, treated his rights as being those declared by the Court of Appeal. While his conduct up to the change of solicitors on or about Dec. 31, 1921, indicates no trace of any claim reserved against the old company, his invariable course since that date has been to ignore the existence or attitude of the new company altogether. He did not even bring into account in reduction of his claim for damages against the liquidator personally either the 25 per cent. of that total claim which the new company had ready for him in cash or any value attributable to the balance of debentures which were his for the asking. I had prepared a reasoned and detailed statement on the above lines, when I became aware that your Lordships were all resolved that the old company had not, by reason of anything that happened on Oct. 19, 1919, been released from liability to the respondent, and I bow readily to so strong an intimation of judicial opinion upon an equivocal question on which one cannot but be distrustful of one's own views, made more difficult as they are by technical considerations. Accordingly, my Lords, I do not trouble your Lordships further on this branch of the case. I do not resist the decision upon it intimated by all your Lordships who have preceded me.

Thereupon at once arises the second question—one which did not receive in the Court of Appeal the consideration devoted to it in your Lordships' House. The respondent is entitled to prove in the revived liquidation of the old company for any damages for breach of his contract with that company that he can establish. But is the liquidator, as the Court of Appeal has held, bound to admit his proof for the sum awarded by Sir Walter Schwabe? In other words, is that award binding in any sense upon the old company or its liquidator? On this subject I find myself in entire agreement with my noble and learned friend LORD SUMNER, whose judgment I have had the advantage of seeing in print.

The whole question turns upon the effect of ASTBURY, J.'s order of Feb. 20, 1923, under which, in terms unqualified in every relevant sense, he declared the dissolution of the old company "to have been void." That order was made in pursuance of power conferred upon the learned judge by s. 223 of the Companies (Consolidation) Act, 1908, and this present question depends entirely upon the effect, under that section, of such an order. The Companies (Consolidation) Act, 1908, makes the dissolution of one of its companies possible in three different events. First of all, a company treated as defunct by the registrar in the circumstances stated in s. 242, may by him be struck off the register under that section "and the company will be dissolved." It must be noted that in this case the dissolution takes place

A without any previous winding-up, and may be effected without anyone interested in the company in fact being aware of it. Subsection (6) of s. 242 [s. 353 (6) of Companies Act, 1948] accordingly provides :

B "If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the court on the application of the company or member or creditor may, if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and thereupon the company shall be deemed to have continued in existence as if its name had not been struck off; and the court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off."

C This section first appeared in company legislation in s. 26 of the Companies Act, 1900. It was before the legislature when s. 223 was first enacted in the Companies Act, 1907. It will appear in a moment how significant is the fact that the provisions of s. 242 (6) which I have italicised are not repeated in s. 223. That section is concerned with a dissolution of a company following a winding-up by the court or one following a voluntary winding-up. Section 172 [s. 274 of Act of 1948] regulates dissolution complementary to a compulsory liquidation. "When the affairs of the company have been completely wound-up" the court is to make an order that the company be dissolved from the date of the order "and the company shall be dissolved accordingly." Section 195 [s. 290 of Act of 1948] regulates dissolution succeeding a voluntary winding-up. The liquidator, "as soon as the affairs of the company are fully wound-up," convenes by advertisement a final meeting of the company and lays before it an account of the winding-up. Within a week after the meeting the liquidator must make a return to the registrar of the holding of the meeting and its date; on receipt the registrar must forthwith register the return, and on the expiration of three months from that registration "the company shall be deemed to be dissolved." Section 223, which, as I have already indicated, did not appear in company legislation until the Act of 1907, applies equally but exclusively to a company which has been "dissolved accordingly" under s. 172, and to a company which has been "deemed to be dissolved" under s. 195, and an order under that section may be made at any time "within two years of the date of the dissolution."

G In these circumstances I cannot myself doubt that both the words of the section empowering the court to make an order "declaring the dissolution to have been void," and the following words expository of the result, "and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved," were in each case designedly chosen to produce the precise result which my noble and learned friend has attributed to them. It is true that a declaratory order under the section unqualified in terms does, and it was, in my judgment, essential, if many difficulties which readily occur to the mind were to be avoided, that such an order should have the effect of restoring to the revived company its corporate existence as from the very moment of the dissolution thereby declared "to have been void." But the expository words which follow carefully, and, as I think, advisedly, refrain from adding that such an order is to have the effect of restoring to the company from the same moment, not its corporate existence only, but its corporate activity also. On the contrary, these expository words import, as I think, that it is only after the order has been made—it is "thereupon" but not before—that any active consequences are to ensue. I think that the terms in which these consequences are described are exhaustive and emphatic. They are intended to show that, an order under the section made, it may be as long as two years after a dissolution which up to that moment was completely effective, is not at once and as of course to ratify acts done during the interval which, if done at

all, must necessarily have been acts of mere usurpation, by a liquidator or other pretended agent with no office knowingly done on behalf of a company which had no existence. On consideration, it appears, I think, clear that automatically to validate such acts as being the acts of a duly constituted officer on behalf of a duly incorporated company might involve consequences too disastrous to be even envisaged. These are avoided by the terms of the section. The company is restored to life as from the moment of dissolution, but, continuing a convenient metaphor, it remains buried, unconscious, asleep and powerless until the order declaring the dissolution to have been void is made. Then, and only then, is the company restored to activity. A
B

Now is made apparent the reason for the difference in phraseology and effect between s. 223 and sub-s. (6) of s. 242. A dissolution under s. 242, as I have said, is preceded by no winding-up and the section had to envisage one which might have taken place without the knowledge of anyone concerned in the company. Hence the wide powers given to the court by sub-s. (6). Section 223, on the other hand, is confined to cases where the dissolution follows the complete winding-up of the company's affairs and cannot take effect at all except at the instance or with the knowledge of the liquidator, the company's only executive officer. The legislature has not seen fit to make provision for validating any intermediate acts done on behalf of such a company so dissolved. In my judgment, accordingly, the arbitration proceedings which abated on the dissolution of the old company thereby became abortive and have in no sense been reconstituted as a result of *ASTBURY, J.*'s order. In my opinion, the result is that expounded by my noble and learned friend, with whom also I am in entire accord as to the respondent's claim against *Atkey, Ltd.* He is entitled to prove in the liquidation of this company for such amount, not exceeding £1,075 in all, as he can show to be still due from and unpaid by *Atkey, Ltd.* That right, with the further right to prove for such sum as he can show to be payable to him in respect of his direct claim against the company is, in my judgment, the measure of his rights in this liquidation. C
D
E

Order of Court of Appeal varied.

Solicitors: *Goodman, Saunders, Squires & Co.; Arnold, Fooks, Chadwick & Co.* F
[Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]

MORGAN v. LIVERPOOL CORPORATION

[COURT OF APPEAL (Lord Hanworth, M.R., Atkin and Lawrence, L.J.J.),
December 15, 16, 1926]

[Reported [1927] 2 K.B. 131; 96 L.J.K.B. 234; 136 L.T. 622;
91 J.P. 26; 43 T.L.R. 146; 71 Sol. Jo. 35; 25 L.G.R. 79]

Housing—"Small house"—Condition to be implied in tenancy—House to be kept
"in all respects reasonably fit for human habitation"—Fitness—Broken win-
dow sashcord—Right of landlord to inspect premises—Need of notice by
tenant of disrepair—Latent or patent defect—Housing Act, 1925 (15 and 16
Geo. 5, c. 14), s. 1 (1) (2).

The breaking of a sashcord affecting the use of a window in a small house
held (by LORD HANWORTH, M.R., and LAWRENCE, L.J., ATKIN, L.J., dissent-
ing) not to render the house not "in all respects reasonably fit for human
habitation" within s. 1 (1) of the Housing Act, 1925.

The notice of disrepair required to be given to a landlord before he is liable
to repair under a covenant, express or implied, in the contract of letting applies
where the covenant is implied by statute, as by s. 1 (1) of the Housing Act,
1925, and whether the defect in the premises is latent or patent, and the notice
is necessary even though the landlord has the right (as by s. 2 (2) of the Act
of 1925) to enter the premises to view the condition thereof on giving 24 hours'
notice to the tenant.

Rent Restriction—Increase of standard rent—Right exercised by landlord—
No implied obligation to keep premises in "good and tenantable repair"—
Broken window sashcord—Increase of Rent and Mortgage Interest (Restric-
tions) Act, 1920 (10 and 11 Geo. 5, c. 17), s. 2 (1) (d), s. 2 (5).

Section 2 (1) (d) of the Increase of Rent and Mortgage Interest (Restrictions)
Act, 1920, conferred on a landlord the right to increase the rent of a dwelling-
house within the Act where he was responsible for "repairs," defined by s. 2 (5)
as any repairs required to keep the premises "in good and tenantable repair."

Held: no condition was to be implied in a statutory tenancy as a result of
these provisions that the landlord would keep the premises in such repair; in
any case (LAWRENCE, L.J., dissenting) the breaking of a sashcord would not
render a house within the Rent Acts not in good and tenantable repair.

Notes. Section 1 of the Housing Act, 1925, has been replaced by s. 6 of the
Housing Act, 1957, the wording of which is somewhat different, the words "in all
respects reasonably" before "fit for habitation" in the 1925 Act being omitted.
Section 2 of the Rent Restriction Act, 1920, was repealed by the Housing Repairs
and Rents Act, 1954, and the Rent Act, 1957, but the passages in the judgments
on the point under the Act of 1920 have been retained in this report as it is thought
they may be of value in cases falling under s. 1 (3) of the Rent Act, 1957.

Considered: *Summers v. Salford Corpn.*, [1943] 1 All E.R. 68; *McCarrick v. Liverpool Corpn.*, [1946] 2 All E.R. 646. Referred to: *Wilchick v. Marks and Silverstone*, [1934] 2 K.B. 56; *Wringe v. Cohen*, [1939] 4 All E.R. 241.

As to the obligation of a landlord to repair and the need for notice of disrepair,
see 23 HALSBURY'S LAWS (3rd Edn.) 562 et seq.; and for cases see 31 DIGEST (Repl.)
198, 199, 344 et seq. For Housing Act, 1957, see 37 HALSBURY'S STATUTES
(2nd Edn.) 314; and for Increase of Rent &c. Act, 1920, see *ibid.*, vol. 13, p. 981.

Cases referred to:

- (1) *Jones v. Geen*, [1925] 1 K.B. 659; 132 L.T. 796; 41 T.L.R. 311; 23 L.G.R. 396; sub nom. *Jones v. Phillips*, 94 L.J.K.B. 413, D.C.; 31 Digest (Repl.) 343, 4748.
- (2) *Smith v. Marrable* (1843), 11 M. & W. 5; Car. & M. 479; 12 L.J.Ex. 223; 7 Jur. 70; 152 E.R. 698; 31 Digest (Repl.) 195, 3266.

- (3) *Stanton v. Southwick*, [1920] 2 K.B. 642; 89 L.J.K.B. 1066; 123 L.T. 651; 84 J.P. 207; 36 T.L.R. 567; 64 Sol. Jo. 498; 18 L.G.R. 425, D.C.; 31 Digest (Repl.) 198, 3303. **A**
- (4) *Fisher v. Walters*, [1926] 2 K.B. 315; 95 L.J.K.B. 846; 135 L.T. 411; 90 J.P. 195; 42 T.L.R. 499; 70 Sol. Jo. 710; 24 L.G.R. 327, D.C.; 31 Digest (Repl.) 198, 3306.
- (5) *Walker v. Hobbs & Co.* (1889), 23 Q.B.D. 458; 59 L.J.Q.B. 93; 61 L.T. 688; 54 J.P. 199; 38 W.R. 63; 5 T.L.R. 640, D.C.; 31 Digest (Repl.) 198, 3304. **B**
- (6) *Makin v. Watkinson* (1870), L.R. 6 Exch. 25; 40 L.J.Ex. 33; 23 L.T. 592; 19 W.R. 286; 31 Digest (Repl.) 346, 4768.
- (7) *Murphy v. Hurly*, [1922] 1 A.C. 369; 91 L.J.P.C. 116; 127 L.T. 49; 38 T.L.R. 386; 66 Sol. Jo. 314, H.L.; 31 Digest (Repl.) 346, 4774.
- (8) *Broggi v. Robins* (1899), 15 T.L.R. 224, C.A.; 31 Digest (Repl.) 383, 5104. **C**
- (9) *Hugall v. M'Lean* (1885), 53 L.T. 94; 33 W.R. 588; 1 T.L.R. 445, C.A.; 31 Digest (Repl.) 346, 4770.
- (10) *Cavalier v. Pope*, [1909] A.C. 428; 75 L.J.K.B. 609; 95 L.T. 65; 22 T.L.R. 648; 50 Sol. Jo. 575, H.L.; 31 Digest (Repl.) 386, 5124.
- (11) *Ryall v. Kidwell & Son*, [1914] 3 K.B. 135; 83 L.J.K.B. 1140; 111 L.T. 240; 78 J.P. 377; 30 T.L.R. 503; 12 L.G.R. 997, C.A.; 31 Digest (Repl.) 387, 5128. **D**

Appeal by the defendant corporation from an order of SIR W. F. K. TAYLOR, K.C., judge of the Court of Passage, Liverpool.

The facts are stated in the judgment of the Master of the Rolls.

J. E. Singleton, K.C., and *Wilfrid Clothier*, for the corporation, referred to *Jones v. Geen* (1); *Smith v. Marrable* (2); *Stanton v. Southwick* (3); *Ryall v. Kidwell & Son* (11); *FOA ON LANDLORD AND TENANT* (6th Edn.), p. 173; and *Fisher v. Walters* (4). **E**

F. R. Batt, for the plaintiff, referred to *Walker v. Hobbs & Co.* (5); *Makin v. Watkinson* (6); *Murphy v. Hurly* (7); and *Jones v. Geen* (1).

LORD HANWORTH, M.R.—This is an appeal from the Liverpool Court of Passage and from a judgment which was delivered by the presiding judge, SIR WILLIAM KYFFIN TAYLOR, K.C. The claim was made by a man who was tenant of a house owned by the respondents, No. 63, Holly Street, in the city of Liverpool. The standard rent under the Rent Restrictions Acts was 5s. 6d. a week. That rent had been increased to a sum of 8s. 1d. a week, and the claim that was made by the plaintiff arose out of an accident which occurred to him in the house. He was opening a window in the back room of the house, which contained a kitchen, a back kitchen and two rooms upstairs. When he opened the top of the window one of the cords of the window sash broke with the result that the top part of the window slipped down and caught the plaintiff's hand and injured it. One of the panes in the upper part of the window, in the course of its fall, was broken and a piece of glass from that fracture struck one of the plaintiff's eyes. The effect of that accident was that he had to receive treatment, which he did the next day, because of the pain which he suffered in his hand, and he also had some attention directed to his eye, and if the piece of glass was still there it was removed. Altogether he, no doubt, suffered some pain. He had small expenses which he paid at the hospital, a sum of 10s., and he claimed a sum of £20 on the ground that he had lost his earnings as a contractor for a period of four weeks. The presiding judge, after hearing the evidence, gave judgment in favour of the plaintiff for the sum of £24. **F**

The claim, which was based upon the liability of the defendants as the landlords of the premises, was put in three forms—first, for breach of the covenant for quiet enjoyment; secondly, it was said that the defendants were under an obligation to repair the premises and keep them in repair; and, thirdly, it was said that the premises were, at the commencement of the tenancy, in all respects reasonably fit for human habitation and should, during the holding, be kept reasonably fit for human habitation. The second and third points arose upon the covenant which is **G** **H** **I**

A imported into a tenancy of a house of this class by the Housing Act, 1925, and by the effect of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. To both of these statutes I must refer at greater length in a moment. The learned judge came to the conclusion that the premises were not in all respects reasonably fit for human habitation, and having come to that decision he allowed judgment to pass for the plaintiff for £24.

B It was contended on behalf of the defendants, first, that the facts proved did not bring the case within a breach of the covenant which is implied under the Act of 1925; secondly, that there was no notice given, whereas notice ought to be given where it is contended that a landlord has failed to comply with his covenant to repair; and, thirdly, there was a third ground which has been argued in this court and which the learned judge had presented to him, but apparently not fully argued before him, namely, that there was a liability of repair imposed upon the landlord by virtue of the Rent and Mortgage Interest (Restrictions) Act, 1920. That has been argued before us and we must deal with it.

C I desire now to direct attention to the covenant on which the claim is based. This house is what I might call an industrial dwelling, in which working men have their homes, and by s. 1 (1) of the Housing Act, 1925, it is provided :

D "In any contract for letting for habitation a dwelling-house at a rent [with which this house complied] there shall, notwithstanding any stipulation to the contrary, be implied a condition that the house is at the commencement of the tenancy, and an undertaking that the house will be kept by the landlord during the tenancy, in all respects reasonably fit for human habitation."

E By sub-s. (2),

"The landlord, or any person authorised by him in writing, may at reasonable times of the day, on giving twenty-four hours' notice in writing to the tenant or occupier, enter any premises to which this section applies for the purpose of viewing the state and condition thereof."

F It is said there was evidence upon which the presiding judge ought to hold that by reason of the breaking of this window cord the house was not in all respects reasonably fit for habitation. Alternatively, the liability upon the defendants was based on the terms of the Rent Restrictions Act, 1920, s. 2 (1) (d), which provides that where the landlord is responsible for the whole of the repairs there is to be an addition to the rent, and where the landlord is responsible for part, and not the whole, of the repairs a lesser amount is to be added to the rent. By sub-s. (5) :

G "For the purposes of this section, the expression 'repairs' means any repairs required for the purpose of keeping premises in good and tenantable repair, and any premises in such a state shall be deemed to be in a reasonable state of repair, and the landlord shall be deemed to be responsible for any repairs for which the tenant is under no express liability."

H It is said that inasmuch as the rent has been increased in pursuance of the Rent Restrictions Acts the tenant is entitled to impute to the landlord a condition of liability for repair which is indicated in the sections which I have read, and which are a condition precedent to the landlord being entitled to recover a larger sum of rent.

I After giving the best consideration that I can to these points, I think it right to express my opinion. The point of notice, to which I will come, and which applies to both points, is also essential to the case, but I think it would be unfortunate not to express an opinion after the argument that we have had, because one might leave the case in a condition in which it might be supposed, if notice had been given, the tenant would have been entitled to recover. Taking first the expression in the Housing Act, 1925, I ask myself whether, if a window cord is in such a condition that it in fact breaks, that is evidence that the house is not in all respects reasonably fit for human habitation. The learned judge below attached some importance, and rightly, to the words "in all respects." It appears to me that one must also

bear in mind the effect of the word "reasonably" before the word "fit." In some measure the terms "in all respects" and "reasonably" seem antithetic or antagonistic, but one has to ask oneself whether such a misfortune as happened on this occasion is evidence cogent enough to establish a liability as against the defendants because the house was not in all respects reasonably fit for human habitation. I should be sorry in any way to cut down the responsibility which is thrown upon landlords in favour of those who occupy houses of this class by this term. It is important, however, that one should not overlook the word "reasonably" which is found in this portion of the subsection. It appears to me that the breaking of a window cord is an accident which may take place in any sort of house. Although in order to make a house in all respects fit for habitation I should think it is clear that it must have windows, and windows that open, it appears to me that the breaking of a window cord is an incident in the course of the habitation of a house which must from time to time occur in all classes and kinds of houses inhabited by all classes and kinds of persons, and in itself I cannot see from that happening that there was a proof or a test that one could apply as to whether or not the house was fit or unfit for human habitation.

Turning to the claim made under the Rent Restriction Acts, here I have grave difficulty in seeing that the plaintiff is entitled to rely upon those Acts as giving him the foundation for a cause of action. The Rent Restriction Acts were intended to restrict the power of landlords unduly to increase the rent and to allow them only to do so in cases where the Act provided that they should be entitled to make an increased charge. The Acts restricted the landlord's power generally to increase the rent of the houses to which they applied. Under the system of the Acts, for the purpose of estimating the increase which is justified within the Acts, you have to estimate whether the landlord was liable for all the repairs or some of the repairs, and according as his liability was for all the repairs or some of the repairs, so by cl. (d) of s. 2 (1) an estimate is to be made, if an agreement is not reached, as to how far there can be an increase. The words which are found in sub-s. (5) interpreting the meaning of the word "repairs" appear to be inserted for the purpose of explaining the meaning of the words "reasonable state of repair" which are found in sub-s. (2), and the phrase "landlord responsible for any repairs" is interpreted in the sense that the landlord is to be deemed responsible for any repairs for which the tenant is under no express liability—that is to say, if there is no express relief to the landlord in respect of the repairs he is to be deemed responsible for the whole of the repairs. One more section appears to be of importance, and that is s. 5 of the Rent and Mortgage Interest Restrictions Act, 1923. That, together with s. 2 (1) (d) (ii) of the Act of 1920, gives rights to the tenants whereby, if there has been an increase of rent on the basis of the landlord being liable for repairs, and the landlord has not acted in accordance with that liability, they can have the increase of rent suspended or to have the repairs enforced; but throughout the whole code laid down by these Acts there does not appear to me to be an implication that one is to take those Acts as referring to other tenancies than those specified or to find an alteration of the relation between landlord and tenant with regard to repairs which is to be implied from their terms. The Acts appear to me to have been passed *alio intuitu*. It is true that in *Jones v. Geen* (1), where SALTER, J., delivered a very careful judgment, the question whether the Rent Restriction Acts have imposed a new liability upon landlords is considered, but the actual question that had to be determined there was whether or not the increase of rent that had been imposed upon the tenant was justified having regard to the fact, as it was said, that there was not a liability for repair left upon the landlord. The decision of the Divisional Court was that under an agreement whereby the tenant had to keep and leave the premises in good and tenantable repair, fair wear and tear excepted, there still remained a measure of liability to repair upon the landlord, that he was not wholly excused from responsibility for repairs, and thus that there remained a portion of responsibility to the extent to which he was able to

A qualify himself for making an addition to the rent which he charged. The ultimate order that was made by the court was that

“the matter must go down to the county court judge to determine as best he can, in the light of what has been said here, what is the fair and reasonable amount of addition to the rent which the landlords are to be allowed to make.”

B That is to say, landlords who have got a tenant who is bound to keep the premises and leave them in good and tenantable repair, fair wear and tear excepted, are not excluded from some responsibility for repair. It is not, however, necessary to decide this question. I have, as I say, a difficulty in attaching a different purpose and meaning to the Rent Restriction Acts, but, if it be so, taken at their furthest, the Acts would impose upon the landlord a liability in respect of such repairs as would be required for the purpose of keeping premises in good and tenantable repair. Although, in my opinion, it would be necessary for any person, landlord or tenant, who was under a responsibility for keeping premises in good and tenantable repair to make good the cords of window sashes, I should find some difficulty in saying that, if a window sash broke, there was an immediate proof that the premises were not in good and tenantable repair for the same reason as that I gave when dealing with the Housing Act, 1925—that the breaking of a window sash cord appears to be an incident which, even if premises are kept in good and tenantable repair, may occur by mischance from time to time, however careful or diligent either the landlord or the tenant may be in respect of that. Therefore, I am unable to agree with the presiding judge that there was imposed by either of these statutes a liability in respect of this mishap.

E There is, however, another and fatal objection to the plaintiff's claim. It has long been established law that where there is a covenant on the part of a landlord to keep premises in repair the tenant must give notice to the landlord of what is out of repair, for he, the tenant, being in occupation, has an opportunity of knowing what the condition of the premises is, an opportunity denied to the landlord, who may be at a distance; and on the principle which is stated by LORD SUMNER in *Murphy v. Hurly* (7) ([1922] 1 A.C. at p. 375), the maxim *lex non cogit ad impossibilia*, it is necessary in order to attach responsibility to the landlord that notice should have been given to him. It is said that that is true and applies in cases where the landlord during the tenancy had no right of access to the premises, but here, by virtue of sub-s. (2) of s. 1 of the Housing Act, 1925, the landlord was entitled, on giving twenty-four hours' notice to the tenant, to enter the premises for the purpose of viewing the state and condition thereof. It is important, therefore, to consider what is the basis on which notice is required, and whether it is required although the landlord himself could have entered and viewed the premises? That it is required appears to me to be quite clear from *Makin v. Watkinson* (6), and it is also clear, I think, that we have to consider the addition of this covenant as to be implied in a contract of tenancy under the terms of s. 1 of the Rent Restrictions Act, 1920. It is not more than, or higher than, a covenant which might have been inserted in the contract of tenancy between the parties. The fact that it derives its origin from a statute does not put it on higher authority. All that the statute says is that by virtue of the statute there is to be implied in the contract of tenancy a certain covenant, and the contract is to be read with that clause inserted in it. Without going through all the cases which have been cited, it appears to me that notice is required whether or not in these cases there was the means of access.

I That appears to me to have been determined by a case in this court, where LORD RUSSELL OF KILLOWEN gave the judgment, *Broggi v. Robins* (8), where he says (15 T.L.R. at p. 225):

“Did the landlord commit a breach of his contractual obligations merely because he did not repair in some case where the event proved that repairs had been necessary? Or was it necessary that his attention should be drawn to the fact that the premises were out of repair, and that repairs were needed?”

He holds that the latter proposition is the true one. He definitely holds in a case where there was, as there was there, a right of access, that notice was still necessary to draw the attention of the landlord to the fact. More than that I think that counsel for the corporation is right in the inference which he draws in reference to the case which is referred to by LORD ATKINSON in *Murphy v. Hurly* (7) ([1922] 1 A.C. at p. 382), namely, *Hugall v. M'Lean* (9). In that case, a somewhat striking case, in the absence of notice where neither side knew of the faulty condition of the premises, the landlord was not held to be liable owing to the absence of notice. Finally, in *Murphy v. Hurly* (7), I think it is quite clearly laid down that in cases of this sort as between landlord and tenant it is essential that the landlord should have notice, even though he had means of access. I attach importance to the words of LORD SUMNER. He says ([1922] 1 A.C. at p. 387) that "the nature and conditions of this rule are, however, equally well settled," that is to say, that there must be notice, and the circumstances in which notice is necessary are "that the tenant is in occupation and the landlord is not," with the consequence that the tenant has means of knowledge while the landlord has no right of access. He goes on:

"Perhaps I may add that the repairs of dwelling-houses, however frequently required, are still casual and occasional."

Taking those words with the subsequent words to which attention was called, it appears to me that in cases of this class where you have casual repairs necessary from time to time, but which, if it was the duty of the landlord to discover them, would throw upon him an unreasonable burden, it is the duty of the tenant to inform the landlord if there is to be a responsibility in respect of a breach of his covenant enforced against the landlord. These three cases appear to me definitely to show that in this class of covenant in this class of case it is necessary that notice should be served upon the landlord. There was no such notice in the present case, and, therefore, that is fatal to the plaintiff's claim. I would like to add, however, that I do not read the judgments in *Murphy v. Hurly* (7) as being that the rule to give notice is absolute in all cases. LORD BUCKMASTER calls attention to the fact that in certain circumstances there need not be a notice as in the case they were actually considering where the duty of the landlord was to keep under his eye the wall which was the cause of the injury which had there occurred, and I think the words of LORD SUMNER are to the same effect. Although, however, the rule may not be absolute in all cases, I think in cases like the present, landlord and tenant cases, the rule appears to be absolute, and, therefore, as there was no such notice, that notice being necessary in respect of the breach of covenant from whatever statute it is to be implied, the plaintiff's claim fails and the learned judge was wrong in disregarding the point that there was no notice. He did so because it was said that the cause of the injury was a latent defect. I find some difficulty in seeing whether or not that would be a sufficient cause. It does not, however, I think arise in the present case, but after *Hugall v. M'Lean* (9), and the way in which that is treated by LORD ATKINSON, I doubt very much whether the breaking of a window cord could be treated as a latent defect, within the meaning of any doctrine of a latent defect, which may be imported to diminish the responsibility for sending notice. For these reasons it appears to me that this appeal must be allowed and judgment must be entered for the defendants in the case, with costs here and below.

ATKIN, L.J.—I agree that the appeal should be allowed with costs, and I agree upon the only ground, unfortunately, upon which all three of us are agreed, namely, that notice is required before the liability of the landlord to repair in this case exists. The result is that we have embarked, and are embarking, upon a series of obiter dicta in respect of the other parts of the case, which I trust no doubt will be useful, but which, so far as I can see, will not be authoritative. Nevertheless, inasmuch as the case has been argued and the matter has already been dealt with, I propose to say something about all the points that have been raised.

A The first point is as to the alleged liability of the landlord under the Housing Act, 1925. That imposes a liability on the landlord to keep the house in all respects reasonably fit for human habitation. Those are words which it is obvious present difficulties when you have to apply them to concrete facts. The facts in this case it is, I think, relevant to consider. The tenant was a tenant from the Liverpool Corporation of a house which fell within the definition in the Housing Act, 1925. It consisted of a kitchen on the ground floor and two bedrooms, a front room and a back room, above. In that house the tenant, the present plaintiff, a man of fifty, lives with his wife and six children. In September, 1925, an accident had happened with regard to the front window. One of the plaintiff's daughters was opening the top sash when it suddenly fell and injured her fingers. Eventually that damage was repaired by the corporation; no complaint of the injury was made, and no action was brought in respect of the injury against the corporation. On Feb. 15, of this year [1926] the plaintiff at about eleven o'clock in the morning, being then out of work, went to the back bedroom, unlatched the top sash, which fell down by reason of the cord giving way and crushed—and, as I gather, severely crushed—his hands, which would be on the top ledge of the lower sash. He had to go into hospital; his hands were bandaged, one hand was put in a splint, and he remained in that condition under treatment for about three weeks; he was then subjected to massage, and he says, and the learned judge has believed him, that the accident happened in that way, and that he suffered pain and suffering by reason of that accident. In addition to that calamity, which is, to my mind, a very natural result of the sash of a window of that kind falling suddenly, the man met with a rather more unexpected injury by reason of a pane of glass breaking during the fall and a small splinter getting into his eye. His eye was also slightly damaged as well and had to be treated.

E That is the damage, and those are the circumstances in which the plaintiff brings his action. The question is whether or not the learned judge below was wrong in coming to the conclusion that that state of facts shows a condition of a house which is not in all respects fit for human habitation. I am bound to say, speaking for myself, I am not satisfied that the learned judge was wrong in coming to that conclusion. It is, of course, in all the circumstances a question of fact, and while no one would say that the mere fact that one cord, or two cords for that matter, were broken necessarily put a house in a state in which it is unfit for human habitation, when you take the class of house and the people with whom you are dealing and the particular circumstances of the case, you may be forced to a different conclusion. I think that the standard which was suggested by counsel for the plaintiff in his argument is one which commends itself to me, which is that if the state of repair of a house is such that by ordinary user damage may naturally be caused to the occupier, either in respect of personal injury to life or limb or injury to health, then the house is not in all respects reasonably fit for human habitation. It seems to me difficult to say that that house in that state is reasonably fit for human habitation, and if that rule was the correct test, it appears to me that the facts here bring the case within such a definition. For this purpose it is not merely a question of a window falling with such weight as a window sash has. One might test it by reference to any other thing that might be in a house, as, for instance, a gas lamp or gas chandelier or a gas bracket or a curtain pole or any other thing which on being touched might fall and cause serious injury; and if the curtain pole was in fact part of the structure of the house, as it is conceivable it might be, and it fell within the ordinary repairing duty of the person who has to repair, I think that case also might very well fall within such a case as this. There is another matter which has to be dealt with, and that is the question of health, to which I think the learned judge properly attached importance. If a man is the owner of a house which has many rooms and many windows, it may very well be that the fact that one window will not open easily or open at all would be far from making that house in any respect unfit for human habitation. But when one is dealing with a working-class house with two bedrooms occupied in the ordinary

way in which an industrial dwelling may be occupied, that is to say, by a man and his wife and children, it appears to me that the question whether or not the only window in one of the only two bedrooms is capable of being opened with reasonable facility, and the fact that it cannot be opened and will have to remain shut, have a bearing upon the question whether that room is reasonably fit for human habitation. A

Another thing which I think does test the matter is this. After the window has fallen and the sash cords have proved to be insufficient, is there or is there not an obligation upon the landlord of the house to repair the sash cords? That obligation was answered in this case in practice because as soon as that happened the corporation in fact did all the repairs. They are not bound to do the repairs except under this section, and though that, of course, is not conclusive, because a good landlord may very often do repairs that he is not under a contract bound to do, especially when there is no obligation on the tenant to do the repairs, it seems to me to have quite a bearing on the case by way of a test, and it seems to me that if after notice in such a case the landlord refused to repair the window so that it could not be raised with ordinary facility, there certainly would be evidence that that house was left by the landlord in a state which was not in all respects reasonably fit for human habitation. I also think in dealing with that matter it is not immaterial to notice that the tenant himself is prohibited from executing slight repairs or is restricted in his right of doing slight repairs because he himself is restricted by the regulations from driving any nails into any woodwork in the house, and it appears the only way in which this window was made available for some time was by driving nails into some part of the window sash. It appears to me that the learned and very experienced judge in matters of this kind at the Court of Passage is not shown to be wrong when he came to this conclusion of fact in the case. B C D E

But then it is said that there was a further obligation than the obligation under the Housing Act, and that the Rent Restriction Act, 1920, imposed a statutory obligation on the landlord of any house which came within the Act to keep that house in good and tenantable repair. It is said, therefore, that we need not consider the question whether this house was in all respects fit for human habitation; all that we need to consider is whether it was or was not in good and tenantable repair, and it is conceded that is a more onerous obligation than the first obligation, and I think that is clear. I am not prepared to accept the view that the Rent Restriction Act did in fact in s. 2 (5) impose that obligation upon the landlord towards his tenants. The matter arises in this way. By the Act of 1920 the landlord is entitled to make additions to his rent by complying with the statutory conditions, and he may, by s. 2 (1) (d), increase the amount of rent of a dwelling-house beyond the standard rent in this way: F G

"(i) where the landlord is responsible for the whole of the repairs, an amount not exceeding twenty-five per cent. of the net rent; or (ii) where the landlord is responsible for part and not the whole of the repairs, such lesser amount as may be agreed, or as may, on the application of the landlord or the tenant, be determined by the county court . . ." H

By s. 2 (5): "For the purposes of this section," it is not a general provision, but "For the purposes of this section, the expression 'repairs' means any repairs required for the purpose of keeping premises in good and tenantable repair, and any premises in such a state shall be deemed to be in a reasonable state of repair, and the landlord shall be deemed to be responsible for any repairs for which the tenant is under no express liability." I

It appears to me that that is only a statutory answer to the question which must be asked in the first place when you are seeking to decide whether a landlord may increase the rent or not, namely, whether the landlord is responsible for the whole of the repairs or for part of the repairs, and it says: We will answer that by saying for the purpose of this section he is deemed to be responsible for any repairs for which the tenant is under no express liability. That appears to me to be very far

A from creating a statutory liability on the landlord to the tenant. That is not the question which is arising here; there it was desired only to define the state of circumstances which by the Act is a condition precedent to the right of the landlord to increase the rent. It is only where he is responsible for the repairs that he may increase the rent at all. In the bulk of the cases which come within the Rent Restriction Acts, the landlord is under no contractual obligation to the tenant to do any repairs at all; nobody has contracted to do any repairs, and the only liability that the landlord would be under would be a possible implied agreement—and whether that exists or not there is some controversy—but a possible implied agreement to keep the premises watertight. I am far from saying that that exists, but that would be the extent of it. I think all this Act meant was: You want to find out on whom the burden of repairs falls, whether it falls on the landlord or not; if it falls on the landlord, he may increase the rent, because if it falls on the landlord, then the reason for the increase of rent exists, namely, the increased cost of labour and the increased cost of material, and it is extremely important to give him facilities for repairing because, after all, the tenant is going to benefit by it. Then there is a series of provisions, which are very carefully drawn, by which, if the landlord, being so defined to be responsible for the repairs, does not in fact execute the repairs after he has increased the rent, the tenant need not pay the increased rent, and he entitles himself to do that by getting a certificate from the sanitary authority saying that the house is not in the state of good and tenable repair which is mentioned in the statute. I cannot think that the Act of Parliament in those terms for the first time in 1920 was doing something which had the effect of imposing a statutory obligation in excess of the existing obligation in existing contracts of tenancy upon a landlord towards the tenant. It would be very odd, if that were so, that the Act does not in one way or another give effect to the remedy that the tenant would then have, not so much in not paying the increase of rent, but claiming damages for breach of the covenant to repair. Therefore, to my mind, it is wrong to suggest that s. 2 (2) of the Act of 1920, which is carefully limited by the words “for the purposes of this section,” does in fact impose upon the landlord a liability towards his tenant, and, if that is so, then this further obligation does not exist.

Having disposed, therefore, of the two contractual terms and having come to the conclusion, as I do, that the only provision that binds the landlord is the provision in the Housing Act, then comes the question whether or not that is enforceable. The clause in the Housing Act is imposed as a contractual term and as such it appears to be only available to the tenant because it is a term of the tenancy. *Cavalier v. Pope* (10) would prevent an occupier who was not a tenant from taking advantage of a breach of the contract. It is merely a statutory term of the contract. Ordinarily speaking, if it had been an express term I think there would be no doubt that in ordinary circumstances the obligation of the landlord to do repairs does not come into existence until he has had notice of the defect which his contract to repair requires him to make good. The reason for that is obvious. The landlord has given the tenant exclusive occupation of the house. The landlord, therefore, is not in a position to know whether the house is in repair or out of repair, and it would be quite contrary to justice to impose an obligation to repair of this kind upon a landlord in respect of matters of which he has no knowledge. It appears to me that the reason for reading in that condition depends, and depends in truth and in fact, solely upon that consideration; he has given the exclusive occupation of the house to his tenant and he himself does not know, and, more than that, he has not the means of knowledge. The result is, to my mind, that in all cases of that kind, speaking generally, it is a condition of the liability of the landlord that he should receive notice of the repairs. Any other view would certainly impose a very considerable hardship upon the landlord, as is illustrated by this case. Here is a case of something which arose quite suddenly. It is possible that a very careful inspection of the window cords might have revealed the state that they were in, but there are many other defects which arise quite

suddenly—leaks spring up in joints of water pipes and gas pipes, and so on—and to say that the landlord is responsible for the consequences of those things not being in repair in circumstances in which no time could have elapsed between the time when the defect first arose and the time when the injury from it occurred, would certainly be to impose a very harsh obligation upon a landlord which the courts do not impose except subject to a condition that he must receive notice of the defect. To my mind, in those circumstances it is clear that, if the landlord gives exclusive occupation to the tenant, the landlord does not in fact know, and in this case could not know, of the defect. It is true that he has a right of access given to him by the Act—he may come upon the premises at any time after twenty-four hours' notice to inspect the state of repair; but such a provision as that, though useful to the landlord and to the tenant to enable the landlord to repair defects which arise from time to time, is quite insufficient to redress the injustice that would arise from imposing this obligation upon the landlord. Indeed, it could not be just unless the landlord lived on the premises to the same extent that the tenant did. As I said before, I cannot imagine a set of circumstances which would be more intolerable to a tenant, to say nothing of the landlord, if the landlord had repeatedly day by day and so on, in order to protect himself, to survey all his houses for the purpose of seeing whether there was any little defect which might result and cause injury. The power of access that is given, extensive though it may be, does not take the case away from the principle from which the courts have inferred the condition that the liability is not to arise except on notice. The position is quite a satisfactory one, because as soon as the tenant is aware of the defect he must then give notice, and if the landlord does not repair it, the landlord will be liable. If in fact the tenant is not able to ascertain the defect, there seems to be no reason why the landlord should be exposed to what remains still the same injustice of being required to repair a defect of which he does not know.

In the present case notice was not given to the landlord. If, as soon as the defect became so known by the fall of the sash and the tenant was able to give notice to the landlord, he had given notice, the landlord would then have become under a liability to repair because if he did not, the house would be in a state not in all respects fit for human habitation; but no notice was given, and so I think the landlord was not liable. I think precisely the same rule would be applied if the true view were, which I think it is not, that there was a statutory obligation on him to repair imposed by the Rent Restriction Act. For these reasons it appears to me that the appeal must be allowed with costs and judgment entered for the defendants with costs.

LAWRENCE, L.J.—I agree. The learned presiding judge has found that because the window cords of the windows in the back room of the house in question were defective and suddenly broke, the house was not in all respects reasonably fit for human habitation within the meaning of s. 1 (1) of the Housing Act, 1925. I feel myself quite unable to concur in this finding. *SALTER, J.*, in *Jones v. Geen* (1), states that the requirements of the section demand that the house should be decently fit for human beings to live in. Personally, I am content to take the expression as it stands in the section without attempting to paraphrase it or further to define it. Moreover, for myself I feel disinclined to attempt to state what circumstances might or might not constitute a breach of the condition or undertaking implied by reason of s. 1 (1) of the Act. I desire, however, to express my emphatic opinion that the defective condition of the cord of the window in question did not render the house in any respect unfit for human habitation within the ordinary acceptation of that expression. The utmost that, in my opinion, could be said was that the back room was rendered less comfortable, and that in order to get complete enjoyment of it the broken window cords would have to be replaced by new cords. But it seems to me, with the greatest respect to those who hold a different view, that to say that, therefore, the house was in some respects unfit for human habitation is somewhat fantastic. Such a slight want of repair as a de-

A defective window cord, or defective window cords, cannot, and do not, in my opinion, constitute a breach of the undertaking mentioned in s. 1 (1) of the Act.

This does not dispose of the case. Counsel for the plaintiff contended that the corporation was under liability to the tenant to keep the house in good and tenantable repair either under an implied term of the contract of tenancy, or under s. 2 (5) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

B If the corporation is so liable I agree with the contention that such a liability would include a liability to repair the broken window cords, but I find no sufficient evidence to support any liability under the terms of the tenancy agreement. On the question whether liability is imposed by the Act of 1920 I regret to say that I do not see eye to eye with the Master of the Rolls and ATKIN, L.J. As at present advised I am of opinion that in the circumstances the corporation was made liable

C to the tenant to keep the property in good and tenantable repair by virtue of s. 2 (5) of the Act of 1920, and if the fate of this appeal had depended on this question I should have desired further time to consider that point. As, however, in my opinion, it does not so depend, there is no reason for me to express a final opinion upon that question. It seems to me, whether the liability be one which arises under the Housing Act, 1925, or under the Act of 1920, the question whether

D such liability arises, or can be enforced against the corporation without first having given the corporation notice of the defect, is the same. On the question of notice I am in complete agreement with the judgments delivered by the Master of the Rolls and ATKIN, L.J., and have very little to add. In my opinion, the established rule is that the obligation of the landlord to keep the premises in repair is not broken unless notice has been given to him of the want of repair, and that mere

E knowledge is not sufficient to saddle the landlord with liability. The foundation of such rule is that the tenant in occupation is generally in a far better position to know of any want of repair. I am further of opinion that for the reasons stated by ATKIN, L.J., the rule applies to latent as well as to patent defects, and certainly applies to the defect which existed in the present case. For the reasons which I have shortly stated I agree that this appeal must be allowed, with costs here and

F below.

Appeal allowed.

Solicitors: *F. Venn & Co.*, for *Walter Moon*, Liverpool; *Attenboroughs*, for *R. Barrow-Sicree*, Liverpool.

[*Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.*]

R. E. JONES, LTD. v. WARING AND GILLOW, LTD.

[HOUSE OF LORDS (Viscount Cave, L.C., Lord Atkinson, Lord Shaw, Lord Sumner and Lord Carson), February 12, 15, 16, 18, 19, June 18, 1926]

[Reported [1926] A.C. 670; 95 L.J.K. 913; 135 L.T. 548;
42 T.L.R. 644; 70 Sol. Jo. 756; 32 Com. Cas. 8]

Mistake—Mistake of fact—Money paid under mistake of fact—Recovery—Plaintiffs fraudulently persuaded by third party to make payment to defendants—No estoppel based on lack of proper inquiry by plaintiffs.

Bill of Exchange—"Holder in due course"—Not original payee of cheque—Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), s. 21 (2).

Agent—Fraud—Excess of duty—Cheque drawn by principal in favour of third party on condition—Condition not communicated to third party by agent—Right of principal to recover amount of cheque.

In 1919 B. had bought from the respondents under a hire-purchase agreement furniture of the value of some £14,000, and in part payment gave a cheque for £5,000, which was dishonoured, the respondents re-taking possession of the furniture. B. then falsely represented to the appellants that he was agent for a firm manufacturing "Roma" motor cars, stating that the firm were financed by the respondents. At his instigation the appellants signed an agreement which purported to appoint them agents for the sale of "Roma" cars in South Wales and the south and west of England. The appellants further agreed to buy 500 "Roma" cars, and to pay a £10 deposit on each, £5,000 in all. At B.'s request the appellants drew a cheque for £5,000 which B. handed to the appellants who re-delivered the furniture to him. When it was discovered that B. had acted fraudulently the appellants sought to recover from the respondents the £5,000 as money had and received by the respondents to the appellants' use, alternatively, as money paid as and for a consideration which had failed, and, in the further alternative, as money paid under a mistake of fact.

Held: (i) by LORD SHAW, LORD SUMNER and LORD CARSON, VISCOUNT CAVE, L.C., and LORD ATKINSON dissentiente, the appellants were entitled to recover the £5,000 from the respondents as money paid under a mistake of fact, namely, that the respondents were financing the manufacturers of "Roma" cars, there being no evidence on which it could be held that the appellants, by having paid the money to B. without making proper inquiries, thus enabling him to make fraudulent representations to the respondents, were estopped from enforcing their claim;

(ii) a "holder in due course" within s. 21 (2) of the Bills of Exchange Act, 1882, did not include the original payee of a cheque, and, therefore, the respondents were not entitled to retain the money under that subsection:

Dictum of MOULTON, L.J., in *Lloyd's Bank, Ltd. v. Cooke* (1), [1907] 1 K.B. 794, disapproved.

(iii) nor could they retain the money as having been paid to them by an agent of the appellants who did not disclose to them the conditions on which the payment was made or otherwise acted fraudulently or in excess of his duty.

Watson v. Russell (2) (1864), 5 B. & S. 968, distinguished.

Decision of Court of Appeal, [1925] 2 K.B. 612, reversed.

Notes. Considered: *Norwich Union Fire Insurance Society, Ltd. v. Price, Ltd.*, [1934] All E.R. Rep. 352; *Morgan v. Ashcroft*, [1937] 3 All E.R. 92; *Ayres v. Moore*, [1939] 4 All E.R. 351; *Weld-Blundell v. Synott*, [1940] 2 All E.R. 580. Referred to: *Lloyd's Bank v. Chartered Bank of India, Australia and China*, [1928] All E.R. Rep. 285; *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, [1942] 2 All E.R. 122; *Transvaal and Delagoa Bay Investment Co.*

A *v. Atkinson*, [1944] 1 All E.R. 579; *Wilson and Meeson v. Pickering*, [1946] 1 All E.R. 394; *Larner v. L.C.C.*, [1949] 1 All E.R. 964; *Metropolitan Police District Receiver v. Croydon Corpn.*, [1956] 2 All E.R. 785.

As to the liability of a principal for the wrongful acts of his agent generally, see 1 HALSBURY'S LAWS (3rd Edn.) 222. As to a holder in due course of a negotiable instrument, see 3 HALSBURY'S LAWS (3rd Edn.); and for his duties, see *ibid.*, p. 193 et seq. As to recovery of money paid under a mistake, see 26 HALSBURY'S LAWS (3rd Edn.) 921 et seq. For cases see 1 DIGEST 594; 6 DIGEST 12, 221 et seq.; 35 DIGEST 147 et seq. For Bills of Exchange Act, 1882, see 2 HALSBURY'S STATUTES (2nd Edn.) 505.

Cases referred to :

- C** (1) *Lloyds Bank, Ltd. v. Cooke*, [1907] 1 K.B. 794; 76 L.J.K.B. 666; 96 L.T. 715; 23 T.L.R. 429, C.A.; 6 Digest 136, 899.
- (2) *Watson v. Russell* (1862), 3 B. & S. 34; 31 L.J.Q.B. 304; 7 L.T. 328; affirmed (1864), 5 B. & S. 968; 34 L.J.Q.B. 93; 11 L.T. 641; 13 W.R. 231; 122 E.R. 1090, Ex.Ch.; 6 Digest 87, 643.
- (3) *Kelly v. Solari* (1841), 9 M. & W. 54; 11 L.J.Ex. 10; 6 Jur. 107; 152 E.R. 24; 35 Digest 151, 487.
- D** (4) *Colonial Bank v. Exchange Bank of Yarmouth, Nova Scotia* (1885), 11 App. Cas. 84; 54 L.T. 256; 34 W.R. 417; sub nom. *Colonial Bank v. Bank of Nova Scotia*, 55 L.J.P.C. 14, P.C.; 35 Digest 156, 524.
- (5) *Kerrison v. Glyn, Mills, Currie & Co.* (1911), 81 L.J.K.B. 465; 105 L.T. 721; 28 T.L.R. 106; 17 Com. Cas. 41, H.L.; 1 Digest 670, 2826.
- E** (6) *Lewis v. Clay* (1897), 67 L.J.Q.B. 224; 77 L.T. 653; 46 W.R. 319; 14 T.L.R. 149; 42 Sol. Jo. 151; 6 Digest 135, 897.
- (7) *Lickbarrow v. Mason* (1787), 2 Term Rep. 63; 6 East, 20, n.; 100 E.R. 35; reversed sub nom. *Mason v. Lickbarrow* (1790), 1 Hy. Bl. 357, Ex. Ch.; reversed and *venir de novo* awarded (1793), 4 Bro. Parl. Cas. 57, H.L.; 6 Digest 456, 2911.
- F** (8) *Farquharson Bros. & Co. v. King & Co.*, [1902] A.C. 325; 71 L.J.K.B. 667; 86 L.T. 810; 51 W.R. 94; 18 T.L.R. 665; 46 Sol. Jo. 584, H.L.; 35 Digest 82, 794.
- (9) *Kleinwort, Sons & Co. v. Dunlop Rubber Co.* (1907), 97 L.T. 263; 23 T.L.R. 696; 51 Sol. Jo. 672, H.L.; 3 Digest 179, 333.
- G** (10) *Continental Caoutchouc and Gutta Percha Co. v. Kleinwort, Sons & Co.* (1904), 90 L.T. 474; 52 W.R. 489; 20 T.L.R. 403; 48 Sol. Jo. 388; 9 Com. Cas. 240, C.A.; 3 Digest 179, 332.
- (11) *Deutsche Bank (London Agency) v. Beriro & Co.* (1895), 73 L.T. 669; 12 T.L.R. 106; 1 Com. Cas. 255, C.A.; 3 Digest 207, 487.
- (12) *Holt v. Markham*, [1923] 1 K.B. 504; 92 L.J.K.B. 406; 128 L.T. 719; 67 Sol. Jo. 314, C.A.; 35 Digest 157, 533.
- H** (13) *Standish v. Ross* (1849), 3 Exch. 527; 19 L.J.Ex. 185; 12 L.T.O.S. 495; 13 J.P. 269; 35 Digest 158, 541.
- (14) *Baylis v. Bishop of London*, [1913] 1 Ch. 127; 82 L.J.Ch. 61; 107 L.T. 730; 29 T.L.R. 59; 57 Sol. Jo. 96, C.A.; 35 Digest 156, 526.
- (15) *Durrant v. Ecclesiastical Comrs.* (1880), 6 Q.B.D. 234; 50 L.J.Q.B. 30; 44 L.T. 348; 45 J.P. 270; 29 W.R. 443; 20 Digest 530, 2525.
- I** (16) *Cocks v. Masterman* (1829), 9 B. & C. 902; Dan. & Ll. 329; 4 Man. & Ry. K.B. 676; 8 L.J.O.S.K.B. 77; 109 E.R. 385; 8 Digest 235, 652.
- (17) *London and River Plate Bank, Ltd. v. Bank of Liverpool, Ltd.*, [1896] 1 Q.B. 7; 65 L.J.Q.B. 80; 73 L.T. 473; 1 Com. Cas. 170; 6 Digest 107, 737.
- (18) *Morison v. London County and Westminster Bank, Ltd.*, [1914] 3 K.B. 356; 83 L.J.K.B. 1202; 111 L.T. 114; 30 T.L.R. 481; 58 Sol. Jo. 453; 19 Com. Cas. 273, C.A.; 6 Digest 109, 746.
- (19) *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A.C. 49; 72 L.J.P.C. 1; 87 L.T. 457; 51 W.R. 289; 19 T.L.R. 56, P.C.; 3 Digest 233, 646.

- (20) *Milnes v. Duncan* (1827), 6 B. & C. 671; 9 Dow. & Ry. K.B. 731; 5 A.L.J.O.S.K.B. 239; 108 E.R. 598; 35 Digest 154, 515.
- (21) *London Joint Stock Bank v. Macmillan and Arthur*, [1918] A.C. 777; 119 L.T. 387; 34 T.L.R. 509; 62 Sol. Jo. 650, H.L.; 3 Digest 233, 644.
- (22) *Commonwealth Trust, Ltd. v. Akotey*, [1926] A.C. 72; 94 L.J.P.C. 167; 134 L.T. 33; 41 T.L.R. 641, P.C.; 39 Digest 636, 2322.
- (23) *Currie v. Misa* (1875), L.R. 10 Exch. 153; 44 L.J.Ex. 94; 23 W.R. 450, Ex. Ch.; affirmed sub nom. *Misa v. Currie* (1876), 1 App. Cas. 554; 45 L.J.Q.B. 852; 35 L.T. 414; 24 W.R. 1049, H.L.; 6 Digest 115, 772.
- (24) *Perry Herrick v. Attwood* (1857), 2 De G. & J. 21; 27 L.J.Ch. 121; 30 L.T.O.S. 267; 11 Jur.N.S. 101; 6 W.R. 204; 44 E.R. 895, L.C.; 35 Digest 481, 2145.
- (25) *Brocklesby v. Temperance Permanent Building Society*, [1895] A.C. 173; 64 L.J.Ch. 433; 72 L.T. 477; 59 J.P. 676; 43 W.R. 606; 11 T.L.R. 297; 11 R. 159, H.L.; 35 Digest 482, 2149.
- (26) *Skyring v. Greenwood* (1825), 4 B. & C. 281; 6 Dow. & Ry. K.B. 401; 107 E.R. 1064; 35 Digest 157, 537.

Appeal from an order of the Court of Appeal (SIR ERNEST POLLOCK, M.R., SCRUTTON, and SARGANT, L.JJ.), reported [1925] 2 K.B. 612.

The action was brought by the appellants, plaintiffs in the action, to recover £5,000 as money had and received by respondents, defendants in the action, to the plaintiffs' use, or, alternatively, as money paid as and for a consideration which had failed, or, in the further alternative, as money paid under a mistake of fact.

The facts appear from their Lordships' opinions.

Alexander Grant, K.C., Eustace Hills, K.C., and P. B. Morle for the appellants.
Jowitt, K.C., and A. E. Woodgate for the respondents.

The House took time for consideration.

June 18. The following opinions were read.

VISCOUNT CAVE, L.C.—This action arose out of circumstances which are fortunately unusual. A man named Bodenham obtained from the respondents, Waring and Gillow, Ltd., furniture and other goods of the value of about £13,800 upon the terms of a hire-purchase agreement dated Nov. 29, 1919, by which he agreed to pay £5,000 down and afterwards a monthly sum until the whole purchase-money was paid. He gave his cheque for the £5,000, but it was dishonoured; and the respondents sued him upon the cheque and re-took possession of the furniture. Bodenham, being without means, called at the London office of the appellants, R. E. Jones, Ltd., and told them that he represented a firm of motor manufacturers bearing the name of International Motors who had the control of a car called the "Roma" car; he produced an illustrated prospectus and specification of the car, and offered on behalf of International Motors to appoint the appellants agents for the sale of the car in South Wales and the south-west of England. There was at that time a large demand for cars, and after a short negotiation the appellants accepted the proposal. Bodenham then put before the appellants a form of agency agreement to be signed by International Motors and the appellants, one term of the agreement being that the appellants should purchase not less than 500 "Roma" cars and should upon the execution of the agreement deposit with International Motors the sum of £5,000, being £10 per car upon the 500 cars. The appellants demurred to paying this large sum to Bodenham or to International Motors (whom they did not know), and Bodenham then told them (to quote the statement of counsel for the plaintiffs at the trial, which was accepted by the defendants as correct) "that the people who were financing the thing and who were the principals behind him in the matter were Messrs. Waring and Gillow, the well-known Oxford Street firm," and that if the agency agreement were signed the deposit of £5,000 might be paid to them. This statement satisfied the appellants, who knew Messrs. Waring and Gillow as a firm of high standing; and they signed the agreement

A (which was dated Dec. 31, 1919) and handed to Bodenham two cheques payable to the order of the respondents, one being a cheque for £2,000 dated Dec. 31, 1919, and the other a cheque for £3,000 post-dated Jan. 14, 1920. Bodenham then called on the respondents, to whom he had previously stated that he expected large payments under some valuable contracts, and handed the two cheques to them as a payment of his deposit of £5,000 under the hire-purchase agreement. The respondents' chief accountant noticed that the cheques were signed by one director only of the appellants company, although the form of cheque was adapted for signature by two directors and the secretary, and also that one of the cheques was post-dated; and in a telephone conversation between the representatives of the appellants and the respondents, in which nothing was said about the purpose of the payment, it was arranged that the two imperfect cheques should be returned to the appellants and a fresh cheque for £5,000 duly signed and posted to the respondents. This was accordingly done, the respondents cashed the cheque for £5,000, and on the faith of this payment restored to Bodenham the furniture which they had seized and let him have some more. On Jan. 15, the appellants not having heard from Bodenham about the cars, their secretary called upon the respondents, and thereupon the whole fraud was exposed. There was no firm called International Motors and no "Roma" car; and the statements made by Bodenham to the appellants as to the car and as to the connection of the respondents with it were a tissue of lies concocted by Bodenham with a view to getting £5,000 paid to the respondents and representing it to be the deposit under his hire-purchase agreement. The respondents then again took possession of the furniture, and Bodenham has since been sentenced to a term of imprisonment for another fraud. On Mar. 26, 1920, the appellants commenced this action against the respondents, claiming repayment of the £5,000 as money had and received by the defendants for the use of the plaintiffs, or, alternatively, as money paid for a consideration which had failed, or as money paid under a mistake of fact. They also claimed damages for negligence, but this claim has not been pressed. The action was tried by LORD DARLING, sitting as an additional judge of the King's Bench Division, who gave judgment for the plaintiffs; but on appeal to the Court of Appeal the judgment was set aside and judgment given for the defendants. The plaintiffs have now appealed to this House. To the above statement of facts it is only necessary to add that no moral blame of any kind is to be imputed either to the appellants or to the respondents. They are both innocent parties; and the only question to be determined is one of law, namely, which of these two innocent parties is to suffer for Bodenham's fraud.

G The ground upon which the plaintiffs (the appellants) have rested their case before your Lordships is, that they are entitled to recover the £5,000 as money paid under a mistake of fact; and I apprehend that, but for the special defences raised by the defendants, to which I will refer later, there could be no doubt as to their right to succeed on this ground. The plaintiffs were told by Bodenham that he represented a firm called International Motors which was about to be formed into a company, that the firm had control of a car called the "Roma" car, which he described as an existing car, and that the defendants were financing the firm and were the principals behind him and behind International Motors in the matter. Believing these statements to be true, the plaintiffs entered into an agreement which bound them to pay a deposit of £5,000 on 500 "Roma" cars; and still believing this to be true, and that the respondents as the nominees of International Motors could give a good receipt for the £5,000, they paid that sum to the respondents. In fact the statements were untrue from beginning to end; and the money was, therefore, paid under a mistake of fact induced by the false statements of a third party and, apart from special circumstances, could be recovered. As to the general principle, it is sufficient to refer to the well-known case of *Kelly v. Solari* (3), and to the more recent decisions in *Colonial Bank v. Exchange Bank of Yarmouth* (4) and *Kerrison v. Glyn, Mills, Currie & Co.* (5).

I It was contended on behalf of the respondents that they were "holders in due

course" of the cheque for £5,000 within the meaning of s. 21 (2) of the Bills of Exchange Act, 1882, and entitled on that ground to retain the proceeds of the cheque. I do not think that the expression "holder in due course" includes the original payee of a cheque. It is true that under the definition clause in the Act (s. 2) the word "holder" includes the payee of a bill unless the context otherwise requires; but it appears from s. 29 (1) that a "holder in due course" is a person to whom a bill has been "negotiated," and from s. 31 that a bill is negotiated by being transferred from one person to another and (if payable to order) by endorsement and delivery. In view of these definitions it is difficult to see how the original payee of a cheque can be a "holder in due course" within the meaning of the Act. Section 21 (2), which distinguishes immediate from remote parties and includes a holder in due course among the latter, points to the same conclusion. The decision of LORD RUSSELL, C.J., in *Lewis v. Clay* (6) was to the effect that the expression does not include a payee; and the opinion to the contrary expressed by MOULTON, L.J., in *Lloyds Bank, Ltd. v. Cooke* (1) does not appear to have been accepted by the other members of the Court of Appeal. This contention, therefore, fails.

The second answer of the respondents is founded on *Watson v. Russell* (2). In that case a ship had been chartered by the defendants to one Keys and had been sub-chartered by Keys through the agency of the plaintiff to a third party. The hire money being in arrear and the defendants being in a position to put an end to the charter, the plaintiff handed to Keys a cheque payable to the order of the defendants for one half of the amount due, and instructed him to deliver it to the defendants with an intimation that it was given in consideration that the ship should perform the charter. Keys sent the cheque to the defendants as a payment on account of the hire money for the ship, but omitted to inform them of the condition upon which it had been handed to him; and the defendants kept the cheque and put an end to the charter. It was held that the plaintiff could not recover the amount of the cheque; and CROMPTON, J., in delivering the judgment of a majority of the Court of Queen's Bench (CROMPTON, BLACKBURN, and MELLOR, JJ.), said:

"If A., by means of a false pretence or a promise or condition which he does fulfil, procures B. to give him a note or cheque or acceptance in favour of C., to whom he pays it, and who receives it *bonâ fide* for value, B. remains liable on his acceptance. His acceptance imports value and liability *primâ facie*, and he can only relieve himself from his promise to pay C. by showing that C. is not holder for value, or that he received the instrument with notice or not *bonâ fide*. The instrument is one which C. has a right to take, relying on the acceptance or making of the party, and it is no answer to say that there is no consideration as between him and the acceptor or maker, if the holder took it *bonâ fide* for value."

This decision was affirmed in the Exchequer Chamber by a strong court, and it is no doubt a decision of great authority; but on full consideration I am not satisfied that it covers the present case. No doubt Bodenham (like Keys in the case cited) was commissioned by the drawers of the cheques for £2,000 and £3,000 to carry them to the payees, his mandate being coupled with the condition—plainly to be inferred from the admitted facts—that he should hand them to the payees as a deposit on the cars; and this condition he failed to perform. So far the cases are very similar. But, on the other hand, there was not in *Watson's Case* (2), as there was in this case, a mistake of fact on the part of the drawers of the cheques; and I am impressed by the circumstance—to which some of your Lordships have called attention—that *Watson's Case* (2) has been treated in the books as applying only where an agency exists, and that in the present case there was no agency in any real sense of the word. It is to be observed also that the effective cheque, the cheque for £5,000, did not pass through Bodenham's hands at all. Upon the whole, therefore, I think that this defence also fails.

But the respondents made a further point, founded on the law of estoppel, which

A appears to me to deserve very careful consideration. The appellants, it is said, without previous communication with the respondents, drew cheques in their favour for sums amounting to £5,000, a proceeding which (as CROMPTON, J., said in *Watson v. Russell* (2)) "imported liability" and would naturally lead the respondents to believe that the appellants were indebted to them in that amount. The appellants then unwisely, if not recklessly, put those cheques into the hands of Bodenham (whom they hardly knew and whom they had no reason to trust) for delivery to the respondents, thereby enabling him to make such representations as he might think fit as to the purpose of the payment. Later, when the respondents communicated with the appellants with regard to the original cheques and obtained from them a substituted cheque for £5,000, the appellants still said nothing about the purpose for which the payment was made, but left it to the respondents to rely on such statements as might have been made to them by Bodenham. The natural result of this conduct on the part of the appellants was that the respondents believed that the appellants were indebted to them in the sum of £5,000 and were paying it to them for the purpose which Bodenham falsely described; and it was in that belief, so induced, that they accepted the payment and re-delivered to Bodenham the goods which they had seized and let him have additional goods. No doubt, they afterwards resumed possession of the goods; but there can be no doubt that the goods so resumed had suffered depreciation since the time when they were re-delivered or delivered to Bodenham, and the respondents have accordingly suffered some detriment. In these circumstances, it is argued, the doctrine of estoppel applies, and the appellants are prevented by their own conduct, on which the respondents acted to their disadvantage, from disputing the payment of £5,000 and claiming repayment of that amount. There is a great body of authority in favour of the view that, where a person to whom money has been paid by mistake has been misled by the payer's conduct, and on the faith of that conduct has acted to his own detriment, the payer cannot in law—as surely he cannot in fairness—insist on repayment. The well-known dictum of ASHHURST, J., in *Lickbarrow v. Mason* (7), that

F "wherever one of the two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it," cannot now be treated as free from exception; but it still holds good as a general principle, and where the payer has been guilty of anything which can be called negligence or indiscretion, there has been no hesitation in applying it: see per LORD HALSBURY, L.C., in *Farquharson Bros. & Co. v. King & Co.* (8) ([1902] A.C. at p. 332). Thus, in *Kleinwort, Sons & Co. v. Dunlop Rubber Co.* (9), the plaintiff claiming repayment of money paid by mistake succeeded only because the jury had answered in the negative the question whether the defendants had been led by the plaintiff's mistake to alter their position to their own disadvantage; and LORD LOREBURN, in expressing his opinion in this House, said that

H "it is indisputable that, if money paid under a mistake of fact is re-demanded from the person who received it before his position has been altered to his disadvantage, the money must be repaid, in whatever character it was received."

The same condition of the payer's right to recover, namely, the absence of any alteration of the payee's position to his detriment, has been emphasised in other cases such as *Continental Caoutchouc and Gutta Percha Co. v. Kleinwort, Sons & Co.* (10), and *Kerrison v. Glyn, Mills, Currie & Co.* (5), per LORD MERSEY (17 Com. Cas. at p. 54), and in *Deutsche Bank (London Agency) v. Beriro & Co.* (11), and *Holt v. Markham* (12). It is true that, where the payee has done nothing more than to expend the money on his own purposes, that has been held to afford no defence: *Standish v. Ross* (13), *Baylis v. Bishop of London* (14), but this may be because the payee has suffered no real detriment. *Durrant v. Ecclesiastical Comrs.* (15) is not easy to reconcile with the later decisions.

I The general rule as laid down in the authorities above cited appears to me to be sufficient to determine this case; and, this being so, it is unnecessary to dwell on

the circumstance that the principle of estoppel has been applied with special stringency to claims to recover money paid on bills of exchange and other negotiable instruments. Instances of such an application are to be found in the well-known case of *Cocks v. Masterman* (16), in *MATHEW, J.*'s judgment in *London and River Plate Bank, Ltd. v. Bank of Liverpool, Ltd.* (17), and in the observations of *BUCKLEY, L.J.*, in *Morison v. London County and Westminster Bank, Ltd.* (18) ([1914] 3 Q.B. at p. 373). But the bearing on those authorities of the decision of the Judicial Committee in *Imperial Bank of Canada v. Bank of Hamilton* (19) was not fully dealt with in the argument of this case; and, accordingly, while I am inclined to the view that the rule in *Cocks v. Masterman* (16) lends support to the conclusion at which I have arrived, I have thought it best to rest my opinion on the wider ground taken in the *Dunlop Co.'s Case* (9). Upon the whole I have come to the conclusion that on the ground of estoppel the respondents are entitled to succeed.

In the course of the argument it was pointed out that if the respondents succeeded in retaining the £5,000 and if the loss which they had suffered by reason of the re-delivery of the goods and the delivery of further goods to Bodenham on the faith of that payment amounted to less than that sum, they would be in the position of making a profit in consequence of Bodenham's fraud. The respondents very naturally and properly disclaimed any desire to make such a profit, and undertook to return to the appellants such part (if any) of the £5,000 as was in excess of the damage or detriment which they (the respondents) had sustained by reason of such re-delivery and further delivery of goods and the use thereof by Bodenham until possession was again taken by the respondents, any difference as to the amount of such damage or detriment to be referred to arbitration. I think that this undertaking should be recited in the order to be made on this appeal; but subject to that undertaking I would dismiss this appeal.

LORD ATKINSON concurred with the Lord Chancellor.

LORD SHAW.—I am of opinion that this appeal should succeed, and that the respondents, Messrs. Waring and Gillow, should repay to the appellants the sum of £5,000 paid by the latter to the former under mistake of fact. With the narrative of the circumstances of the case given by my noble and learned friend upon the Woolsack I respectfully and substantially agree. That narrative is well within the evidence. I further respectfully agree with the Lord Chancellor that the money was paid under a mistake of fact, or, rather, I should put it, under a series of mistakes of fact. These mistakes were induced by the false statements of Bodenham, which, to use language already employed, were a tissue of lies.

What Bodenham represented was: (i) that there was a firm called "International Motors"; (ii) that they were putting upon the market an existing car called the "Roma" car, of which he exhibited a sketch and specifications; (iii) that by an agreement which Bodenham induced the appellants to sign they became the purchasers of 500 of these cars, in respect of each of which a deposit of £10 was to be made, making in all £5,000; and (iv) that Messrs. Waring and Gillow were the financial backers of International Motors, and accordingly it was appropriate and suitable that as such a cheque for the sum should be made payable to them. The plausibility of Bodenham, who is now a convict and was then an accomplished rogue, succeeded on these representations in inducing this payment to be made. The truth was that there was no firm of International Motors, that there was no "Roma" car, that the purchase was accordingly of a phantom article from a phantom seller, that the respondents were not financial backers of International Motors, and that, finally, no sum was due in respect of this illusive transaction from Messrs. Jones to Messrs. Waring and Gillow or anybody else. Bodenham was, apparently, a person of expensive habits and had ordered large quantities of furniture from the respondents. The bargain was a hire-purchase bargain, requiring an initial payment of £5,000. He endeavoured to meet this obligation by his cheque, in favour of the respondents, but that cheque was, on presentation by

A them to the bank, dishonoured. Bodenhams then immediately thereafter produced the appellants' cheques for £2,000 and £3,000, for which, being signed inadvertently by only one director, a fresh cheque for £5,000 was duly and properly signed and posted to the respondents. The respondents accepted this cheque. As to how it had originated, or how Bodenhams, whose own cheque had been dishonoured, was thus suddenly put into possession of funds, the respondents made B no inquiry either of Bodenhams or of Messrs. Jones whose cheque it was. The appellants had no knowledge of any indebtedness by Bodenhams to the respondents, and their cheque passed to the respondents solely and wholly because they were misled by the series of mistakes in fact already noted. It seems quite clear that they would never have parted with their money to the respondents if they had had any knowledge whatsoever of the real truth. It remains to be considered whether C in these circumstances the money so paid under mistake in fact should not be repaid.

On the second part of the case I further agree entirely with the judgment from the Woolsack. What the respondents did with the cheque was to place it to their bank credit. It was never a negotiated cheque in the ordinary sense of that word or in the sense of s. 31 of the Bills of Exchange Act, 1882. The cheque never D went into the circle by transfer or endorsement, and it is in these circumstances, in my opinion, inappropriate to use language as to "a holder in due course" as applicable to the position of a direct payee of a cheque. The matter is treated so, and I think rightly, by LORD RUSSELL, C.J., in *Lewis v. Clay* (6), and I, too, venture to disagree with the view to a contrary effect expressed by MOULTON, L.J., E in *Lloyds Bank, Ltd. v. Cooke* (1). It is in substance just the same as if the appellants instead of posting their cheque had sent along, per messenger, bank notes for £5,000. In these circumstances I am of opinion that the demand of the appellants for the refund of the contents of the cheque is sound, and should be granted.

F *Watson v. Russell* (2) is much relied upon in the Court of Appeal. But I suppose it may at least safely be said that *Watson v. Russell* (2) has never been treated as though it imported an invasion or evasion of the long-established rule as to the effect of mistake in fact and as to the title to a refund in consequence thereof. I propose to explain in a few words that I think *Watson v. Russell* (2) applies to a different set of circumstances from the present. It belongs to a different class of case. It has not, in my opinion, any real bearing upon cases G depending upon payments having been made under a mistake in fact. The class of case ruled by *Watson v. Russell* (2) is confined solely to that of payments made under a condition not communicated to the receiver, a condition as to the future conduct which it was hoped, expected, or stipulated should follow the payment. Before determining the point of difference between these two classes of cases it is H important to note exactly the principle of cases of refund on account of mistake in fact, as that principle was authoritatively expounded by PARKE, B., in *Kelly v. Solari* (3). Said that very learned judge:

I "I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it; though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake. The position that a person so paying is precluded from recovering by laches, in not availing himself of the means of knowledge in his power, seems, from the cases cited, to have been founded on the dictum of BAYLEY, J., in *Milnes v. Duncan* (20); and with all respect to that authority, I do not think it can be sustained in point of law. If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person

receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the fact. In such a case the receiver was not entitled to it, nor intended to have it."

The facts of the present case appear to me exactly to meet all the requirements of the principle thus set forth. It is quite true that various attempts have been made, not to attack the elementary rule set forth in the first portion of the citation, but to set up a species of estoppel by reason of the carelessness of the person who was misled into the mistake in fact. I am not aware that in the whole course of the decisions such an assault upon *Solari's Case* (3) has ever been successful, and since its date in 1841 it has, I believe, remained of paramount authority as part of the law of England. In the language, for instance, of LORD LINDLEY in *Imperial Bank of Canada v. Bank of Hamilton* (19) ([1903] A.C. at p. 56):

"As regards negligence in paying the cheque: It cannot be denied that when the Bank of Hamilton paid the cheque on the 27th Jan. it had means of ascertaining from its own books that the cheque had been altered. But means of knowledge and actual knowledge are not the same; and it was long ago decided in *Kelly v. Solari* (3) that money honestly paid by mistake of facts could be recovered back, although the person paying it did not avail himself of means of knowledge which he possessed. This decision has always been acted upon since."

More recent cases have affirmed the general principle, and I refer in particular to the judgment of LORD SUMNER, then HAMILTON, J., in *Kerrison v. Glyn, Mills, Currie & Co.* (5).

This being the general principle of the law as to payments made under mistake in fact, I now inquire what was the general principle of *Watson v. Russell* (2). The first observation to make is that there was no mistake in fact whatsoever in that case. What had happened was that the defendant had chartered a ship to one Keys at a certain rate per week to be paid for four weeks in advance. Keys sub-chartered the ship to Messrs. Barnes. Keys had paid the first instalment, but he was unable to pay the second, except with Messrs. Barnes's assistance, and, as CROMPTON, J., states:

"Not being able to remit the money due to the defendant, he applied to the plaintiff for some assistance, who then gave him the cheque in question dated the 22nd Dec., 1860, drawn on Messrs. J. Barnes & Co. for £60 payable to the order of the defendant, but on the terms that he was to inform the defendant, by the letter enclosing the cheque, that it was given 'in consideration that the Martje Flors should perform the charter and go to Gibraltar and back.'"

The cheque was forwarded to the defendant, the owner, by Keys without any notification of the consideration just quoted, and the position accordingly was that the owner of the ship received the payment absolutely as in the course of business and without any condition whatsoever. Other payments, however, having fallen due, he declined to allow the ship to start, and the condition, not made with him but between the charterer and the sub-charterer, was not communicated to the owner. In those circumstances the latter exercised his right of stopping the vessel. The amount of the cheque was undoubtedly due to the owner for value received. It was received unconditionally and bonâ fide and for value. In those circumstances it was held that Barnes remained liable on his acceptance.

It is here necessary to observe—what is indeed very elementary as a distinction—that the imposition of a condition has relation to the future, whereas a mistake in fact has relation to the past. When a document is granted, a deed signed, or a payment made under a mistake in fact, that mistake has reference to occurrences which have taken place or things which have been done prior to or at the time of

A the transaction. In regard to these things mistakes occur. The true facts may not have been known or may have been misrepresented with such a result that the mind of the grantor does not go with the transaction at all; his mind goes with another transaction, and he is meaning to give effect to that other transaction depending upon facts different from those which were the true facts. On the other hand, the imposition of a condition upon the making of a payment or the granting of a deed or the making of a transaction—the imposition of a condition as to what is to be done at the conclusion of the transaction or the receipt of the money—affects the future, and if that condition as a matter of obligation is not carried forward so as to reach the recipient of the money it cannot affect him. In short, *bonâ fide* and for value he has received from a person who made no mistake as to the existing or anterior fact and who had not communicated to him any obligation with regard to the future in such circumstances. How this class of case can be said in any way to bear upon or modify a natural case of mistake in fact I am really at a loss to understand. I do not think that *Watson v. Russell* (2) can bear such an interpretation as to make it apply to the circumstances of the present case, which are outstanding and clear, of a mistake in fact having been made.

D **LORD SUMNER.**—So many points have been argued in this case that it is necessary to settle at the outset what the facts are, in order to see which points really arise. As no evidence was called, but the case was argued on admissions made by counsel, I think that we ought not to draw inferences of fact or go beyond those admissions.

The material facts are as follows. (a) The action is brought for the return of the £5,000 which the respondents got by cashing the £5,000 cheque. The previous cheques were incompletely signed; they were not cashed, and their return or cancellation did not constitute any consideration for the issue of the £5,000 cheque. (b) R. E. Jones, Ltd., would not have issued the £5,000 cheque if they had not thought that they were bound to deposit that sum with somebody under the contract signed with International Motors on Dec. 31, 1919, and also that payment to Waring and Gillow, Ltd., would discharge their obligation in a manner that would safeguard themselves. There was no question of fictitious payees. They knew Waring and Gillow, Ltd., and meant their cheque to be cashed by them. They had been told that the relation between Waring and Gillow, Ltd., and International Motors was a close one, though they were not identical, and, believing this, they proposed to Bodenham to make the cheque for the £5,000 deposit payable to Waring and Gillow, Ltd., to which he readily assented. They issued it to discharge their obligation, and there being no obligation in fact, the money was paid to Waring and Gillow, Ltd., under a mistake of fact, a mistake arising directly between these two companies. (c) Bodenham never had any mandate from R. E. Jones, Ltd., to say anything to or to deal with Waring and Gillow, Ltd., on their behalf. He was a carrier of the cheques given to him, but, so far as R. E. Jones, Ltd., were concerned, he was nothing more. (d) The question, which of two innocent persons is to suffer by a third party's fraud, and the proposition that someone "acts to his detriment on the faith of" something done by another, never seem to me clear in themselves. The question assumes that the law must in such a case interfere on behalf of one or the other. This does not follow without more. "Acting on the faith" may only mean "acting in the belief" or "because of." Something more is required for estoppel. R. E. Jones, Ltd., did not stand by and watch Waring and Gillow's change of position before making a claim. The most that can be said is that Waring and Gillow, Ltd., took the cheque and ascertained that it would be paid, as it was. R. E. Jones, Ltd., made no promise not to ask for the money back, but, if they had done so, it would not have estopped them. No representation was made by or on behalf of R. E. Jones, Ltd., to Waring and Gillow, Ltd. If Waring and Gillow, Ltd., changed their position towards Bodenham after he brought the cheques, that was because they thought he had greater pecuniary resources than they had supposed, and, in so far as they thought so because of what

he said or did, R. E. Jones, Ltd., had no responsibility for his words or acts. I am unable to take the view on the admissions made that, by the production of the two cheques by Bodenham, Waring and Gillow, Ltd., were led to believe (what was not the fact), that R. E. Jones, Ltd., were their debtors, or that it was brought to them by him on the part of R. E. Jones, Ltd., for such purposes as Bodenham on his part, might happen to state. How the case would have stood had all this been proved in fact, I need not, therefore, discuss. I will only add that the *Kramrisch Case* (9) (*Kleinwort v. Dunlop Rubber Co.*), particularly LORD LOREBURN's proposition (97 L.T. at p. 264), and *Kerrison's Case* (5), all refer to the defence to a claim for money paid under a mistake of fact, which an agent may set up if, before discovery of the mistake, he has paid it over to the principal for whom he received it, but, as at present advised, I do not think they go further on the question of estoppel. The direct communications between R. E. Jones, Ltd., and Waring and Gillow, Ltd., by telephone or letter, did not constitute representations by R. E. Jones, Ltd., nor was it on the faith of anything so said or written that Waring and Gillow, Ltd., changed their position towards Bodenham. There was no duty between R. E. Jones, Ltd., and Waring and Gillow, Ltd., and, without that, the wide proposition of ASHURST, J., in *Lickbarrow v. Mason* (7) would not apply: see observations of LORD MACNAGHTEN, in *Farquharson Bros. & Co. v. King & Co.* (8) ([1902] A.C. at p. 335), and of LORD LINDLEY (ibid. at p. 342), and of LORD PARMOOR, in *London Joint Stock Bank, Ltd. v. Macmillan and Arthur* (21) ([1918] A.C. at p. 836), which were apparently overlooked in *Commonwealth Trust, Ltd. v. Akotey* (22). In the following cases a duty is the distinguishing feature, either that of banker to customer or arising in some similar relation: *Deutsche Bank (London Agency) v. Beriro & Co.* (11); *Holt v. Markham* (12), or a duty as agent, *Lloyds Bank, Ltd. v. Cooke* (1), or a duty such as existed in *Durrant v. Ecclesiastical Comrs.* (15). (e) I do not think that either party acted negligently, that is, in the absence of any duty to one another, imprudently, or without ordinary caution. The point is probably immaterial.

R. E. Jones, Ltd., are accordingly entitled to recover the £5,000 as money paid under a mistake of fact, unless Waring and Gillow, Ltd., can establish some special defence. For this purpose reliance is placed on *Watson v. Russell* (2), and especially on the dictum of CROMPTON, J., 3 B. & S. at p. 38. As to the latter, it goes beyond the facts of the case, at any rate so far as any false pretence is concerned. Keys has constantly been treated as having been the agent of Russell, and in the text-books the case is classed under the head of fraud by an agent or of an agent exceeding or disregarding his authority. This is so, for example, in BYLES ON BILLS (9th Edn.), p. 159, note c, the last for which BYLES, J., was responsible, and the later editions make no change. CHALMERS ON BILLS OF EXCHANGE (8th Edn.) treats Keys as "ostensibly" the agent of Russell (pp. 62, 112). In the Exchequer Chamber, Mr. Brett for the appellant calls Keys an actual agent, and the court, in dismissing the appeal, says nothing to the contrary and nothing in approval of the proposition of CROMPTON, J. (34 L.J.Q.B. at p. 94). The decision is purely one upon the law of the negotiation of cheques, and it is in this sense that it was approved in *Currie v. Misa* (23) (L.R. 10 Ex. at p. 162), in the words:

"The holder of a cheque may either cash it immediately, or he may hold it over for a reasonable time. If he cashes it immediately he is safe. The maker of the cheque cannot afterwards repudiate, and claim back the proceeds, any more than he could claim back gold or bank notes."

In my opinion, Keys had a mandate from Russell, namely, to deliver the cheque to Watson only on a condition. He delivered the cheque and forgot to mention the condition, and thus was, as SCRUTTON, L.J., says, an agent with a secret limitation of his ostensible authority, which he disregarded. The actual case is, therefore, distinguishable on the facts. Further, the present case cannot be brought within the terms of the proposition of CROMPTON, J., whether or not that is beyond criticism. There is no admission that the cheques were got by

A Bodenham by means of any promise or condition, and I think that the admission made is to the contrary, and that R. E. Jones, Ltd., thought they would make themselves safe by making the cheques payable to people whom they knew, without whose endorsement Bodenham would be helpless. It is only in the Court of Appeal that there is any reference to what Bodenham was to say to Waring and Gillow, Ltd. SCRUTTON, L.J., says that "of course" R. E. Jones, Ltd., meant

B Bodenham to say to Waring and Gillow: "These cheques are in respect of a deposit," but counsel did not admit that. SARGANT, L.J., says that Bodenham procured the cheques "by means of false pretences or promises," not saying what nor having any materials for doing so. LORD HANWORTH, M.R., however, says that "the purpose for which Bodenham was entrusted with the cheques, was 'in order that he might be the means of transit.' " I think that is right, being in conformity

C with the admissions, and that we should go no further. If so, nothing in *Watson v. Russell* (2) is in point now. Here the two cheques were "given" to Bodenham only, as they might have been "given" to a boy messenger. He was no party to the instruments and had no right to "pay" them to Waring and Gillow, Ltd., nor did Waring and Gillow, Ltd., "receive" them from him for value. They were imperfectly signed in any case and never were acted on. Equally the principle of

D *Perry Herrick v. Attwood* (24) and *Brocklesby v. Temperance Permanent Building Society* (25) is inapplicable, since Bodenham was in no sense an agent for R. E. Jones, Ltd.

It is not necessary to decide whether Waring and Gillow, Ltd., could have sued on the £5,000 cheque, as holders in due course, since the cheque was paid. As at present advised, I do not think MOULTON, L.J.'s observations in *Lloyds Bank, Ltd. v. Cooke* (1) ([1907] 1 K.B. at pp. 805-807) are correct, the effect of ss. 2, 21 (2), 29 (1), and 31 of the Bills of Exchange Act, 1882, having been misapprehended. It seems to me further that, even if Waring and Gillow, Ltd., could have sued R. E. Jones, Ltd., to judgment on the cheque for £5,000, this would not conclude the matter, unless it were also held that no cross-action for money had and received would also lie, which I am not now prepared to say.

F It appears to me that the real grievance of the respondents is that it is hard to make them suffer because R. E. Jones, Ltd., made a mistake. If it is any satisfaction to them, I am willing to say that I think it is, but such is the law. It might be a good thing if the statutes of limitation were amended so as to cut down to a very short period the time within which actions such as *Kelly v. Solari* (3) and others may be brought, but the present case at any rate was very promptly

G begun, and intrinsically the hardship is not as great as it seems to be at first sight. It is the peculiar character of coin or currency that gives rise to this idea. If a tradesman misdelivers goods, so that the wrong person gets them, many laymen and all lawyers recognise at once that they do not thereby become the property of the receiver, for passing of property is a question of intention, and obviously the tradesman never meant in such circumstances to make his goods the property of

H the wrong man. When goods are found the maxim that finding is keeping attracts many people, but not without a strong subconsciousness of guilt. In the case of payments of money, however, the notion is common that, if someone pays me money when he need not do so, it is my windfall, for I am not bound to keep his accounts for him. This is where the fallacy comes in. I may not be bound to know the payer's accounts, but I ought to know my own. The executrix of Solari

I ought to have known, and probably did, that the company had cancelled the policy, and was making a mistake in paying again. If so, there was no real intention on the company's part to enrich her. So, here, Waring and Gillow, Ltd., must be taken to have known that R. E. Jones, Ltd., were not their debtors. If so, and without more, there was no intention of making the £5,000 theirs in any event. Doubtless when that plausible person, Mr. Bodenham, brought them two cheques with an attractive tale, they honestly and readily concluded that he was deserving of more credit than they had supposed, and, as good tradesmen must, they proceeded with his business in a spirit of trust, and not in one of suspicion, but at

bottom they took Bodenham's story for what it was worth, and cashed the cheque at their own peril. The case is quite different where, as in *Skyring v. Greenwood* (26), the payers are under an obligation to inform the payee of the true state of his account and, disregarding this obligation, pay him more than he was entitled to. The payment is then at their risk and they must stand by it. Accordingly I think that the appeal succeeds. A

LORD CARSON.—I agree with the noble Lord on the Woolsack that, apart from the other considerations by way of defence to which the noble Lord refers, there could be no doubt as to the right of the appellants to succeed in this action upon the ground that the £5,000 which is in controversy was paid under a mistake of fact. Upon reading the judgments of the Court of Appeal, I am of opinion that the real difference which arises between the conclusions at which that court arrived and those at which I have arrived are based upon the different views which they and I respectively have formed as to the inferences to be drawn from the evidence. The Master of the Rolls has in the main decided the question upon the grounds that there was no such mistake of fact as would entitle the appellants to recover. **SARGANT, L.J.**, stated specifically that he had come to a perfectly clear conclusion that there never was a representation made by Bodenham at all to Messrs. Jones that he was the agent of Messrs. Waring and Gillow; while **SCRUTTON, L.J.**, in approaching the case on this branch of the matter, states as follows: B

"Thus we come to the much more difficult branch of the case as to whether there was such a mistake of fact here on the part of anybody, or on the part of persons who are relevant to a mistake of fact, that the money can be recovered under an action for money had and received as it has been explained in the cases which have been decided." C

Upon the other hand, the learned judge, **LORD DARLING**, who tried the case, was of opinion that the money in question was money paid under a mistake of fact. D

Now, the principles upon which such an action is to be decided are clearly stated in the judgments of **PARKE** and **ROLFE, BB.**, in *Kelly v. Solari* (3). **PARKE, B.**, says: E

"I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it." F

ROLFE, B., states the proposition as follows: G

"With respect to the argument that money cannot be recovered back except where it is unconscientious to retain it, it seems to me, that wherever it is paid under a mistake of fact, and the party would not have paid it if the fact had been known to him, it cannot be otherwise than unconscientious to retain it." H

I do not think that there is any authority which modifies that clear and concise statement, and the question is: Do the facts proved bring this case within the principles so laid down?

I agree with the noble Lord that the mistake of facts which was introduced by the false statements of Bodenham, namely, that he represented a firm called International Motors, that the firm had control of a car called "Roma"—a picture of which was produced, and which was described as an existing car—and that the respondents were financing the firm and were the principals behind him and behind International Motors were such mistakes of fact as to entitle the appellants to recover the money which they had paid on a belief that those facts were true. One admission made in the course of the trial by the counsel representing the respondent goes, I think, to the very root of the matter. When **LORD DARLING** said to him: "The plaintiffs' case is that they believed they were paying £5,000 to the defen- I

A dants in respect of motor cars sold to them by the defendants," the learned counsel replied: "That is right."

B The one difficulty that I felt in the course of the argument was as to the effect of the provisions of the Bills of Exchange Act, 1882, and whether counsel for the respondents might not be right in his contention that if the respondents had brought an action against the appellants upon the cheque for £5,000, they would be entitled to rely on the fact that they were holders in due course of the said cheque, having regard to the provisions of s. 21 (2) of the Bills of Exchange Act, 1882. I am, however, now convinced, and in that I agree with the noble Lord on the Woolsack, that the term "holder in due course" cannot be held to include the original payee of the cheque, and for the reasons stated by the noble Lord I further agree with him that the decision of LORD RUSSELL, C.J., in *Lewis v. Clay* (6) upon this point was right, and is to be preferred to the contrary opinion expressed by MOULTON, L.J., in *Lloyds Bank, Ltd. v. Cooke* (1). In my opinion, having come to these conclusions, in the absence of any other defence the appellants are entitled to succeed in the action.

C But another question has been raised arising out of the decision of *Watson v. Russell* (2). Before dealing with that case, I think it is not unimportant to observe that the judgment of SCRUTTON, L.J., examines the authorities upon the basis that Bodenham is to be treated in the present case as the agent of the appellants in handing over the original cheques to the respondents. He says in the course of his judgment:

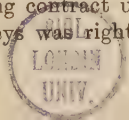
E "It appears to me that the facts here are the same as in the case of where an agent with a secret limitation acts in excess of that limitation, and the person with whom he acts, who is ignorant of the secret limitation, is not bound by the secret limitation and can treat him as having the authority which he professes to have."

SARGANT, L.J., takes the same view. He says:

F "It seems to me there is one question of fact which is of very great importance in this case, and that is the question, not whether Bodenham was in fact the agent of Messrs. Waring and Gillow—everybody knows he was not—but whether Bodenham represented himself to the plaintiffs, Messrs. R. E. Jones & Co., as being the agent of Messrs. Waring and Gillow, because that may affect very definitely the capacity in which the cheques were handed to Bodenham to hand to Messrs. Waring and Gillow."

G And it is in that context that he makes the further statement, to which I have already referred, that he had come to a perfectly clear conclusion that we must take it that there never was a representation made by Bodenham at all to Messrs. Jones & Co. that he was the agent of Messrs. Waring and Gillow. I cannot agree with these conclusions from the evidence. In his opening statement, which was accepted as a correct view of the facts, the learned counsel for the appellants specifically stated that the respondents were the principals and that the cheques were given to Bodenham to take to the defendants, Bodenham representing himself to be acting as the agent of the defendants, and without going through the evidence which seems to me to support this conclusion, I think that the learned judge was entitled to come to the conclusion that Bodenham had purported to be the agent of Messrs. Waring and Gillow, and that it was in the belief that he was such that they handed to him the cheques made payable to Waring and Gillow.

I In the circumstances, I find it impossible to come to the conclusion that Bodenham can be treated, either as a matter of fact or as a matter of law, as the agent of the appellants in conveying the cheques to the respondents. Having come to that conclusion, I do not myself see how the case of *Watson v. Russell* (2) can be held to rule, or indeed to have any bearing upon, the present case. In the first place, in *Watson v. Russell* (2) there was no mistake of fact whatsoever. In the second place, there was an existing contract upon which a sum was due, and for which the money entrusted to Keys was rightly applicable, and which had to be



paid either by the plaintiff as agent for the sub-charterers or by Keys, the original contracting party, if the terms of the charterparty were to be fulfilled. And, in my opinion, the plaintiff in that case, in handing the cheque to Keys, though no doubt with an intimation that it was given in consideration that the ship should perform the charter, constituted Keys his agent. The case, therefore, is not one of money paid under a mistake of fact, but is one, like many others that were cited in the course of the argument before us, where an agent acts either in excess of his duty, or contrary to his instructions, or even fraudulently, and the loss, if any such occurs, has to be borne, not by the payee, but by the principal, and that, I think, will be found to be the distinguishing feature in all the cases that have been cited in aid of the case put forward by the respondents. The passage relied upon by the respondents in the judgment of CROMPTON, J., goes farther than the facts of the particular case, and does not seem to me to have been necessary for the decision on the facts before the court. I would further point out that although that case was decided as far back as the year 1862, there is nothing, as has already been pointed out, in the Bills of Exchange Act, 1882, which confers such a right as is there suggested upon the holder of a note or cheque procured in favour of a third party by false pretences or a promise or condition which has not been fulfilled. Of course, if it could be shown that Bodenham was in any sense the agent of the appellants, the result would have been different, and, indeed, that was conceded in the course of the argument by the counsel on behalf of the appellants.

It is also argued that the decision of the Court of Appeal can be supported on the doctrine of estoppel. I am not sure that I quite understand from what particular contention, or in relation to what particular state of facts, it is alleged that the appellants are estopped, and if I am right in holding that Bodenham was not the agent of the appellants for the purpose of handing over the cheques, I fail to see how any conduct can be imputed to the appellants which can be said to have led to an alteration in the position of the respondents, or how any duty whatever was cast upon the appellants which they neglected to perform, and the neglecting of which caused the loss to the respondents. *Kleinwort, Sons & Co. v. Dunlop Rubber Co.* (9) appears to me to be in no wise inconsistent with what I have just stated, as the payment, as found by the jury, was made to Kleinwort as agent for Kramisch.

There is only one other matter to which I would like to refer, namely, a statement by SARGANT, L.J., which although not the main ground upon which he allowed the appeal, he thought of sufficient importance to make a part of his judgment. He says:

"In all these cases where the question is which of two innocent parties is to suffer, one cannot leave out of consideration the question which of the two innocent parties really has been guilty of carelessness, or negligence, or want of ordinary care,"

and he thereupon proceeds to find the appellants guilty because they chose to pay the money on the representations made to them by Bodenham, without communication with the respondents. This is a consideration which I must absolutely decline to enter upon. If I did, I would have to go into the whole circumstances of the dealings between the respondents and Bodenham, the dishonouring of his cheque, and the tender immediately afterwards of the two cheques in question drawn not in his favour but in favour of the respondents—a somewhat curious transaction where credit had been given to Bodenham for so many thousand pounds. No such inquiry has been prosecuted, and, in my opinion, there could be no more futile way of attempting to ascertain the rights of parties in an action of this kind. In my opinion, the appeal should be allowed and the judgment of LORD DARLING restored.

Appeal allowed.

Solicitors: *T. D. Jones & Co.*, for *Edward Harris*, Swansea; *Finch, Jennings, & Tree*.

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

A

HIRJI MULJI v. CHEONG YUE STEAMSHIP CO., LTD.

[PRIVY COUNCIL (Viscount Dunedin, Lord Sumner and Lord Wrenbury),
November 3, 5, 6, 1925, February 25, 1926]

B

[Reported [1926] A.C. 497; 95 L.J.P.C. 121; 134 L.T. 737;
42 T.L.R. 359; 17 Asp.M.L.C. 8; 31 Com. Cas. 199]

Arbitration—Arbitration clause—Frustration of contract—Termination of clause.

C

By a charterparty dated Nov. 17, 1916, the appellants chartered a steamship from shipowners for ten months from Mar. 1, 1917. The charterparty contained an arbitration clause providing that "any dispute arising under this charter shall be referred to arbitration." On Mar. 31, 1917, the ship was requisitioned by His Majesty's government and remained under requisition until February, 1919. In March, 1919, the shipowners offered delivery of the steamer to the charterers, but the latter refused to accept her. The shipowners then gave notice of the appointment of an arbitrator under the arbitration clause, but the charterers declined to take any part in the arbitration, in which an award was made in favour of the shipowners. In an action on the award,

D

Held: the requisition of the ship being for a period which was inconsistent with the further prosecution of the adventure, the adventure was frustrated and the charterparty was terminated when that fact became apparent—at latest in the latter part of 1917; the arbitration clause was a part of the charter, and, as it was not couched in such terms as would except it from the results which followed from the frustration, it came to an end with the charter; the arbitrator could not clothe himself with jurisdiction by finding that there had been no frustration; and, therefore the arbitrator had no jurisdiction and the action on the award could not be maintained.

E

F

Notes. Distinguished: *De la Garde v. Worsnap* (1927), 96 L.J.Ch. 446. Considered: *Heyman v. Darwins, Ltd.*, [1942] 1 All E.R. 337; *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, [1942] 2 All E.R. 122; *Kruse v. Questier & Co.*, [1953] 1 All E.R. 954. Referred to: *Stevens & Sons v. Timber and General Mutual Insurance Association, Ltd.*, [1933] All E.R.Rep. 806; *Maritime National Fish, Ltd. v. Ocean Trawlers, Ltd.*, [1935] All E.R.Rep. 86; *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corp., Ltd.*, [1941] 2 All E.R. 168; *Swift v. Macbean*, [1942] 1 All E.R. 126; *Denny Mott and Dickson, Ltd. v. James B. Fraser & Co.*, [1944] 1 All E.R. 678; *The Steaua Romana, The Oltenig*, [1944] P. 43; *Cricklewood Property and Investment Trust, Ltd. v. Leightons Investment Trust, Ltd.*, [1945] 1 All E.R. 252; *Morgan v. Manser*, [1947] 2 All E.R. 666; *William Cory & Son. v. City of London Corp.*, [1950] 2 All E.R. 584; *Blane Steamships, Ltd. v. Ministry of Transport*, [1951] 2 T.L.R. 763; *British Movietonews, Ltd. v. London and District Cinema, Ltd.*, [1951] 2 All E.R. 617; *Getreide-Import-Gesellschaft m.b.H. v. Contimar S.A. Compania Industrial Commercial Y-Maritima*.

G

H

As to the effect of the frustration of a contract on an arbitration clause therein, see 2 HALSBURY'S LAWS (3rd Edn.) 17, 24; and as to frustration generally, see *ibid.*, vol. 8, p. 185 et seq. For cases see 2 and 12 DIGEST (Repl.) 518 and 436 et seq., respectively.

I

Cases referred to:

- (1) *Scott & Sons v. Del Sel*, 1923 S.C. (H.L.) 37; 2 Digest (Repl.) 447, *140.
- (2) *Bank Line, Ltd. v. A. Capel & Co.*, [1919] A.C. 435; 88 L.J.K.B. 211; 120 L.T. 129; 35 T.L.R. 150; 63 Sol. Jo. 177; 14 Asp.M.L.C. 370, H.L.; 12 Digest (Repl.) 443, 3365.
- (3) *Produce Brokers Co., Ltd. v. Olympia Oil and Cake Co., Ltd.*, [1916] 1 A.C. 314; 85 L.J.K.B. 160; 114 L.T. 94; 32 T.L.R. 115; 60 Sol. Jo. 74; 21 Com. Cas. 320, H.L.; 2 Digest (Repl.) 602, 1289.

- (4) *A.-G. for Manitoba v. Kelly*, [1922] 1 A.C. 268; 91 L.J.P.C. 101; 126 L.T. 711; 38 T.L.R. 281, C.A.; 2 Digest (Repl.) 460, 262. A
- (5) *Sanderson & Son v. Armour & Co., Ltd.* (1922), 91 L.J.P.C. 167; 127 L.T. 597; 1922 S.C. (H.L.) 117; 59 Sc.L.R. 268; 2 Digest (Repl.) 447, *125.
- (6) *Champsey Bhara & Co. v. Jivraj Balloo Spinning and Weaving Co., Ltd.*, [1923] A.C. 480; 92 L.J.P.C. 163; 129 L.T. 166; 39 T.L.R. 253, P.C.; 2 Digest (Repl.) 649, 1710. B
- (7) *May v. Mills* (1914), 30 T.L.R. 287; 2 Digest (Repl.) 452, 194.
- (8) *Jackson v. Union Marine Insurance Co., Ltd.* (1873), L.R. 8 C.P. 572; 42 L.J.C.P. 284; 42 W.R. 79, C.P.; affirmed (1874), L.R. 10 C.P. 125; 44 L.J.C.P. 27; 31 L.T. 789; 23 W.R. 169; 2 Asp.M.L.C. 435, Ex. Ch.; 12 Digest (Repl.) 438, 3339.
- (9) *F. A. Tamplin Steamship Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397; 85 L.J.K.B.K.B. 1389; 32 T.L.R. 677; 21 Com. Cas. 299; 115 L.T. 315, 13 Asp.M.L.C. 467, H.L.; 12 Digest (Repl.) 442, 3361. C
- (10) *Dahl v. Nelson, Donkin & Co.* (1881), 6 App. Cas. 38; 50 L.J.Ch. 411; 44 L.T. 381; 29 W.R. 543; 4 Asp.M.L.C. 392, H.L.; 41 Digest 517, 3471.
- (11) *Geipel v. Smith* (1872), L.R. 7 Q.B. 404; 41 L.J.Q.B. 153; 26 L.T. 361; 20 W.R. 332; 1 Asp.M.L.C. 268; 12 Digest (Repl.) 418, 3245. D
- (12) *Bensaude v. Thames and Mersey Marine Insurance Co.*, [1897] A.C. 609; 66 L.J.Q.B. 666; 77 L.T. 282; 46 W.R. 78; 13 T.L.R. 501; 8 Asp.M.L.C. 315; 2 Com. Cas. 238, H.L.; 29 Digest 47, 93.
- (13) *Horlock v. Beal*, [1916] 1 A.C. 486; 85 L.J.K.B. 602; 114 L.T. 193; 32 T.L.R. 251; 60 Sol. Jo. 236; 13 Asp.M.L.C. 250; 21 Com. Cas. 201, H.L.; 12 Digest (Repl.) 433, 3322. E
- (14) *Larrinaga & Co., Ltd. v. Société Franco-Américaine des Phosphates de Médulla, Paris* (1923), 92 L.J.K.B. 455; 129 L.T. 65; 39 T.L.R. 316; 16 Asp.M.L.C. 133; 29 Com. Cas. 1, H.L.; 12 Digest (Repl.) 441, 3356.
- (15) *Edward Grey & Co. v. Tolme and Bunge* (1915), 31 T.L.R. 551; 12 Digest (Repl.) 445, 3374. F
- (16) *Re Hohenzollern Actien Gesellschaft für Locomotivbahn and City of London Contract Corpn.* (1886), 54 L.T. 596; 2 T.L.R. 470; Hudson's Building Contracts (7th Edn.) p. 546, C.A.; 2 Digest (Repl.) 458, 256.
- (17) *Kennedy, Ltd. v. Barrow-in-Furness Corpn.* (1909), Hudson, Building Contracts (7th Edn.) p. 520, C.A.; 2 Digest (Repl.) 431, 79.
- (18) *Johannesburg Municipal Council v. D. Stewart & Co. (1902), Ltd.*, 1909 S.C. (H.L.) 53; 47 Sc.L.R. 20; 1909, 2 S.L.T. 313, H.L. G
- (19) *Jureidini v. National British and Irish Millers Insurance Co., Ltd.*, [1915] A.C. 499; 84 L.J.K.B. 640; 112 L.T. 531; 31 T.L.R. 132; 59 Sol. Jo. 205, H.L.; 2 Digest (Repl.) 444, 161.
- (20) *Macaura v. Northern Assurance Co.*, [1925] A.C. 619; 94 L.J.P.C. 154; 133 L.T. 152; 41 T.L.R. 447; 69 Sol. Jo. 777; 31 Com. Cas. 10, H.L.; 2 Digest (Repl.) 685, 1932. H

Appeal by the charterers from a decision of the Supreme Court of Hong Kong upon an award by a single arbitrator.

By a time charter made between the respondents as owners and the appellants as charterers on Nov. 17, 1916, it was provided that the steamship *Singaporean* should be placed at the appellants' disposal on Mar. 1, 1917, at Singapore and should be employed by them for ten months in sundry specified trades. The charter contained an arbitration clause, and a clause providing that the charter should be construed and governed by "British" law. By the arbitration clause it was provided that

"any dispute arising under this charter shall be referred to the arbitration of two persons in Hong Kong. . . ."

Shortly before the time at which the ship was to have entered upon the performance

A of the charter, she was requisitioned on behalf of His Majesty's Government, and she continued in government service until February, 1919. On Mar. 2, 1919, the shipowners' agents informed the charterers of her release and asked who would take delivery of the ship on their behalf at Singapore. The charterers replied on Mar. 4 that it was now useless to offer delivery, giving as their reason that the charter had long expired. Notice was given to the charterers that the owners
B claimed arbitration and had named their arbitrator. This notice was disregarded by the charterers, and, no second nomination having been made, the owners proceeded before their own arbitrator who, upon hearing evidence, made an award in their favour. The owners then sued on the award and judgment was given in their favour. On appeal to the full court, the appeal was dismissed by a majority (SIR W. REES-DAVIES, C.J., and GOMPERTZ, J.; SIR SKINNER TURNER, J., dissenting).
C The charterers appealed.

Jowitt, K.C., Porter, K.C., and Geoffrey Shaw for the charterers.

Clauson, K.C., and A. C. Nesbitt for the shipowners.

Feb. 25. **LORD SUMNER.**—In this case the respondents, owners of the steamship *Singaporean*, sued in the Supreme Court of Hong Kong on an award
D made there in their favour by a single arbitrator. Notice had been given to the charterers, the present appellants, that the respondents claimed arbitration upon a dispute alleged to arise under a time charter made between them on Nov. 17, 1916, and had named their arbitrator. This notice they disregarded, and, no second nomination having been made, the respondents proceeded before their own arbitrator, who made this award on the information which they laid before him. It
E was not contended before their Lordships that this procedure was not regular and in accordance with the local ordinances dealing with the subject.

The charterparty provided that the *Singaporean* should be placed at the appellants' disposal on Mar. 1, 1917, at Singapore, and should be employed by them for ten months in sundry specified trades. It contained the usual terms, including a cancelling clause, an arbitration clause, and a clause providing that the charter
F should be construed and governed by "British" law. Shortly before the time at which the ship was to have entered upon the performance of the charter, she was requisitioned on behalf of His Majesty's Government. For some reason the shipowners thought that after a few months she would be again placed at their disposal, and on April 5, 1917, they wrote to the charterers to ask whether they would be
G prepared to take up the charter after the release of the vessel. The charterers, whether on independent information of their own or on these expressed anticipations of the owners, replied on May 12 that they would require the steamer when released. Some correspondence passed in the autumn, which showed that the charterers then desired to know when the ship would be free, and that the shipowners were unable to find this out. Then there followed a long silence. From Oct. 11, 1917, to March, 1919, no communication passed between the parties. The
H *Singaporean* continued in government service until late in February, 1919. On Mar. 2, 1919, the shipowners' agents informed the charterers of her release and asked who would take delivery of the ship on their behalf at Singapore. The charterers replied on Mar. 4 that it was now useless to offer delivery, giving as their reason that the charter had long expired. To this contention they adhered until and at the trial, when it was decided against them by the Chief Justice, who
I gave judgment for the plaintiffs in the action.

By the charter the ten months for which it was to be in force did not run from any specified date, but from the time at which the ship was placed at the disposal of the charterers. It was clearly a misapprehension on the charterers' part to say simply that the charter had expired by effluxion of time. The trial judge, on the other hand, says that an admission was made before him that the correspondence amounted to an exercise of the cancelling option in favour of maintaining the charter. This must be a mistake, for the only option mentioned is an option to cancel, and a decision to maintain the charter would not be an exercise of any

option under this clause. Nevertheless, he made use of this to support his view, A repeated by him on the appeal, but with some hesitation, that, by affirmatively electing not to cancel the charter, when Mar. 1, 1917, passed without the ship being placed at their disposal, the charterers, who had full knowledge of the fact of the requisition, so conducted themselves as to oust the doctrine of frustration. He thought that they must be deemed to have relied on arrangements of their own to provide for such a case, so that no implication could arise. The charterers had B agreed to take the ship, and, therefore, were ready to protect themselves. This view may be shortly disposed of. Their Lordships think that on the facts it was untenable, and in argument before them it was not supported. The cancelling clause clearly was never put into operation by the charterers, and the term of the charter, therefore, remained unaffected by it. Counsel admitted before the Board, and rightly on the materials, that the communications which passed on April 5 C and May 12, 1917, did not amount to a new contract, or in any way vary the contract contained in the charterparty. No new promise was made, nor, if there had been any new promise in form, was there any consideration to support it. The parties were over-sanguine. If they thought that the delay would not frustrate the charter, events showed that they were wrong and their error left their position unaffected. D

The case made by the appellant charterers was throughout that the arbitrator had no jurisdiction. The claim made against them, with which he had purported to deal, could not be said to be a dispute "arising under this charter" in the words of the clause, seeing that, before it was made or any question arose, the whole charter had come to an end by frustration of its objects in consequence of the requisitioning of the ship. The shipowners supported the view above set out, and, further said (in addition to points arising out of the state of the pleadings, which are not now material), that there had been no frustration, and that, even if this were not so, the clause continued to apply and was a submission effective to give the arbitrator jurisdiction. On this point, on which he had expressed no opinion at the trial, the Chief Justice agreed with GOMPERTZ, J., on the appeal. Their conclusion, as expressed in the judgment of the latter learned judge, may be thus summarised. Frustration of a contract depends upon the express and implied terms of the contract itself. Such a question is, therefore, within a clause which refers "any dispute under the contract" to arbitration. Here the decision is not on a point collateral to the merits—the finding is on the merits—and on the very matters as to which the parties have agreed that the award should be final. Many authorities were cited, and much reliance was placed on *Scott & Sons v. Del Sel* (1), E of which, unfortunately, the court had only a brief note and not the full report before them. SIR SKINNER TURNER held that the contract having been still executory when the requisition occurred, the effect on the contract was that its object was frustrated by the delay caused thereby, and, consequently, the whole charter, including the arbitration clause, had come to an end before the shipowners raised their claim that it was still in force. F

Upon the question of frustration the case is a typical one, and is governed both in its facts and its law by *Bank Line, Ltd. v. A. Capel & Co.* (2). A great many charterparties have been dealt with during the last few years on indistinguishably similar facts and have been held to have been frustrated by reason of the requisition. The facts of the present case are a fortiori to those in the *Bank Line Case* (2), and no court of law could have held upon them that the charter had not been G frustrated at latest when, in the latter part of 1917, it had become plain that the first expectations of a speedy release of the ship were unfounded. The arbitrator thought otherwise. His award is not clearly expressed, no doubt owing to the fact that only one party appeared before him, but their Lordships do not think that any objection can be reasonably taken to its form. It means that the charterparty had not been frustrated at all. So regarded, it was wrong in law and fact. H

As the arbitrator was the judge, if at all, both of law and fact, the sole question is whether he had any jurisdiction to decide, as he purported to do, between the I

A parties. This depends on the question whether or not there was any submission, and that again on the question whether, at the time when it purported to be submitted to him, there was a dispute, subsisting between the parties, "under this contract," that is, a contract then subsisting. That a person before whom a complaint is brought cannot invest himself with arbitral jurisdiction to decide it is plain. His authority depends on the existence of some submission to him by the parties of the subject-matter of the complaint. For this purpose a contract that has determined is in the same position as one that has never been concluded at all. It founds no jurisdiction. LORD PARKER OF WADDINGTON sums up this subject in *Produce Brokers Co., Ltd. v. Olympia Oil and Cake Co., Ltd.* (3) in the following words ([1916] 1 A.C. at p. 327):

C "The arbitrator cannot make his award binding by holding, contrary to the true facts that the question which he affects to determine is within the submission. . . . Where, however, the submission is contained in the contract it may be a question of construction whether such expressions as 'all disputes arising under this contract' include questions as to the ambit of the submission itself. *Primâ facie* I do not think that they would."

D In the same case LORD LOREBURN said (*ibid.* at p. 322):

"A court will decide for itself whether an inferior court has clothed itself with jurisdiction by an erroneous finding on something vital to the jurisdiction."

See, too, *A.-G. for Manitoba v. Kelly* (4) ([1922] 1 A.C. at p. 276). Accordingly, if it be the law that when a contract is frustrated it is brought forthwith to an end as regards matters thereafter arising, and if it was the fact that the contract had so come to an end before 1919, when for the first time an offer of the ship for service was effectively made, then the arbitrator could not clothe himself with jurisdiction by finding that there had been no frustration at all.

E With regard to the reasoning of the majority in the court below, their Lordships must observe, with very great respect, that they hardly appreciated the difference which is made by holding that the entire charter had come to an end. An arbitrator under an ordinary arbitration clause may have jurisdiction to construe the contract which contains the submission, and to find for or against trade customs said to be incorporated with it: *Produce Brokers' Case* (3); or to adjudicate upon breaches of a contract, partly or wholly performed, but still in existence, for the purpose of awarding damages for such breaches already committed, even though it is determined as regards future performance by repudiation on one side and acceptance on the other: *Sanderson & Son v. Armour & Co., Ltd.* (5); *Champsey Bhara & Co. v. Jivraj Balloo Spinning and Weaving Co., Ltd.* (6). This proposition is quite different from saying that a dispute, which might have arisen under the contract containing the submission, if it had not come to an end without fault on either side, is a dispute submitted thereunder, when the contract itself no longer exists.

H *May v. Mills* (7), though alluded to, was disposed of by assuming that it only excluded from the submission matters collateral to the main issue. Their Lordships venture to think that the question whether there is jurisdiction is not collateral; it is essential and fundamental, though, if the point is once got over, the merits may bulk so large as to make it seem a minor matter.

I The respondent shipowners raised before their Lordships two somewhat refined arguments, to which their Lordships trust no real injustice is done by the following summary. The doctrine of frustration rests upon a term or a condition implied in the contract. In contemplation of law the parties, if they had anticipated and had taken into consideration the events which ultimately frustrated the object of their adventure, would have made provision for it, and, again in contemplation of law, the legal operation of those events upon the contract is the very thing for which that term would have provided. Hence, in implying that term to give a foundation for a legal conclusion, the law is only doing what the parties really (though sub-consciously) meant to do themselves. Accordingly, the respondents asked why

must one mode of dealing with an unanticipated event be adopted rather than A another? At any rate, why should not an arbitrator, in passing upon the questions raised by the implication, adopt a conclusion not in all respects identical with the decision in the *Bank Line, Ltd. v. A. Capel & Co.* (2)? If, for example, he thought that the parties would have said (had they thought of it) that the contract should continue after the happening of the event, at least so far as to submit to his arbitration the question whether or not there had really been any frustration at all, B would he not have been competent to do so? Or, putting it in another way, if the term which he thought fit to imply had been that in the event of frustration the contract as a whole should not be void, but that the parties should merely be relieved from further performance of acts which under the charter they severally undertake to do, if so, must the court not intend that his award was based on this kind of view and accordingly support it *ut res magis valeat quam pereat*? The C alternative argument was that, even if frustration occurred and so brought the contract to an end, the arbitration clause is not one of those matters which are affected by the event or are frustrated. On the contrary, it is precisely such an event that requires the continuance of the agreement to refer, so that, in case of difference as to the character of the event or the date from which frustration must be deemed to have arisen, the conventional tribunal, originally provided, may be D available for its solution. Though further performance is excused, how is this contract discharged, unlimited as it is in time?

All these arguments, it will be seen, resolve themselves, on examination, into the fundamental inquiry, whether in law and fact frustration had been brought about before any dispute arose with regard to frustration or its cause or its consequences. The arbitration clause is but part of the contract, and, unless it is E couched in such terms as will except it out of the results which follow from frustration, generally, it will come to an end too. This must be so, if the law is that the legal effect of frustration is the immediate termination of the contract as to all matters and disputes which have not already arisen. Throughout the line of cases, now a long one, in which it has been held that certain events frustrate the commercial adventure, contemplated by the parties when they made the contract, F there runs an almost continuous series of expressions to the effect that such a frustration brings the contract to an end forthwith, without more and automatically. They are too numerous to be cited exhaustively, but there are few expressions to the contrary and none in recent cases. By way of illustration, reference may be made only to the following.

In *Jackson v. Union Marine Insurance Co., Ltd.* (8) (L.R. 10 C.P. at p. 145), at G one end of the series, BRAMWELL, B., delivering the judgment of the majority in the Exchequer Chamber, describes the result of what happened by the words "the contract is at an end." In *Re F. A. Tamplin Steamship Co., Ltd. v. Anglo Mexican Petroleum Products Co., Ltd.* (9), at the other, LORD LOREBURN says that, if the parties had considered the matter when making the contract, "they would have said 'if that happens, it is all over between us.'" Accordingly, the implied H term as to frustration may be expressed in these words. LORD HALDANE said:

"The contract must be looked upon as being wholly dissolved and the courts cannot take any course which would in reality impose new and different terms on the parties. . . . The Court of Appeal below gave judgment to the effect that the contract remained in existence, and that the 'restraint of princes' clause kept the contract alive. . . . I think that the entire contract was I avoided. . . . The contract is gone and the clause with it."

A statement of the general principle by LORD PARKER OF WADDINGTON is expressed in the same case as follows:

"The principle which really underlies all cases in which a contract has been held to determine upon the happening of some event which . . . frustrates the object which the parties to the contract have in view, . . . applies also to charterparties, where some commercial adventure contemplated by the parties

- A . . . is brought to an end. . . . It was easy to imply a condition that if the voyage became impossible of completion within that season the contract should be at an end."
- Finally, in *Bank Line, Ltd. v. A. Capel & Co.* (2), LORD FINLAY sums up the law in these words ([1919] A.C. at p. 441):
- B "The doctrine that a contract may be put an end to by a vital change of circumstances has been repeatedly discussed. . . . The law of the subject is well settled . . . the doctrine of frustration of the adventure as terminating the contract is excluded by the terms of the charterparty. . . . Neither of these clauses (26 and 31) can have the effect of preventing the termination of the charterparty by the requisition."
- C That requisition, or, at any rate, requisition for so long as showed that it was to endure for a considerable, though indefinite, time (whichever be regarded, in fact, as the event defeating the adventure), of itself terminates the charter and all its parts, as soon as it happened, is a conclusion which, though warranted and binding in view of these and other passages, does not depend merely on the language, which a long sequence of the highest authorities have happened to use. It rests on
- D principle, and is the only way of reconciling the special rule as to frustration with the general rules as to the obligation of contracts. An event occurs, not contemplated by the parties, and, therefore, not expressly dealt with in their contract, which, when it happens, frustrates their object. Evidently it is their common object that has to be frustrated, not merely the individual advantage, which one party or the other might have gained from the contract. If so, what the law provides must be a common relief from this common disappointment and an immediate termination of the obligations as regards future performance. This is
- E necessary, because otherwise the parties would be bound to a contract, which is one that they did not really make. If it were not so, a doctrine designed to avert unintended burdens would operate to enable one party to profit by the event and to hold the other, if he so chose, to a new obligation.
- F LORD BLACKBURN (*Dahl v. Nelson, Donkin & Co.* (10) (6 App. Cas. at p. 58)) summarises the effect of *Jackson's Case* (8) in these words:
- "A delay in carrying out a charterparty, caused by something for which neither party was responsible, if so great and long as to make it unreasonable to require the parties to go on with the adventure, entitled either of them, at least while the contract was executory, to consider it at an end."
- G It should be noted that, although at first sight this right to consider the contract as "at an end" might seem, from this language, to be in the option of either party but not to arise till that option is exercised, this is not really the gist of the opinion. The passage gives the effect of two cases, *Geipel v. Smith* (11) and *Jackson v. Union Marine Insurance Co., Ltd.* (8). In both cases there had been
- H an actual refusal to perform after the event in question happened, in the former by the shipowner and in the latter by the charterer, and in each case the formal question was whether the refusal could be justified, but there is nothing in LORD BLACKBURN's language to support the view that the contract does not terminate till a party to it says so. LORD BLACKBURN himself had said when a party to the judgment in *Geipel v. Smith* (11) (L.R. 7 Q.B. at p. 414),
- I "It is possible the blockade might be raised within a reasonable time. . . . If the defendants chose to run the risk, and in the event turn out right, they are in the same position as if they had waited the reasonable time and had then sailed away,"
- a passage which strongly supports the principle, that it is the event that frustrates, though time may be required in order to appreciate its effect on the contract, the event in such a case as the present being requisition for a time inconsistent with the objects of the adventure. BRETT, J., puts the principle thus in *Jackson's Case* (8) in the Common Pleas (L.R. 8 C.P. at p. 581):

"Where a contract is made with reference to certain anticipated circumstances, and where, without any default of either party, it becomes wholly inapplicable to or impossible of application to any such circumstances, it ceases to have any application; it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made."

When this was affirmed in the Exchequer Chamber (L.R. 10 C.P. at p. 144), BRAMWELL, B., speaking of the exception of "perils of the sea," says:

"The words are there. What is their effect? I think this: they excuse the shipowner, but give him no right. The charterer has no cause of action, but is released from the charter. When I say 'he' is, I think 'both' are."

Again, in *Bensaude v. Thames and Mersey Marine Insurance Co.* (12), LORD WATSON's extempore phrase,

"Such delay in the prosecution of her voyage as entitled the charterer to determine the adventure"

is explained, partly by the fact that the charterer had done so, and partly by comparing with it LORD HALSBURY's language ([1897] A.C. at p. 611):

"It underlies the whole judgment of COLLINS, J., that the right to insist upon payment of the insurance money as upon a total loss of the freight was consummate at the moment the main shaft broke. Now there is a fallacy underlying that form of the argument, namely, that there must be a sufficiently ascertained condition of damage to show at once that the loss must have accrued, because the damage was of such a character that it could not be repaired in the time. The facts here have been ascertained, and we know why the freight was lost. Why was it? Not simpliciter, but because the main shaft was broken under special circumstances—that is, at a distance from any place where it could be repaired within such a time as would have enabled the vessel to prosecute her voyage."

Evidently, therefore, whatever the consequences of the frustration may be upon the conduct of the parties, its legal effect does not depend on their intention, or their opinions or even knowledge, as to the event, which has brought this about, but on its occurrence in such circumstances as show it to be inconsistent with further prosecution of the adventure. Sometimes the event is such as to speak for itself, like the outbreak of war on Aug. 4, 1914, in *Horlock v. Beal* (13): per LORD WRENBURY ([1916] 1 A.C. at p. 528). Sometimes the frustration is evident, when the gravity and the circumstances of the breakdown can be known, as in *Bensaude's Case* (12); sometimes, as in the case of requisition, when it can be known that in all reasonable probability the delay will be prolonged and a fortiori when it has continued so long as to defeat the adventure. Frustration is then complete. It operates automatically: *Larrinaga Co. v. Société Franco-Américaine des Phosphates de Medulla, Paris* (14). What the parties say and do is only evidence, and not necessarily weighty evidence, of the view to be taken of the event by informed and experienced minds.

Language is occasionally used in the cases which seems to show that frustration is assimilated in the speaker's mind to repudiation or rescission of contracts. The analogy is a false one. Rescission (except by mutual consent or by a competent court) is the right of one party, arising upon conduct by the other, by which he intimates his intention to abide by the contract no longer. It is a right to treat the contract as at an end, if he chooses, and to claim damages for its total breach, but it is a right in his option and does not depend in theory on any implied term providing for its exercise, but is given by the law in vindication of a breach. Frustration, on the other hand, is explained in theory as a condition or term of the contract, implied by the law ab initio, in order to supply what the parties would have inserted had the matter occurred to them, on the basis of what is fair and reasonable, having regard to the mutual interests concerned and of the main objects of the contract: see per LORD WATSON in *Dahl v. Nelson, Donkin & Co.* (10).

A It is irrespective of the individuals concerned, their temperaments and failings, their interests and circumstances. It is really a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands. There is, however, this point of contact between the two cases. Though a party may exercise his right to treat the contract as at an end, as regards obligations de futuro, it remains alive for the purpose of vindicating rights already acquired under it on either side. So with frustration. Though the contract comes to an end on the happening of the event, rights and wrongs, which have already come into existence remain, and the contract remains too, for the purpose of giving effect to them. No question of this sort, however, arises here. The contract was wholly executory. The ship was requisitioned before she was placed at the charterer's disposal; the performance of the charter never began, and the failure to begin it by tendering the ship at Singapore was excused in the owners' favour by the excepted restraints of princes. In these circumstances, by the year 1919, when a dispute first arose, "this charter" no longer existed. The dispute was not one of which it could be predicated that it was one arising under "this charter," since that had terminated by frustration a year before. An arbitration clause is not a phoenix, that can be raised again by one of the parties from the dead ashes of its former self. By its very terms, as well as by the fact that it was only one part of the indivisible charter, it had come to an end also, and it is unnecessary to consider in what terms, if any, a clause might have been framed which would have saved the clause alive in the event of the frustration of the adventure and the charter. It may be noted that in practically all the numerous cases of frustration of charters by requisitioning during recent years, the charter must have contained an arbitration clause, yet no point of this kind has apparently been raised on any ordinary form of charter. The cases in general afford little support to the idea that any form of clause would survive the contract as a whole: see *Edward Grey & Co. v. Tolme and Bunge* (15) (31 T.L.R. at p. 138) and *Re Hohenzollern Actien Gesellschaft für Locomotivbahn and the City of London Contract Corp.* (16) (54 L.T. at p. 597), and conversely *Kennedy, Ltd. v. Barrow-in-Furness Corp.* (17) in the Court of Appeal.

F Sundry special authorities were cited in this connection, but they do not carry matters any further. They are either cases of repudiation and rescission, or of approbation and reprobation, or of continuing obligations under a contract still in being. In *Johannesburg Municipal Council v. D. Stewart & Co. (1902), Ltd.* (18), it was admitted on the pleadings that the contract had been repudiated and the matters in dispute arose out of this, but the Lord Chancellor is reported as saying (1909 S.C. (H.L.) at p. 53):

G "If the course of action which is established be that there has been a repudiation or a breaking of the contract in the sense that the contract has been frustrated by the breach, then it would not be within the arbitration clause."

H Whatever exactly this sentence means, at any rate it does not help the appellants now. Conversely in *Sanderson & Son v. Armour & Co., Ltd.* (5) though repudiation of the contract by the defenders was pleaded by the pursuers and the case had, of course, to be dealt with on the footing that this would be duly proved, it was denied, and the defenders relied on the arbitration clause and were held entitled to it. A mere allegation that they had thrown the contract up could not deprive them of the right to have the dispute dealt with by the tribunal constituted by it. In *Scott & Sons v. Del Sel* (1) LORD CAVE, L.C., expressly laid aside the question of frustration, since by virtue of its terms the contract continued in existence even in the events which had happened. As for *Jureidini v. National British and Irish Millers' Insurance Co., Ltd.* (19) insurers pleaded the absence of an award as to quantum only as a fatal non-fulfilment of a condition to the right to sue on a policy. As they had themselves repudiated the claim in toto, it was held that they could not insist on the absence of an award. It is a case of approbation and

reprobation: see *Macaura v. Northern Assurance Co., Ltd.* (20) ([1925] A.C. at A p. 631).

Their Lordships' conclusion is that the arbitrator acted without jurisdiction and that the action on his award ought to have failed, and they will humbly advise His Majesty that the two judgments below should be set aside and that judgment in the action should be entered for the appellants, with costs here and below.

Appeal allowed. B

Solicitors: *Gibson & Weldon; Markby, Stewart & Wadsons.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

VINCENT v. SOUTHERN RAIL. CO.

[HOUSE OF LORDS (Viscount Cave, L.C., Lord Atkinson, Lord Shaw, Lord Sumner and Lord Carson), November 23, 25, December 14, 1926]

[Reported [1927] A.C. 430; 96 L.J.K.B. 597; 136 L.T. 513;
71 Sol. Jo. 34]

Railway—Accident—Prevention—Men working on line—Provision of look-out—Duty of railway company—Liability for injury to worker—Prevention of Accidents Rules, 1902 (S.R. & O., Rev., 1904, XI, Railway, p. 9), r. 9.

By r. 9 of the Prevention of Accidents Rules, 1902, made under the Railway Employment (Prevention of Accidents) Act, 1900, it is provided that: "With the object of protecting men working singly or in gangs on or near lines of railway in use for traffic for the purpose of relaying or repairing the permanent way of such lines the railway company shall . . . in all cases where any danger is likely to arise provide persons or apparatus for the purpose of maintaining a good look-out or for giving warning against any train or engine approaching such men so working, and the persons employed for such purpose shall be expressly instructed to act for such purpose and shall be provided with all appliances necessary to give effect to such look-out."

Held: the duty of a railway company under this rule was an absolute duty to provide a look-out man who had been instructed to act for that purpose; a company was entitled to charge a foreman or ganger with the duty of deciding whether danger existed, and, if he considered it did, of appointing a member of the gang to act as look-out, but if in any case it was proved that the foreman to whom, under the company's regulations, this duty was entrusted had failed in it and had not appointed a look-out man, the company might well be held liable for injury happening to any member of the gang other than the foreman himself.

Per LORD SUMNER: The rule is satisfied by the company providing men enough to enable a look-out man to be detailed from among them and leaving it to the foreman to set the look-out as part of his regular duty. It is not necessary for the look-out to be provided by someone who is not a member of the gang being appointed additionally to the gang and getting his orders independently of the foreman.

Notes. The Minister of Transport and Civil Aviation is now the rule-making authority under the Act of 1900. Railways were nationalised by the Transport Act, 1947, under which the rights and liabilities of companies were vested in the Transport Commission.

Applied: *Smith v. Baveystock & Co.*, [1945] 1 All E.R. 531. Considered: *Cade v. British Transport Commission*, [1957] 1 W.L.R. 947. Referred to: *Wheeler v.*

A *New Merton Board Mills, Ltd.*, [1933] 2 K.B. 669; *London and North Eastern Rail. Co. v. Berriman*, [1946] 1 All E.R. 255; *Dyer v. Southern Rail. Co.*, [1948] 1 All E.R. 516.

As to accidents on railways, see 27 HALSBURY'S LAWS (2nd Edn.) 279 et seq.; and for cases see 38 DIGEST 354, 355. For Railway Employment (Prevention of Accidents) Act, 1900, see 19 HALSBURY'S STATUTES (2nd Edn.) 884.

B **Appeal** from an order of the Court of Appeal (BANKES, SCRUTTON, and ATKIN, L.JJ.) refusing to order that the verdict of a special jury and the judgment directed to be entered in favour of the respondents at the trial of an action in which the appellant was plaintiff and the respondents were defendants, be set aside.

C The appellant, plaintiff in the action, claimed, under the Fatal Accidents Acts, 1846 and 1864, on behalf of herself and her infant children damages in respect of the death of her husband, Edward James Vincent, which, she alleged, was caused by the negligence of and breach of statutory duty by the respondents under the Railway Employment (Prevention of Accidents) Act, 1900, and the Prevention of Accidents Rules, 1902, made by the Board of Trade pursuant to s. 1 (1) of the Act. It was admitted or proved that on Nov. 13, 1923, Edward James Vincent, who was **D** a signal ganger in the employment of the respondents, was, together with one Stockwell, a fitter's mate, employed by the respondents to repair a detector rod at a place near to the Gas House Lane signal-box, near Ashford, Kent. Stockwell was duly qualified to act as a look-out man. About 2.15 p.m. on that date while so employed both Edward James Vincent and Stockwell were knocked down and killed by the "up" boat train travelling from Dover to London at a time when two **E** "down" trains from London were also passing the place at which the two men were employed. By r. 9 of the rules of 1902:

F "With the object of protecting men working singly or in gangs on or near lines of railway in use for traffic for the purpose of relaying or repairing the permanent way of such lines the railway company shall after the coming into operation of these rules in all cases where any danger is likely to arise provide persons or apparatus for the purpose of maintaining a good look-out or for giving warning against any train or engine approaching such men so working, and the persons employed for such purpose shall be expressly instructed to act for such purpose and shall be provided with all appliances necessary to give effect to such look-out."

G The rule had been brought specifically to the notice of both men and both were qualified to act as look-out men. The action was tried by AVORY, J., and a special jury, and at the conclusion of the case the learned judge left seven questions to the jury, which together with the answers were as follows:

H "(1) Q. Was Vincent at the time in question working on the permanent way for the purpose of repairing the same?—Yes. (2) Q. Was Vincent responsible for deciding whether this was a one man job and was he responsible for a look-out man being in attendance?—Yes. (3) Q. Was the man Stockwell in the circumstances provided as a look-out man?—Yes. (4) Q. Did the defendant company in the circumstances of this case omit to perform their statutory duty of providing a person for the purpose of maintaining a good look-out?—No. (5) Q. Did such omission cause the death of Vincent?—The **I** answer to No. (4) answers this question. (6) Q. Were the defendants guilty of negligence in the performance of their common law duty to take reasonable care for the safety of their workmen?—No. (7) Q. Was the death of Vincent caused by his own negligence or the negligence of his fellow workman Stockwell?—Yes, one or the other or both."

Upon these findings judgment was entered for the defendants. An application to the Court of Appeal for a new trial upon the ground of misdirection having been dismissed, the plaintiff now appealed to the House of Lords.

Mitchell Banks, K.C., W. Shakespeare and Montague Berryman for the appellant. A
Schiller, K.C., and Malcolm Hilbery for the respondents.

The House took time for consideration.

Dec. 14. The following opinions were read.

VISCOUNT CAVE, L.C.—The main facts giving rise to this action are not in dispute. On Nov. 13, 1923, Edward James Vincent, a signal ganger in the employ of the respondent company stationed at Ashford, went, by the instructions of Mr. Stapeley, the signal inspector in charge of the Ashford district, to a place on the respondents' line near the Gas House Lane signal-box for the purpose of repairing a detector rod. At the place in question there are three lines of railway, namely, a slow down-line (which was the northernmost of the three lines), a main down-line (in the centre) and an up-line (on the southern side); and the detector rod, which is a contrivance for preventing the signals from acting when the points are not fully closed, was fitted to the up-line. Vincent, who was an experienced and careful man, was allowed by the inspector to decide for himself what assistance he required; and he took with him a fitter's mate named Stockwell, who was a member of his gang. The two men left Ashford station at about 1.20 p.m. and reached the place in question at about 1.40; and at a few minutes before two o'clock the adjustment of the detector rod (which was a small matter) appears to have been completed, and the men went to the signal-box. At 2.5 p.m. they left the signal-box, and the signalman did not again see them alive. At 2.18 three trains passed the spot, namely, a train on each of the two down-lines running towards Ashford station, and a third train on the up-line, namely, the express train from Dover running from the direction of Ashford towards London. Just before the up-train reached the place where the men had been at work, a platelayer named Gilbert, who was working a little way off in the Ashford direction, saw Vincent and Stockwell going from the main down-line towards the up-line—to use Gilbert's words, "just leisurely walking across," and formed the impression that the boat train must strike them. On going to the spot after the trains had passed Gilbert found both Vincent and Stockwell lying by the up-line, dead, and it became clear that they had been struck and killed by the up-train. There was evidence that immediately before the accident they, or one of them, had been at work, not on the detector rod on the up-line, but on a locking bar (or clearance bar) which was fixed to the main down-line in the neighbourhood of the detector rod, for Gilbert says that when he first saw them it appeared to him that they were working on the locking bar, and after the accident it was found that some nuts had been removed from that bar and tools were lying near it. From these facts, which were substantially the only facts proved in direct relation to the accident, it would appear to be reasonably clear that just before the accident the two unfortunate men, or one of them, had been engaged in repairing the locking bar on the down-line; that they saw the down-train approaching, and stepped aside for safety; and that, not seeing the up-train—probably because neither of them looked that way and the noise of the other two trains prevented them from hearing its approach—they went in a leisurely way on to the up-line and so met their death. The widow and dependent children of Vincent were no doubt entitled to compensation under the Workmen's Compensation Act; but the widow preferred to bring this action against the company under Lord Campbell's Act, alleging that the company had been guilty of negligence and of a breach of their statutory duty, which resulted in her husband's death, and claiming damages for herself and her children.

The statutory duty referred to is that imposed by r. 9 of the Prevention of Accidents Rules, 1902, made pursuant to the Railway Employment (Prevention of Accidents) Act, 1900. The Act provides by s. 1 (1) as follows:

"The Board of Trade may subject to the provisions of this Act make such rules as they may think fit with respect to any of the subjects mentioned in the schedule to this Act with the object of reducing or removing the dangers and risks incidental to railway service."

A The subject-matter set out in the schedule included :

“No. 12. Protection to permanent way men when relaying or repairing permanent way.”

Rule 9 of the rules of 1902 is in the following terms :

B “With the object of protecting men working singly or in gangs on or near lines of railway in use for traffic for the purpose of relaying or repairing the permanent way of such lines, the railway company shall after the coming into operation of these rules in all cases where any danger is likely to arise provide persons or apparatus for the purpose of maintaining a good look-out or for giving warning against any train or engine approaching such men so working, and the persons employed for such purpose shall be expressly instructed to act for such purpose and shall be provided with all appliances necessary to give effect to such look-out.”

Rule 273 of the rules and regulations issued by the respondent company contains the provisions following :

D “When men are working singly or in gangs on or near lines in use for traffic, the foreman, ganger, or other man in charge of the gang for the time being must, in all cases where any danger is likely to arise, appoint one or more persons as may be necessary, expressly to maintain a good look-out, and to give warning of any train approaching, and he must satisfy himself that the look-out man appointed is properly equipped, is stationed in a suitable position, and is wearing a distinctive badge. No man is to be appointed as look-out man unless he has previously been passed by the engineer's department as competent to act in that capacity.”

E This regulation was in existence before the passing of the Act of 1900, but was continued in operation after the passing of that Act and the making of the statutory rules; and it had been brought specifically to the notice of Vincent and Stockwell, both of whom were qualified to act as look-out men. The allegations in the statement of claim were that the work in which the two deceased men were engaged was work in which danger of injury by passing trains was likely to arise, and that the defendants were wanting in care and were guilty of a breach of their statutory duty in causing and allowing the work to be performed without providing persons or apparatus for the purpose of maintaining a good look-out, or for giving warning against the approach of any train during the performance of the work, and that it was in consequence of this negligence and breach of duty that the death of Vincent occurred. These allegations were denied. The action was tried by AVORY, J., and a jury, and at the conclusion of the case the learned judge left seven questions to the jury. [His Lordship read the questions and replies (see supra, p. 61) and continued:] On these findings judgment was given for the defendants. An application to the Court of Appeal for a new trial on the ground of misdirection and that the verdict was against the weight of evidence, failed, and the plaintiff has now appealed to this House.

H The principal objection taken by the appellant to the summing-up of the learned trial judge related to the direction given by him to the jury as to the effect of r. 9 above quoted, and especially to the following passage in the summing-up :

I “A reasonable construction obviously must be put upon it, and, in my view, it is a reasonable construction to put upon that rule, and a reasonable compliance with it, if the company make regulations which the men themselves are expected to observe, and under those regulations a man like Vincent, that is, the foreman of a gang, or the ganger as he is called, is entrusted with the duty of seeing that a look-out man is provided whenever he or any of his gang are at work upon the line. That is why I have called your attention to what appears to me to be the importance of this r. 273, that rule being still in force and it being under that rule the duty of Vincent to provide a look-out man. If this was a job which he could do by himself, then you may reasonably and

properly come to the conclusion that Stockwell was, in the circumstances, provided as a look-out man."

It is said that on the true construction of r. 9 it is necessary that on every occasion when a gang of men is sent to repair the permanent way an agent of the company not being a member of the gang should decide whether in the course of the work danger is likely to arise, and in that event should provide a look-out man and instruct him to act, and that in this case the company, having delegated those duties to the ganger in charge of the gang, had not complied with the rule.

I am disposed to agree with the view, which was expressed by ATKIN, L.J., in his judgment on the appeal, that it is a mistaken view of the rule to say that the company have complied with it by merely making regulations under which a foreman is entrusted with the duty of seeing that there is a look-out man, and that the company have not performed their duty unless in pursuance of that delegated task the foreman does in fact provide and appoint a look-out man. The duty of a company in any case of danger is an absolute duty to provide a look-out man and to see that he is instructed to act; and if in any case it were proved that the foreman to whom, under the company's regulations, this duty was entrusted had failed in his duty and had not appointed a look-out man, the company might well be held liable for injury happening to any member of the gang other than the foreman himself. This does not mean that, in my opinion, the company in charging the foreman or ganger with the duty of deciding whether danger exists and of appointing a member of his gang to act as a look-out is taking an unreasonable course. Being a corporation, they must necessarily entrust that duty to some agent, and I see no sufficient reason why the foreman or ganger (who will be on the spot) should not be selected for that duty; but, nevertheless, if he should fail in that duty, the company may be liable for the consequences of the default to any person not concerned in it.

But, assuming this to be the effect of the rule, there are in the present case two considerations which appear to me to be fatal to the appellant's claim. In the first place there is, in my opinion, no evidence on which the jury could have found that Vincent failed to appoint a look-out in accordance with the company's regulation. The jury have found that Stockwell was provided as a look-out man, which involves a finding that the work on which Vincent was engaged was a one-man job and left Stockwell free for that purpose, and, in my opinion, there was ample evidence on which they could so find. Further the whole of the evidence appears to me to be consistent with the view that Vincent, when he went to work on the locking bar, instructed Stockwell to keep a look-out, and that Stockwell in fact did so and warned Vincent of the approaching down-train, but that both the men, when they left the down-line in order to allow the fast down-train to pass, failed to observe the approach of the up express, and, instead of remaining in the six-foot way, stepped on to the up-line. If so, the right conclusion appears to be that at which the jury arrived, namely, that the accident was due, not to any negligence or breach of duty on the part of the company, but to the carelessness of the two unfortunate men, and there is no ground for directing a new trial. Secondly, if it were otherwise, and if it were found that Vincent had failed to instruct Stockwell to keep a look-out, the plaintiff would still be in the difficulty pointed out by the Court of Appeal. In that case Vincent would have been in default for not complying with the company's regulation which bound him to appoint a proper look-out, and his representative could not recover for the consequences of his own default. On both grounds it appears to me that on the issue of breach of statutory duty the appellant is out of court; and as no other negligence is now alleged, the action was rightly dismissed, and the appeal must fail. Accordingly I move your Lordships that this appeal be dismissed with costs.

LORD ATKINSON and **LORD SHAW** concurred.

LORD SUMNER.—The appellant asks for a new trial on two grounds: (i) that the learned judge's summing-up misconstrued r. 9 of the Prevention of Accidents

A Rules, 1902, and (ii) that the jury's answer to the seventh question, viz., that Vincent's death was caused by the negligence of himself or of Stockwell, or both, was against the weight of the evidence.

The rule may be analysed thus. First it states the object in view, and then it imposes on the railway company the duty of "providing" look-out men in certain circumstances, who are to have suitable appliances and instructions for the purpose.

B As an alternative to look-out men, "apparatus" for maintaining a good look-out may be provided. The object is that of protecting men at work. The provision is to be made "in all cases where any danger is likely to arise"; and the persons are to be provided "for the purpose of maintaining a good look-out or for giving warning against any train or engine approaching such men so working"; and the persons employed for such purpose "shall be expressly instructed to act for such purpose and shall be provided with all appliances necessary to give effect to such look-out."

C What the railway company did was to make and maintain a railway rule, pursuant to which the foreman of a gang was required to appoint a member of the gang expressly to perform this duty "in all cases where any danger is likely to arise" and "to satisfy himself that the man is properly equipped and stationed in a suitable position." In the present case the look-out man provided, if any, was

D either Vincent himself or Stockwell, according as Vincent, the ganger, might have appointed. It was to this that questions were directed by the learned judge asking the jury to say whether the job in hand at the time was a "one-man job" or a "two-man job." Their answer was that it was a "one-man job." There was evidence to raise the question and their answer establishes that the company had provided the necessary person, if the learned judge rightly construed r. 9 as

E authorising a "provision," which consisted in detailing enough men for the gang to enable the foreman to select one of them as look-out, whenever he thought danger was likely to arise. Nothing turns on the equipment, for in the circumstances it would not have been necessary to use it. The evidence showed that the company had provided it, but did not show that it was actually in use or even had been taken to the spot by the men.

F It is clear that, if Vincent, who knew the rule, had obeyed it and if the look-out man had been vigilant, both men would have been safe. Both knew and had been examined in look-out duties, and both were experienced permanent-way men.

The appellant, however, argues that r. 9 is not satisfied by providing men enough to enable a look-out man to be detailed from among them and leaving it to the foreman to set the look-out as part of his regular duty, because, truly construed,

G it requires the look-out provided to be someone who is not a member of the gang itself, but is appointed additionally and gets his orders independently of the foreman. I do not think that this meaning can be got out of the words. "Persons" are to be provided, which is a most general term. Nothing shows that workmen and watchmen are mutually exclusive classes, though, of course, a workman who is employed to keep a look-out, cannot, while doing so, at the same time work on

H repairs. Such "persons" are to be expressly "instructed," but there is nothing to show when or by whom. Standing orders properly brought to their knowledge and prior teaching properly impressed on them will satisfy the term. Apparatus is an alternative provision, and there is nothing to show that it may not be such as the gang themselves would have to place in position or set in operation. The initial words, expressing the object of the rule, are further invoked, and it is said that

I protection to the men implies protection *ab extra*; that protection, in fine, is something different from self-protection. Apart from the point that words which state the object of a rule cannot control the clear mandatory words of the rule itself, I would observe (i) that a rule made by the company may well supply all that these prefatory words require, when it both orders the men to take specified precautions and removes in respect of one member of the gang any duty to join in the repairs which are in hand. This may well supply that external pressure and aid, which will make the instinct of self-preservation efficacious and protect the members of the gang, where their own instincts fail them. Further (ii) the words "in all

cases" (i.e., of relaying or repairing the permanent way in use for traffic) "when any danger is likely to arise" (i.e., from that traffic) are essentially relative to the condition of the permanent way and of that traffic from time to time, and, unless the rule requires the provision of a look-out man, not from time to time, but throughout the day, which it neither says nor implies, the only person who can judge such danger is the man who is on the spot, authorised to detail and instruct the look-out man, and that person is almost inevitably the foreman of the gang. True, the words are "in all cases where" not "whenever," but also the words are in all "cases," not in all "places." I think "case" includes the place, the time, and the method of carrying out the repair, and it is not a breach of the rule on the company's part to delegate to the foreman (as an incorporated company must delegate to someone) the duty of posting a look-out man ad hoc, who has been previously instructed, equipped and provided for the purpose. I conclude, therefore, that the misdirection alleged is not made out.

Equally do I think that the appellant fails to show that the answer impugned was against the weight of the evidence. The plaintiff had to show not only a breach of the rule, but a breach causing her husband's death. In the circumstances a look-out man, if posted, could not have failed to give adequate warning unless he was neglecting his duty. If Vincent acted as look-out he was killed because he failed to observe the up boat-train in time and to act accordingly. If he failed to post any look-out, either Stockwell or himself, he was killed because there was no look-out at all. If he posted Stockwell and was not warned by him in time, his widow could only recover, if under the rule the company is liable not merely for providing a person to act as look-out, but also for the negligence of that person, if, being so posted, he fails to look out properly. As to the first two possibilities, I agree with the Court of Appeal, that the plaintiff was in a dilemma. If Vincent failed to post a look-out or, being the look-out himself, failed to be duly vigilant, he contributed to his own death. As to the third possibility, there is no evidence whatever that Stockwell was made the look-out, and the evidence as it stands negatives it. Work on the detector rod was finished. There is some slight evidence that something was being done to the locking bar on the down main line. Quitting that bar, while the down-train passed on the line, did not oblige the men to cross the up main line. The regulations provide for their remaining in the six-foot. The only man who saw them, Gilbert, speaks of seeing them walking leisurely on the up main line just before they were run down, as they had miscalculated their distance. If so, no one was then keeping any look-out; both men were together, and knew there was no look-out, and they were crossing a line in use, when they might safely have stayed in the six-foot. This evidence, which is all we have, implicates Vincent in contributory negligence and the verdict of the jury was not against the weight of the evidence. I, therefore, express no opinion on the question whether the company is liable under the rule not only to provide a person available for designation as the look-out, but, if a look-out is not posted, is also liable in a question with a workman other than the foreman, or, if the look-out man is posted but fails to be diligent, is liable in a question with a person other than the look-out man himself. I think the appeal should be dismissed.

LORD CARSON concurred.

Appeal dismissed.

Solicitors: *Pattinson & Brewer; W. Bishop.*

[Reported by **E. J. M. CHAPLIN, Esq., Barrister-at-Law.**]

Re STOLLERY. WEIR AND OTHERS v. TREASURY SOLICITOR

[COURT OF APPEAL (Lord Hanworth, M.R., Scrutton and Sargant, L.J.J.), January 11, 12, 1926]

[Reported [1926] Ch. 284; 95 L.J.Ch. 259; 134 L.T. 430; 90 J.P. 90; 42 T.L.R. 253; 70 Sol. Jo. 385; 24 L.G.R. 173]

Evidence—Marriage—Birth certificate of child of alleged marriage—Statement of names of parents—Death certificate of child—Statement of name of father—Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), s. 38.

Certificates of the birth of three children, stating the names of the parents and the maiden name of the mother, and a certificate of the death of one of the children, stating the name of her father, were tendered as evidence of the lawful marriage of the parents.

Held: the certificates were admissible as some evidence, not amounting to *prima facie* or conclusive evidence, of the marriage.

Observation of LORD ROMILLY in *Re Wintle* (1) (1870), L.R. 9 Eq. 373, 374, disapproved; and *Bird v. Keep* (2), [1918] 2 K.B. 692, explained.

Notes. The Births and Deaths Registration Acts, 1836 and 1874, have been almost entirely repealed. For the present statute, see Births and Deaths Registration Act, 1953 (33 HALSBURY'S STATUTES (2nd Edn.) 593), s. 34 (6) of which replaces s. 38 of the Act of 1836.

As to proof of marriage and the admissibility as evidence of entries in registers, see 15 and 19 HALSBURY'S LAWS OF ENGLAND (3rd Edn.) 380–382 and 813, 814, respectively. For cases see 22 and 27 DIGEST (Repl.) 314, 315, and 77, 78, 578, respectively.

Cases referred to:

(1) *Re Wintle* (1870), L.R. 9 Eq. 373; 21 L.T. 781; 34 J.P. 372; 18 W.R. 394; 22 Digest (Repl.) 315, 3271.

(2) *Bird v. Keep*, [1918] 2 K.B. 692; 87 L.J.K.B. 1199; 118 L.T. 633; 34 T.L.R. 513; 62 Sol. Jo. 666; 11 B.W.C.C. 133, C.A.; 22 Digest (Repl.) 316, 3294.

(3) *Wilton & Co. v. Phillips* (1903), 19 T.L.R. 390; 22 Digest (Repl.) 315, 3277.

(4) *In the Estate of Goodrich, Payne v. Bennett*, [1904] P. 138; 90 L.T. 170; 73 L.J.P. 33; 20 T.L.R. 203; 22 Digest (Repl.) 315, 3276.

(5) *Brierley v. Brierley and Williams*, [1918] P. 257; 87 L.J.P. 153; 119 L.T. 343; 34 T.L.R. 458; 62 Sol. Jo. 704; 22 Digest (Repl.) 315, 3272.

(6) *Irish Society v. Bishop of Derry* (1846), 12 Cl. & Fin. 641; 8 E.R. 1561, H.L.; 22 Digest (Repl.) 344, 3672.

(7) *R. v. Weaver* (1873), L.R. 2 C.C.R. 85; 43 L.J.M.C. 13; 29 L.T. 544; 38 J.P. 102; 22 W.R. 190; 12 Cox, C.C. 527, C.C.R.; 22 Digest (Repl.) 315, 3270.

(8) *Doe d. France v. Andrews* (1850), 15 Q.B.D. 756; 117 E.R. 644; 22 Digest (Repl.) 330, 3484.

(9) *Re Turner, Glenister v. Harding* (1885), 29 Ch.D. 985; 54 L.J.Ch. 1089; 53 L.T. 528; 22 Digest (Repl.) 329, 3472.

Appeal from a decision of ROMER, J.

Cecilia Lucy Stollery died in December, 1921, a widow, intestate, and without issue, leaving both real and personal estate. For some time it appeared that she had left no relatives surviving her, and the Treasury Solicitor applied for and obtained a grant of administration of her personal estate. In February, 1924, however, three persons, the plaintiffs Reuben Weir, Ann Weir, and Joseph Weir, came forward and claimed to be the cousins and next-of-kin of Mrs. Stollery. An originating summons for administration was taken out, and an order made for an inquiry in chambers who were the next-of-kin of the intestate. Mrs. Stollery was proved to have been a daughter of John Brown and Lucy Elizabeth Brown, and

described in a birth certificate as Mary Ann Wyers Brown, born in 1857. No record of the parents' marriage could be discovered, but the plaintiffs tendered in evidence three certificates of birth and one of death, being the certificates of birth of the intestate in 1857, of a sister Harriet Ellen and a brother John, in 1859 and 1861 respectively, and a certificate of the death of Harriet in 1889. In each case the parents' names were entered as John Brown and Lucy Elizabeth Brown (formerly Weir or Wiers). ROMER, J., held, on a summons taken out in the action, following *Re Wintle* (1) and the decision of the Court of Appeal in *Bird v. Keep* (2), that a certificate of birth or of death was evidence only of the birth or the death of the person named therein, and, therefore, not admissible to prove the marriage of the parents of that person. The plaintiffs appealed from this decision.

Sir Thomas Hughes, K.C., and *Bertram Long*, for the plaintiffs, referred to *Re Wintle* (1); *Wilton & Co. v. Phillips* (3); *In the Estate of Goodrich, Payne v. Bennett* (4); *Brierley v. Brierley and Williams* (5); *Irish Society v. Bishop of Kerry* (6); *Bird v. Keep* (2); *R. v. Weaver* (7); and *Doe d. France v. Andrews* (8). *Farwell, K.C.*, and *Dighton Pollock* for the Treasury Solicitor.

LORD HANWORTH, M.R.—This is an appeal from a judgment of ROMER, J., who decided upon an originating summons taken out to obtain a decision upon certain points that the four certificates referred to in the summons, one relating to the death of Harriet Ellen Brown, and three certificates of birth relating to the births of John Brown, Harriet Ellen Brown, and Mary Ann Wyers Brown, were not any evidence of the lawful marriage of the parents of those persons mentioned in those four certificates, namely, of John Brown and Lucy Elizabeth Weir.

Mrs. Cecilia Stollery, who was the child of the two persons that I have named, John Brown and Lucy Elizabeth Weir, died on Dec. 2, 1921, intestate, a widow without children, and at the time of her death she had neither father, mother, brother, nor sister surviving her, and there were no relatives who could be found. Therefore, on Jan. 3, 1922, administration of her estate was granted to the Treasury Solicitor. It appears that her estate consisted of a not inconsiderable amount of personalty and a small amount of realty. On Feb. 24, 1924, there was an originating summons taken out by certain persons who claimed to be her next-of-kin as cousins, Reuben Weir, Ann Weir, and Joseph Weir, who asked for the administration of her estate. On Nov. 5, 1924, an inquiry was directed, and upon that inquiry the question was raised whether the parents of Mrs. Cecilia Stollery were in fact married at the time of her birth. No record of the marriage of John Brown to Lucy Elizabeth Weir is to be found, and on Oct. 28, 1925, a summons was taken out to determine whether the certificates to which I have referred and which are certified copies of entries in the register which are in existence, were to be used as containing evidence of the lawful marriage of John Brown and Lucy Elizabeth Weir. The four certificates are the certificates of the birth of Cecilia in 1857, of a sister, Harriet Ellen, in 1859, and of a brother John in 1861, and there is the further certificate of the death of Harriet Ellen in 1889. The question that is propounded in the summons is perhaps not happily drawn, but it is in this form: "Whether the following certified copies of entries in a register of births, deaths, and marriages are *primâ facie* or any evidence of the lawful marriage of John Brown and Lucy Elizabeth Weir."

The statute that bears upon this matter is the Births and Deaths Registration Act, 1836, by s. 38 of which:

"All certified copies of entries purporting to be sealed or stamped with the seal of the said register office shall be received as evidence of the birth, death, or marriage to which the same relates, without any further or other proof of such entry."

It is said that although by s. 38 these certificates which bear the proper seal of the register office come *primâ facie* within s. 38 and might be used as evidence of the birth of the three persons mentioned in the certificates, in 1857, 1859, and

A 1861, and of the death of the person named in the certificate of 1889, yet they cannot be received as evidence of anything more, and that they do not contain anything which may be used as evidence of the lawful marriage of John Brown with Lucy Elizabeth Weir. ROMER, J., decided that none of these certified copies of the entries in the register is any evidence of the lawful marriage of John Brown and Lucy Elizabeth Weir.

B It becomes necessary, therefore, to determine how far the certified copies can be received as evidence upon the question now propounded whether there was a lawful marriage between these two persons. It is necessary to look somewhat closely at certain sections of the Act of 1836. That Act followed the Parochial Registers Act, 1812, which was "An Act for the better regulating and preserving parish and other registers of births, baptisms, marriages and burials in England," and was

C avowedly passed in order to facilitate the proof of pedigrees of persons claiming to be entitled to real or personal estates. The forms under that Act related to baptisms, and not to births, marriages, and burials. The Act of 1836 is an Act to add to the Act of 1812. It provides by s. 17 that register books are to be provided for the use of the registrar, and those books are to contain certain forms which are attached to the Act. The first one is Sched. A relating to and showing

D the births of certain persons within the district of the registrar. The second form relates to marriages within that district, and the third form to deaths. Section 18 imposed upon the registrar the duty of informing himself carefully of every birth and every death which shall happen within his district, and to learn and register as soon after the event as conveniently may be done the particulars required to be registered. I pause there to point out that a time limit is imposed, though not a

E very exact one, upon the registrar—that is to say, he is to perform his duty "as soon after the event"—which must mean either the birth or the death—"as conveniently may be done." Section 19 [repealed, with ss. 20, 22, 23, 25 and 28, *infra*, by Births and Deaths Registration Act, 1874] provided:

F "That the father or mother of any child born . . . may within forty-two days . . . give such notice of such birth or death to the registrar of the district."

Section 20 provided that the father or mother, or, in certain cases, the occupier of the house, is to give information when they are requested so to do by the registrar who is carrying out the duty imposed upon him under s. 18, and he or she is to give information to the registrar according to the best of his or her

G knowledge and belief. Section 22 provided for the case of registry after the expiration of the forty-two days' limit from the birth of the child, and a much more formal procedure is then required. Section 23 provided that births are not to be registered after six months. It is clear, therefore, that the question of the actual date of the birth of a child is of importance in relation to the duty which is imposed upon the registrar and the corresponding duty which is imposed upon the

H father or mother of the child or the occupier of the house or tenement in which the birth happens to take place. Section 25 dealt with the registration of deaths, and under that section particulars are to be given, but it is provided that in the case where an inquest is held on the body,

I "the jury shall inquire of the particulars herein required to be registered concerning the death, and the coroner shall inform the registrar of the findings of the jury, and the registrar shall make the entry accordingly,"

so that, as it stood under that Act, in the case of a death information might have been given to the registrar which he had entered and he would also have supplementary information given him by the coroner in accordance with and under the duty imposed upon the coroner under s. 25. Section 28 provided:

"That every person by whom the information contained in any register of birth or death under this Act shall have been given shall sign his name, description, or place of abode in the register; and no register of birth or death

according to this Act shall be given in evidence which shall not be signed by some person professing to be the informant, and to be such party as is herein required to give such information to the registrar." A

Section 41 imposed penalties upon giving false information.

The Act of 1836 applies to the three birth certificates. The certificate of the death of Harriet Ellen Brown in 1889 is governed by the Act of 1874. That Act is supplemental to the Act of 1836, and under it slightly different provisions are made. Section 1 imposed the duty, which was not imposed by the Act of 1836, on the father and mother, or in default of the father and mother the occupier of the house, to give to the registrar within forty-two days after a birth information of the particulars required to be registered concerning such birth. Section 2 gave power to the registrar to require persons to give information after forty-two days after the birth. Section 7 provided that the name of the father of an illegitimate child is not to be entered except at the joint request of the mother and of the person acknowledging himself to be the father of the child, and that person is in such a case to sign the register together with the mother. Section 16 adds something to the system of recording the result of an inquest, because it provides that where an inquest has been held the information is to be given to the registrar, but B C D

"if the death has been previously registered the said particulars shall be entered in the prescribed manner without any alteration of the original entry."

Thus, there may be in the case of a death two entries, one giving the cause of death, which is one of the items required to be stated in the certificate of death upon the information of the informant within forty-two days, and two, the information which is the result of the finding of the coroner's inquest, and those two will stand in the register, and no correction is to be made in the earlier entry made by the registrar upon information given to him [see now Births and Deaths Registration Act, 1953, ss. 22, 23]. Section 20 (2) provides: E

"In case of the death of any person who has been attended during his last illness by a registered medical practitioner, that practitioner shall sign and give to some person required by this Act to give information concerning the death a certificate stating to the best of his knowledge and belief the cause of such death, and such person shall upon giving information concerning the death or giving notice of the death deliver that certificate to the registrar." F

Therefore steps are taken by the Act to ensure that the registrar may have what would appear at first sight to be authoritative information of the cause of death, because it is based upon the certificate of a medical practitioner who has attended the deceased person. To complete the matter, lest one should be left in any doubt with regard to the system, it is, perhaps, worth while calling attention to the fact that, as the law now stands, it is necessary to give a notice of births and deaths to the medical officer pursuant to the Notification of Births (Extension) Act, 1915, which is a general Act and makes of wide application the original adoptive Act with the same title, which had been passed in 1907, and under which notification of births and deaths was to be given to the medical officer. The system, therefore, is now more complete than it was in 1836, when the Act that we have to consider was originally passed. G H

That being the state of the law under the statute of 1836 which bears upon the certificates of birth, one has to consider what is the effect of s. 38, to which I have already referred, providing that copies of entries in the register "shall be received as evidence of the birth, death, or marriage to which the same relates." How far do they contain evidence of matters stated in them, having regard in this particular case to the fact that the form provided under the Act of 1836 requires a statement to be included of the name and surname of the father and the name and maiden surname of the mother, as well as of the date of birth. I

In 1846 *Irish Society v. Bishop of Derry* (6) was decided in the House of Lords, and a general statement of the law was made in the opinion of the judges who were

A summoned, and that opinion was adopted by the House of Lords. That statement contains the following passage (12 Cl. & Fin. at pp. 668 and 669):

B "In public documents made for the information of the Crown, or all the King's subjects who may require the information they contain, the entry by a public officer is presumed to be true when it is made, and is for that reason receivable in all cases, whether the officer or his successor may be concerned in such cases or not. A marriage or burial register would certainly be admissible to prove a marriage or death in suits to which the clergyman who made it might happen afterwards to be a party, though he had a pecuniary interest in the particular marriage or death at the time."

C That appears to be a wide statement that the entries by the public officer are presumed to be true, and, if so, it might be said that the statement of the father and of the mother appearing in the copy of the certificate must show that those persons were the father and mother of the child. Speaking for myself, unless it was proved that the father and the mother were not married, I should have thought that the use of the words "father" and "mother" meant the legal father and the legal mother, and more particularly so because, having regard to the terms, to D which I have already referred, of the Act of 1874, under which in the case of an illegitimate child the father's name is only in certain circumstances and upon his own signature to be mentioned, it would appear, I think, that the Act of 1836 intended to have recorded the case where there was a father and a mother who were the lawful father and the lawful mother of the child. There was another case in 1850 of *Doe d. France v. Andrews* (8) (15 Q.B. at p. 759) to which I think ought E to refer. In that case SIR WILLIAM ERLE said:

"It depends upon the public duty of the person who keeps the register to make such entries in it, after satisfying himself of their truth. If he does so satisfy himself and makes the entry it is not open to the contesting party to exclude the evidence by showing that he might have obtained the information on which he acted in a more business-like manner."

F It would appear, therefore, upon consideration of s. 38, and the two cases to which I have referred, that these certificates ought to be received in evidence, and that they would appear to be some evidence—I do not at all say conclusive evidence—of the facts and of the date of birth or the date of death recorded in them. But in 1870 LORD ROMILLY, in *Re Wintle* (1), appeared to make a statement of a nature G somewhat different from what I have suggested. It was a case in which there was a petition for the payment out of court of a fund payable to the petitioner on his attaining twenty-one. The application was made on Jan. 29, 1870. It was said that the petitioner's birth was on Jan. 23, 1849. The date of the registration was on Feb. 13 following. The question that arose was whether or not there was evidence that on Jan. 29 the young man had attained the age of twenty-one or H whether, if the registration of his birth was to be taken as the date at which there was conclusive evidence of his birth, the application ought to be postponed until Feb. 13, which would complete twenty-one years from the date of registration. LORD ROMILLY said (L.R. 9 Eq. at p. 374):

I "The Act makes the entry in the register evidence of the fact of birth, and nothing more. And therefore I have always held that it is evidence only of the child having been born before the entry was made."

He, consequently, said that the order could not be made until the following Feb. 13, which would complete the twenty-one years from the date of the registration. If LORD ROMILLY meant to say that the copy of the register could only be evidence of the fact of birth, and nothing more, it appears to me that he was running counter to the two cases I have mentioned and the statement of the law in the House of Lords to which I have referred. It appears to me to be somewhat doubtful whether he did intend to say that. His observation, which is stated very shortly, and not upon a considered judgment, or, apparently, after very serious argument, appears

to gather weight from the observations relating to it made by SWINFEN EADY, M.R., in *Bird v. Keep* (2). SWINFEN EADY, M.R., says ([1918] 2 K.B. at p. 698):

"Thus LORD ROMILLY held that the entry was evidence of the birth having taken place before the date of registration, but not of the exact date of birth. This has been the rule acted upon in Chancery."

If LORD ROMILLY had laid down a rule which has been consistently acted upon in the Court of Chancery one would wish to pay great respect to the rule, but inas-
much as perhaps "rule" is the wrong word to use, and it is a matter of practice,
and if it be that it was comparatively unimportant whether applicants should
receive their money at an earlier date by a few days, or, it may be, a few weeks,
not much importance need be attached to a practice which did not involve any
serious legal rights. It appears to me that that is the true perspective in which
to consider the observation made by LORD ROMILLY in *Re Wintle* (1), because I
think that that decision of his runs counter to other cases to which I must refer.

In *Wilton & Co. v. Phillips* (3), PHILLIMORE, J., did not follow *Re Wintle* (1), but
he held that the evidence derived from a certificate of the entry in a register,
together with evidence of identification, was sufficient evidence of the date of birth,
and he pointed out that it was the constant practice in criminal cases, under the
Criminal Law Amendment Act, to accept the certificate of birth together with the
evidence of some relation identifying the person as proof of age. In 1904, in *In
the Estate of Goodrich, Payne v. Bennett* (4), SIR FRANCIS JEUNE, although his
attention was called to *Re Wintle* (1), again did not follow it. He said:

"I am at a loss to follow LORD ROMILLY's decision. [Section 38 of the Act of
1836] says that the certified copy is to be received as evidence 'of the birth,'
not as LORD ROMILLY says, 'of the fact of birth and nothing more.'"

Then he said:

"The case of *R. v. Weaver* (7), which was one of the criminal cases . . .
appears to me conclusive to show that the certificate is evidence of its contents,
and among its contents is the date of the birth."

In *Brierley v. Brierley and Williams* (5), MCCARDIE, J., who went into the matter,
again accepted the decision of SIR FRANCIS JEUNE in *In the Estate of Goodrich* (4)
in preference to that of LORD ROMILLY in *Re Wintle* (1). MCCARDIE, J., followed and
agreed with PHILLIMORE, J., and SIR FRANCIS JEUNE, and said ([1918] P. at p. 260):

"I desire to add that neither the register nor the certificate are in any way
conclusive, but only *prima facie*, evidence of the facts to be established in a
case such as the present. Evidence, however, can clearly be given to contra-
dict them, and in a proper case corroboration of them may be required."

It appears to me upon those cases that the true effect of s. 38 is that these
certificates are evidence of the date of the birth although not absolute and con-
clusive, but still it is to be taken as—I think one may here use the words—*prima
facie* evidence of the date of the birth, and I prefer the three decisions to which I
have referred, based, as I think they are, upon the ruling of the House of Lords, in
preference to the ruling of LORD ROMILLY.

I must refer, however, to one more case, and that is *Bird v. Keep* (2), which, I
think, affected ROMER, J.'s judgment very substantially. That was a case in
which under the Workmen's Compensation Act, 1906, the question was whether or
not the workman had died from an accident arising out of and in the course of his
employment. The main question in the case was decided upon the admissibility
or not of the finding of the inquisition held by the coroner, but incidentally the
question of the certificate of death and the cause of death as entered in that
certificate arose. It does not appear to me, however, that the court, which was
the Court of Appeal, definitely gave a decision which concludes the point which is
before us. SWINFEN EADY, M.R., referred to *Wilton & Co. v. Phillips* (3), to
Brierley v. Brierley and Williams (5), to *Re the Estate of Goodrich* (4), and the
other cases to which I have referred, and said ([1918] 2 K.B. at p. 698):

A "Even if the entry be evidence of the exact date of the event recorded, whether birth or death, as to which I do not express any opinion, as the point has not been argued, it is not, in my opinion, evidence of the cause of death."

NEVILLE, J., concurred with SWINFEN EADY, M.R. BANKES, L.J., who gave the other decision, said (*ibid.* at p. 704):

B "The question which was raised and decided with reference to a birth certificate in the cases of *In the Estate of Goodrich* (4), *Wilton & Co. v. Phillips* (3), and *Brierley v. Brierley and Williams* (5), had reference to the date of the event recorded in the certificate. I express no opinion upon that point."

It appears to me, therefore, that it cannot be said that *Bird v. Keep* (2) is a binding authority upon the point that we have to decide, and I think, therefore, that we are upon this point entitled to consider the balance of authority to which I have already referred.

C It appears to me that these certificates are admissible in evidence upon the issue whether the parents of Cecilia Stollery were married or not. I do not say that they are *prima facie* evidence proving that marriage, for that appears to me to mean that they are of such force as evidence that in the absence of a rebuttal they ought to be acted upon, and I do not mean so to hold. A judge might reject that conclusion. In any case evidence of identification of the persons named in the certificates will be required, but it appears to me that these certificates are admissible in evidence in the inquiry. It will be a question in the inquiry or issue whether there is enough evidence to establish the marriage of Cecilia Stollery's parents, but I cannot think that it is right to reject the certificates as not containing any evidence, as I understand the use of that term in the question in the summons. They may well prove to be links in the chain of evidence, or corroboration strengthening other evidence presented to the court. The order as made by the learned judge goes too far and must be varied; the appeal will be allowed; the order will be varied to the effect that the certified copies of the entries are admissible as evidence as to the lawful marriage of John Brown and Lucy Elizabeth Weir; they are admissible as evidence, but I do not say, and I repeat it, that they are anything like conclusive evidence.

F Perhaps I may refer to one more case, a case where CHITTY, J., had to consider whether certain entries in the baptismal register which had been made pursuant to the Act of 1812 were admissible. He held, precisely in the same way as I am endeavouring to point out now, that the certificates were admissible as evidence, and, indeed, in that case were found to contain corroboration of facts which were available from other sources. The case is *Re Turner, Glenister v. Harding* (9).

G **SCRUTTON, L.J.**—I agree in the result at which my Lord has arrived, but as we are dealing with a question of some general importance, and altering the order made in the court below, I will express my judgment in my own words.

H A lady, whose name was Stollery, died intestate. Her christian names appear to vary between Cecilia Lucy and Mary Ann, and there may be others. The Crown claimed her property as an intestacy, and administration of the estate was granted to the Treasury Solicitor. Two persons, Reuben John Weir and Joseph Weir, describing themselves as grandsons of a married couple whom they allege to be the grandfather and grandmother of the deceased lady, claimed to be her next-of-kin, and an issue was ordered in Chancery to determine who were her next-of-kin. I In the course of that issue the persons who claimed to be the next-of-kin, the two Weirs, put in, or claimed to put in, four certificates, the certificate of birth of the lady herself, the certificates of birth of her brother and sister, and the certificate of death of her sister, Harriet Ellen, and they claimed that the certificates that they put in, by the statements made in them, afforded evidence of the marriage of the father and mother of Mrs. Stollery, it being, of course, necessary to show a valid marriage to trace a legal connection between Mrs. Stollery and the married couple through whom the two Weirs claimed. On these certificates being tendered,

the question arose how far they were evidence of the statements of fact purporting to be contained in them, and on the suggestion of the master, or by the conspiracy of junior counsel, or both, it occurred to everybody concerned that the proper way to deal with this was not on all the evidence, but by a summons to determine, in the language of the summons, whether the certificates were "primâ facie or any evidence of the lawful marriage of John Brown and Lucy Elizabeth Weir." I think everybody agrees, with that wisdom that comes after the event, that that is not a very satisfactory formula. If "primâ facie evidence" means evidence conclusive, in the absence of any other evidence, it is agreed that these certificates could never be primâ facie evidence, because on them alone you could never act unless you had evidence of the identification of the persons named in the certificates with the persons concerned in the issue which was being tried in the inquiry before the master. The phrase "any evidence" which is the alternative branch of the summons, is ambiguous in that it is not clear whether it means evidence which by itself would establish the marriage, or evidence which, in conjunction with other evidence not before the court, might be sufficient to establish the marriage. The case came before ROMER, J., who, having had conflicting authorities cited to him, came to the conclusion—contrary, I think, to the opinion which he would have formed without the decision of the Court of Appeal in *Bird v. Keep* (2), that being that the statement as to the cause of death in a death certificate derived from the coroner's inquiry was not evidence—that he could see no difference between the statement as to the cause of death and any other statement in the certificate. The learned judge came to that conclusion without his attention having been called, or without himself discovering, that there were very specific statutory provisions with regard to the statement as to the cause of death which completely distinguished that particular statement from other statements in the certificate. I cannot help thinking that if the learned judge's attention had been called to those statutory provisions he would have felt himself free to act on the opinion, which, up to that time, he held, that he should follow the three later common law decisions which had held that the certificates were evidence of the statements contained therein.

In view of the difference of opinion in the authorities, I think it just as well to begin at the beginning. The Births and Deaths Registration Act, 1836: "Whereas it is expedient to provide the means for a complete register of the births, deaths, and marriages of His Majesty's subjects in England," the existing provisions being "insufficient for the purpose," and it is provided by s. 17 that books shall be provided by the Registrar-General containing the heads of information required to be known for the public purposes mentioned in the preamble, and, the registrar having got the books with the blank spaces for the information required to be known, the duty is put upon him of informing himself correctly of every birth and every death and learning and registering the particulars required to be registered, and a form is given which contains room in which certain statements of facts are to be filled in. Stopping there, it seems to me that statements inserted in such a public document for such a purpose required to be known for the public service, are public documents, and that they come within the unanimous opinion of the judges in the House of Lords, adopted by the House in *Irish Society v. Bishop of Derry* (6). That case was a contest between the Irish Society, relying on a grant from the Crown of patronage in their Irish estates, and the Bishop of Derry claiming to be patron of an advowson within those estates. A number of documents were tendered by each side as evidence of who was the patron of the advowson, and, among other documents, the bishop of Derry's counsel tendered secondary evidence of certain returns made by the bishops of Derry in answer to writs issuing from the Exchequer. The question was whether those returns were properly received as evidence of the facts stated therein. The unanimous opinion of the judges, delivered by PARKE, B., was (15 C.B. at p. 759):

"We think that the entry was properly received. The writs related to a public matter, the revenue of the Crown, and the bishops, in making the return,

- A discharged a public duty, and faith is given that they would perform their duty correctly: the return is therefore admissible on the same principle on which other public documents are received. . . . In public documents, made for the information of the Crown, or all the King's subjects who may require the information they contain, the entry by a public officer is presumed to be true when it is made, and is for that reason receivable in all cases, whether the officer or his successor may be concerned in such cases or not."
- B

I may say, incidentally, that it seems to me that that judgment is the justification for PHILLMORE, J.'s statement, which seems rather to have startled ROMER, J., that (19 T.L.R. at p. 390): "A public document coming from the proper place . . . was sufficient proof of every particular stated in it." PHILLMORE, J., appears to me to be simply re-stating the unanimous opinion of the judges in *Irish Society v. Bishop of Derry* (6).

- C The matter does not stop there, because, as in many of the statutes which create registers, there is a provision in the statute as to the admissibility of the document. That provision varies very much in different statutes. In the Companies' Act, 1908, the certificate of incorporation is conclusive [see now Companies Act, 1948, s. 15 (1)]. In some of the Acts, the Merchant Shipping Act, 1894, s. 691 (3), for instance, there is a statement that the document is to be sufficient evidence, which has been generally interpreted to mean sufficient by itself, but capable of contradiction by other evidence. In other Acts, for instance in the Copyright Act, 1842, s. 11 [repealed by Copyright Act, 1911], it says that such copies :
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- E ". . . shall be *prima facie* proof of the proprietorship or assignment of copyright or licence as therein expressed, but subject to be rebutted by other evidence."

- In the Births and Deaths Registration Act, 1836, s. 38 says that the certified copies of entries ". . . shall be received as evidence of the birth, death, or marriage, to which the same relates." A difference of opinion seems to have arisen in the authorities as to how much of the document is made evidence by that section. In the case which begins the list of authorities, the decision in *Re Wintle* (1), LORD ROMILLY restricted the entry to the fact of birth, and nothing more, and, therefore, not the date of birth. I do not think LORD ROMILLY's attention could have been called to the fact that the registrar must inquire into the date of birth, because he only had authority to register a birth which happened after Mar. 1 in a particular year, and he had no authority to register a birth more than forty-two days after the date of the birth, under one section, under certain conditions, or more than six months after the date of the birth, under another section, under other conditions. It must, therefore, have been the duty of the registrar to inquire into the date of birth. I understand from the statement of LORD ROMILLY and the statement of SWINFEN EADY, M.R., in *Bird v. Keep* (2), that it has been the practice of the Chancery Division to treat the certificate only as evidence that the birth happened before the registration, but that practice, which is of very small importance in the sense that it may only postpone a person's coming into his estate for a short time, seems never to have been tested by a case where a person died when he was over twenty-one by the real date of birth, but not twenty-one by the date of registration, at which later date there would have been sufficient money to involve serious consideration whether the practice was right. I am unable to find any justification for the exclusion of the date of birth which is mentioned in the certificate, and which it was the judicial duty of the registrar to inquire into, because the validity of the registration, and his power to register at all, depended on it.
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Re Wintle (1), which is the foundation of the divergence of authority which has happened, appears to me to have been wrongly decided if it excluded the statement of the date of the birth contained in the certificate. Section 38 provided that the certified copy of an entry in the register "shall be received as evidence of the birth . . . to which the same relates." What is the birth to which the same relates?

It is not an abstract birth, with no father, no mother, and no date. It is the birth A
of a particular child to a particular mother, with a requirement to state the father,
and a requirement to state the date of birth. "The birth. . . to which the same
relates" appears to be the birth of which the particulars are stated which, in the
language of the Act, are required to be known, and which the registrar is required
to learn. Therefore, I should agree with the view which was taken in the next B
three common law cases by PHILLIMORE, J., SIR FRANCIS JEUNE, P., and MCCARDIE,
J.—that, in the absence of any special statutory provision, those particulars in the
certificate, which it was the statutory duty of the registrar to inquire into and
learn, and state as the result of his inquiry and learning, in the certificate are
admissible evidence, although subject to contradiction by other evidence, of the
facts therein stated.

There is a further matter which seems to me to be very conclusive. In no cases C
are the rules of evidence applied so strictly as in criminal cases. In several
criminal statutes the question whether a crime has been committed or not depends
upon the age of the child. As is stated by PHILLIMORE, J., in *Wilton & Co. v. Phillips* (3), and as I know from my six years' experience in the criminal courts, it
has been the constant practice to admit a birth certificate as evidence of the date
of the birth, subject to evidence identifying the particular child against whom the D
crime has been committed with the child named in the certificate. If the decision
in *Re Wintle* (1) is to be carried to the extent that the certificate was not evidence
of the date of birth, all those people have been wrongly convicted. The practice
which has prevailed in regard to certificates in the criminal courts is in accordance
with the three common law cases which my Lord has cited, to which I do not
refer again.

I think that ROMER, J., would have followed the later authorities and held that
the statements in the certificates were admissible, but then there came the case
to which my Lord has referred of *Bird v. Keep* (2) in the Court of Appeal. It was
a workman's compensation case where the question was whether a statement in a
certificate of the cause of death purporting to be derived from the finding at an
inquest was admissible. The court held that the county court judge, who had F
decided the case, had evidence outside the certificate on which he was quite
justified in finding what the cause of death was, and, therefore, as both the judges
who expressed an opinion said, it was not necessary for them to go on and decide
the effect of the statement in the certificate, but both SWINFEN EADY, M.R., and
BANKES, L.J., said that, as the matter had been argued, they would express their
opinion that the statement as to the cause of death in the certificate of death G
derived from the coroner's inquisition was not evidence in the workman's compen-
sation case before the county court judge. NEVILLE, J., said that he did not
dissent, although he did not express an opinion, as the matter was not material, in
view of the decision on the other point. ROMER, J., on the materials before him,
I think rightly, said that he was unable to see any distinction between the state-
ment as to the cause of death in the certificate and the statements as to the father, H
the mother, and the date of birth in the certificate, but the learned judge's attention
does not seem to have been called by counsel to the fact—and the learned judge
himself had not enjoyed the pleasure of reading the statutes through to find out
whether there was anything in them—that there were very specific provisions
about statements as to the cause of death derived from the coroner's inquest.

In s. 25 of the Act of 1836, the coroner was bound to inform the registrar of the I
finding of the jury, and the registrar had to make the entry accordingly, that is to
say, the registrar had no judicial or public duty to inquire, but he had to take the
cause of death as found by the coroner's jury. He had to put it in, whether he
agreed with it or not, and whether he thought it was ridiculous, or whether he
thought it was right. In the Act of 1874, the matter went rather further, because
s. 20 (2) provided that on the production of a medical certificate the registrar must
put in the cause of death stated in the certificate, except where there was a
coroner's inquest, when [s. 20 (3)] he must put in the cause of death stated by the

A coroner's jury, even if he had already put another cause of death in the certificate before he received the certificate of the inquest, so that he might be bound to put in two entirely contradictory statements as to the cause of death, one derived from his own information, or from the doctor's certificate, and one derived from the finding of the coroner's jury [see now Births and Deaths Registration Act, 1953, ss. 22, 23]. That duty of the registrar with regard to the statement as to the cause of death seems to me at once to distinguish such a statement in the certificate from the other statements which the registrar is bound to inquire into, and state the results of his personal inquiry according to his judgment. No doubt the registrar usually acts upon the information supplied by the apparently responsible person, the father, the mother, or the householder, who makes statements to him, but he is quite at liberty to reject such statements if he sees reason to believe that they are untrue, or that the person appearing before him is not really the person whom he or she purports to be. For those reasons there seems to be nothing in the decision of the Court of Appeal which would justify us in disregarding the view which was arrived at by the common law courts, and which seems to me to be in accordance with principle.

As to the form of the summons, it is quite clear, as I have said, that the statement in the certificate alone is not *prima facie* evidence, because on the statement in the certificate alone you have not evidence of identification, and, therefore, it is quite clear that it is not *prima facie* evidence by itself. It appears to me that the statement is admissible in evidence, and what its effect is must be determined in conjunction with the other evidence which is put before the master at the inquiry. For instance, we are told, although it is not referred to in the summons, that there is another certificate of the second marriage of the lady who is alleged to have been married to Brown, in which she describes herself as a spinster. Obviously the master will have to take into account that statement in that certificate as well as the statements in the three certificates mentioned. It is not for me to state any opinion as to what conclusion he will arrive at, but it seems to me that each statement in the certificates is admissible in evidence. What the result of the joint evidence will be will be a matter for the master at the inquiry, and I particularly do not wish to express any opinion whether, from the statements in these certificates alone, the master should, or should not, draw the inference of a lawful marriage. There is something to be said, and there are some authorities with regard to the matter, for the position that you may presume a lawful marriage. If I were required to express any opinion on the matter one way or the other, I should desire to look much more carefully into those authorities, and into other authorities which I believe exist, than has been done in this case, and, therefore, I am expressing no opinion which can fetter the master in considering whether or not he should presume that the statements that two people of the same name are living together, and have had three children, are, or are not, sufficient to establish the presumption of a lawful marriage, but the decision of the learned judge obviously goes too far when it said that the certificates are not, and cannot be, any evidence of a lawful marriage. They may be, in conjunction with other evidence, but whether they are or are not will be a question for the master to determine at the inquiry.

I **SARGANT, L.J.**—I am of the same opinion. I think that this summons was taken out with the laudable object of saving expense, but I am afraid that it has not had that result. Probably the parties thought that the only possible evidence of the marriage of the father and mother of the intestate consisted in the certificates in question, and they wanted to know whether, on the faith of these certificates alone, if they are the only evidence, a lawful marriage should be presumed, but, in fact, the form of the summons goes a good deal beyond that, and there does appear to be other evidence. Therefore, in the result, the decision of the learned judge has been to exclude altogether these certificates from the materials on which

the master may arrive at the result of the inquiry before him. They are, as it were, ruled out, and cancelled; they are to be disregarded altogether. I do not think that that can be correct. A

Looking at the Act of 1836, which of course is the foundation of the matter, the Act provides for a register of births, deaths, and marriages, and I think the Act indicates what are the particulars required to identify and to define a birth. The fact that there has been a birth is, of course, of no materiality at all, but if you look at Sched. A to the Act you will find what the legislature considered were the particulars necessary to identify and segregate a particular birth from all the other births that were happening, and what was necessary to identify by way of registration a birth. If you look at the schedule the date of birth is considered material, the name of the child, the sex, the name and surname of the father, the name and maiden surname of the mother, the rank or profession of the father and then the rest has to do with the person who gives the information. It seems to me that the registrar, who is bound to make inquiry, although he is by sections of the Act entitled to act upon the information of certain named persons without making further inquiry, is a public officer, discharging a public duty, and that, therefore, the results of his inquiry when embodied in the register, come within the principle laid down by the judges in *Irish Society v. Bishop of Derry* (6). B C D

In the present case I am not quite sure that I am in agreement on one point with the Master of the Rolls, and on another point with SCRUTTON, L.J. The Master of the Rolls expressed his own individual opinion that the registration of the father and the mother in this book implied that the father and the mother were the legitimate father and the legitimate mother, so that there was something equivalent to a finding, or an expression of the view, of the registrar on the information before him that there had been a marriage resulting in the birth. As to that, I feel considerable doubt, for this reason. At that time there was, to a greater extent than at present, a considerable, and a very appreciable, percentage of illegitimate births. It is quite clear that the Act was making provision for the registration of illegitimate births, as well as of legitimate births, and although the form adopted in the Act is one which applies primarily to legitimate births, inasmuch as it speaks of the maiden surname of the mother, still it is a form which is intended to provide for all births, of both classes. I think, too, that under that Act there was an obligation on both the mother and the putative father, as well as the legitimate father, if requested, to give information with regard to the child, so as to enable the particulars to be registered. That seems to me to be recognised by the Act of 1874, which expressly relieves the putative father from being bound, on request, to give the information, and prevents the registrar from entering the name of a putative father unless he is requested to do so by the father and the mother. Therefore, it appears to me that the mere fact that in the register the names of the father and the mother appear in the printed forms which speak of the name and surname of the father, and the name and maiden surname of the mother, is not of great importance, and that there is no necessary implication that the father and the mother of the child registered in this form were married before the birth. On the other hand, of course, there is this circumstance to be considered in this case, that you have three births at intervals of two years, and in each case the father and the mother are of the same description, apparently living together, and, therefore, it is clear, at any rate, although what force may be attached to it it will be for the master to say in conjunction with the other circumstances, that there was, at any rate, a considerable permanence in the connection between the father and the mother. There was a connection lasting over four years, and there was, apparently, the fact that the mother was living under the same surname as the father. What result that may have from the point of view of reputation as indicating marriage it will be for the master to consider. E F G H I

I will not deal with the cases that have been gone into so fully by my Lord and by SCRUTTON, L.J., because I think it is clear now that *Re Wintle* (1) is not a

A case which can be relied on as a general statement of the law at all. *Re Wintle* (1) really was a decision that the court was not prepared to order payment out to an infant a fortnight earlier than it might otherwise have done, because it appeared that his birth had been registered as of a date one fortnight earlier than the date of registration. When the only result is the postponement of the payment out of a sum of money to a petitioner the result is of little importance, and I think it is only one instance of the extreme care which the court has always taken before paying out money in court to a petitioner, or to a person applying by summons. Certainly as a statement of the general law that the date of the birth, under this system of registration, is to be entirely neglected, and to be no evidence at all, it must be considered to be overruled by the later cases that have been decided. I will not say anything about *Bird v. Keep* (2), because that has been explained by my Lords. In my judgment, it is a case which rests upon the very peculiar position of the result of an inquisition before a coroner. Really, the registration in that case by the registrar is merely a short note of the result of the inquisition held by the coroner, and if the inquisition itself could not be evidence, and that was the point that was mainly argued in the case, it would appear necessarily to result that the short note entered under statutory direction of the result of the inquisition could not itself be evidence.

With regard to s. 38 of the Act of 1836, on which great stress was laid by SCRUTTON, L.J., I by no means want to cast any doubt upon the admissibility of the evidence as entered by the registrar, having regard to the rule laid down in *Irish Society v. Bishop of Derry* (6), but I think perhaps the lord justice attached a little too much importance to s. 38. I do not think that s. 38 has any effect as regards the admissibility or the value of the evidence furnished by the register itself. I think s. 38 is directed merely to one practical purpose, namely, to make the certified copy given by the registrar, and produced in court, of equal value with the register itself if the register itself had been produced. It is a mere case of facilitating the proof of the contents of the register, and, therefore, I do not think that importance ought to be attached to the special words of s. 38, which says that it shall be received as evidence of the births, death, or marriage, to which the same relates, without any further or other proof of such entry. That, I think, is merely a matter of routine, and of relieving persons from the necessity of calling the registrar, and having the register itself produced. The office copy is made as good evidence as the register itself.

There is one other matter that I think I might mention. It does not seem to me that every part of the entry in the register is necessarily of equal weight as evidence with every other part of the entry. The whole is admissible as evidence, but it may very well be that with regard to one part there is a greater certainty than with regard to another part. For instance, the date of registration practically must be assumed to be conclusive. On the other hand, with regard to the date of the birth, there may be some mistake. The registrar is acting only on the information of other persons. With regard to the description of persons, or the place of abode, or matters of that kind, in all those cases, although the evidence is admissible as evidence, it may very well be that the weight of the evidence varies. I think that observation is of particular value when one comes to the fourth certificate in question here, the certificate of the death of one of the children of the union, Harriet Ellen Brown. In that she is described as being the daughter of John Brown, a jeweller, deceased. What the Act requires to be entered, and what the registrar has to make inquiries about, is the rank or profession of the deceased. You find the statement in the register of something which is not a part of the rank or profession of the deceased, namely, that she is a daughter of John Brown, a jeweller. It seems to me that as to that, it is very doubtful whether the register or the certified copy of the register is any evidence at all, because it is something which is not inserted in the register by the official as part of his duty under the Act. The register does not make any provision for showing who are the

parents of the deceased person. With those observations I leave the matter. It appears to me that the order as it stands is wrong in entirely striking out, from the matters which the master has to consider, these certificates. They are, in my judgment, admissible evidence, although the weight of the evidence is for him to consider, in conjunction with the other evidence laid before him at the inquiry. **A**

Solicitors: *F. H. Adams; Treasury Solicitor.*

[Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law.] **B**

CLARKE v. GRIFFITHS. PEACOCK v. GRIFFITHS **G**

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Shearman, JJ.), May 6, 1926] **D**

[Reported [1927] 1 K.B. 226; 95 L.J.K.B. 905; 135 L.T. 58; 90 J.P. 151; 42 T.L.R. 541; 24 L.G.R. 466; 28 Cox, C.C. 240]

Licensing—Club—Supply of intoxicating liquor on additional unregistered premises—"In a club"—Licensing (Consolidation) Act, 1910 (10 Edw. 7 and 1 Geo. 5, c. 24), s. 94. **E**

By the Licensing (Consolidation) Act, 1910, s. 94: "Intoxicating liquor shall not be supplied in a club for consumption off the premises except to a member on the premises; and, if any person supplies or obtains any intoxicating liquor in contravention of the provisions of this section, he shall be liable to a fine not exceeding £10." A club which was registered under s. 91 of the Act of 1910 took a lease of additional premises which were not registered and were a considerable distance away from the club premises. The steward of the club supplied a member of the club on the additional premises with intoxicating liquor which the member paid for and consumed on the additional premises. They were convicted of offences under s. 94 of the Act of 1910. **F**

Held: the words "in a club" in s. 94 related to the registered premises of the club, and, therefore, the intoxicating liquor had not been supplied or obtained "in a club" within the meaning of the subsection, and the convictions must be quashed. **G**

Notes. The Licensing (Consolidation) Act, 1910, was repealed by the Licensing Act, 1953, s. 168 (1) and Sched. X. Section 94 of the 1910 Act has been replaced by s. 125 of the 1953 Act. **H**

As to the application of the liquor licensing law to clubs, see 5 HALSBURY'S LAWS (3rd Edn.) 279 et seq.; and for cases see 8 DIGEST (Repl.) 671-674. For the Licensing Act, 1953, s. 125, see 33 HALSBURY'S STATUTES (2nd Edn.) 256.

Case referred to:

- (1) *Watson v. Cully*, [1926] 2 K.B. 270; 95 L.J.K.B. 554; 135 L.T. 28; 90 J.P. 119; 42 T.L.R. 529; 24 L.G.R. 357; 28 Cox, C.C. 194, D.C.; 8 Digest (Repl.) 671, 136. **I**

Case Stated by justices for the county of Glamorgan.

An information was preferred by the respondent, Toronwy Griffiths, a superintendent of police, under the Licensing (Consolidation) Act, 1910, s. 94, against the appellants, Gearth Webster Peacock and Harry Clarke, charging that on Dec. 5, 1925, at the parish of Llanfabon, in the county of Glamorgan, the appellant Peacock,

A being then the steward of the Llanbradach Workmen's Social Club and Institute, Ltd., whose registered address was 1 and 2, Station Road, Llanbradach, unlawfully did supply certain intoxicating liquor, to wit beer, for consumption off the premises to the appellant Clarke otherwise than on the premises of the club, to wit, at premises occupied by the club at the rear of High Street, in Llanbradach, and the appellant Clarke at the same time and place unlawfully did obtain the liquor, **B** contrary to s. 94 of the Licensing (Consolidation) Act, 1910.

On the hearing of the information on Dec. 22, 1925, the following facts were proved or admitted: (a) The Llanbradach Workmen's Club and Institute, Ltd. (hereinafter called "the said club"), which had its registered address at 1 and 2, Station Road, Llanbradach, was a club registered under the Industrial and Provident Societies Act, 1893, and for some years the said club had occupied the said premises. **C** (b) The said club was registered pursuant to s. 91 of the Licensing (Consolidation) Act, 1910. (c) In August, 1925, the said club took a lease of additional premises known as the Old Workmen's Hall, High Street, Llanbradach, which was at a considerable distance from the club premises. (d) For some years the Old Workmen's Hall had been occupied by the Llanbradach Ex-Servicemen's Club and Institute, Ltd., which had been registered pursuant to s. 91 of the Licensing (Consolidation) Act, 1910, but on May 26, 1925, the justices sitting at **D** Caerphilly struck it off the register and ordered that the premises should not be used for the purpose of any club which required to be registered under the Act for a period of three months from May 26, 1925. The three months expired on Aug. 26, 1925. (e) On Aug. 26, 1925, the secretary of the said club called at the **E** offices of the clerk to the justices and tendered a fee for registering the Old Workmen's Hall as a branch club and delivered to him a letter dated Aug. 26, 1925, and between Aug. 26 and Sept. 28, 1925, correspondence passed between the secretary or other agent of the said club and the clerk to the justices. (f) The premises of the Old Workmen's Hall were never registered under s. 91 of the Licensing (Consolidation) Act, 1910, as premises of the said club. (g) On Oct. 3, 1925, the said club began to use the Old Workmen's Hall as club premises in addition to Nos. 1 and 2, Station Road, Llanbradach. (h) On Dec. 5, 1925, the respondent, being a **F** superintendent of police for the district in which the premises were situated, visited the Old Workmen's Hall and found many members of the said club on the premises and found that the ordinary business of a club was being carried on at such premises but that there was no disorder or improper personal conduct of any kind. **G** The steward of the said club (the appellant Peacock) in the presence of the respondent supplied the appellant Clarke, who was a member of the said club, with beer for which the appellant Clarke made payment, and the appellant Clarke there and then consumed the beer in the presence of the respondent.

H It was contended on behalf of the appellants that they had not contravened s. 94 of the Licensing (Consolidation) Act, 1910, and that the information was misconceived, and that, if the appellants had committed any offences (which was not admitted), such offences had been committed by contravening s. 93 of the Act of 1910. It was contended on behalf of the respondent that the appellants had committed offences under s. 94 of the said Act, as alleged in the information.

The justices convicted the appellants, who now appealed.

I *H. D. Roome and A. T. James* for the appellants.
Wilfrid Lewis for the respondent.

LORD HEWART, C.J.—This case turns on the true construction of s. 94 of the Licensing (Consolidation) Act, 1910. That Act is entitled "An Act to consolidate the law relating to justices' licences for the sale by retail of intoxicating liquor and to the registration of clubs." The portion of the Act which is concerned with the registration of clubs begins at s. 91, and it is a little important to remember that s. 94 occurs in a portion of the Act which is exclusively concerned with clubs, and

is not concerned with other matters arising out of the law of licensing. Section 91 A provides :

"(1) The secretary of every club which occupies a house or part of a house which is habitually used for the purposes of a club, and in which any intoxicating liquor is supplied to members or their guests, or any other premises which are habitually so used, and in which any intoxicating liquor is so supplied, shall cause the club to be registered in manner provided by this Act. B
(2) The registration of a club under this Act shall not constitute the club premises licensed premises, or authorise any sale of intoxicating liquor therein which would otherwise be illegal."

Section 92 contains provisions as to the mode of registration. Section 94 provides :

"Intoxicating liquor shall not be supplied in a club for consumption off the premises except to a member on the premises; and, if any person supplies or obtains any intoxicating liquor in contravention of the provisions of this section, he shall be liable to a fine not exceeding ten pounds." C

The important words in that section are: "Shall not be supplied in a club for consumption off the premises." The case for the prosecution here was that the liquor was supplied in the registered club, i.e., in Station Road, for consumption off the premises, i.e., in the other premises at High Street. The consumption took place in the premises at High Street, which were no part of the registered premises of the club. The question remains: Is it true to say that the liquor was supplied in the club premises in Station Road? Counsel for the respondent has put forward an argument in which, if I could, I should gladly concur. He argued that one must look not merely to the moment of consumption or to the person consuming off the club premises, but to the mode of sale. It is true that the sale was by the steward and on premises which were described as additional premises of the club. Could the liquor be said to be supplied "in" the club? There is no finding whether the liquor was first delivered at the club in Station Road and then removed to High Street, or whether it was delivered direct to High Street. However that may be, the argument of the respondent involved the construction of the words "in a club" as meaning "in or from the premises of a club." The legislation might be more complete if those words were inserted, but I cannot find that the words are sufficiently pregnant to bear that meaning, gladly as I would do so. "In a club" means more or less what it says, and in that sense this case has a relation to *Watson v. Cully* (1) which was recently before this court. A clear antithesis is pointed in s. 94 between "in a club" and "off the premises," and "in a club" means "in the club premises." F

At one point of the argument there was a suggestion that, if the club could not be hit under this section, it could not be hit at all. If that were so, it would be no reason for reading into this section words which are not there, but counsel for the appellants has frankly admitted that the case might have come under s. 93. Various other means might have been suggested, e.g., a charge under s. 95 that the club in Station Road was not being conducted in good faith when it was supplying the liquor of members to members in High Street. On this limited question whether the conviction under s. 94 should stand or be quashed, I have come to the conclusion that it cannot be supported, and that we must allow this appeal. G

AVORY, J.—I am of the same opinion. This conviction can only be supported by reading "in a club" as though it were "in and from" a club: I can see no authority for doing so. The word "supply" is a substitute for the word "sell" in other parts of the Act. It is really equivalent to "serve," and would make it impossible to construe the section in the wide sense contended for. I reserve my opinion whether the facts found in this case could be successfully made the subject of a charge under s. 93 or under any other section. H I

- A** **SHEARMAN, J.**—I am of the same opinion. I think it is clear that “in a club” relates to the premises. It is only necessary to turn to s. 93 and other sections in order to make it clear that “supply” relates to members and “sale” relates to other persons.

Appeals allowed.

- B** Solicitors: *Helder, Roberts, Giles & Co.*, for *W. R. Davies & Co.*, Pontypridd; *Willis & Willis*, for *Gilling & Goodfellow*, Cardiff.

[*Reported by J. F. WALKER, Esq., Barrister-at-Law.*]

C

ROBINSON, FISHER AND HARDING v. BEHAR

D

[KING'S BENCH DIVISION (Avery and MacKinnon, JJ.), November 17, 1926]

[Reported [1927] 1 K.B. 513; 96 L.J.K.B. 150; 136 L.T. 284;

91 J.P. 59; 43 T.L.R. 66]

Auctioneer—Sale of goods—Conditions of sale—“Lots uncleared . . . shall be re-sold”—Right of auctioneer to refuse to re-sell.

E

The plaintiffs, who were auctioneers, put up certain goods for sale by auction. The conditions of sale printed in the catalogue provided: “The lot to be taken away and paid for . . . the day after sale,” and “Upon failure of complying with the above conditions . . . all lots uncleared within the time aforesaid shall be re-sold.” The defendant, through his own negligence, purchased one lot in mistake for another. The plaintiffs refused a request by him to put the lot up again for sale, and he declined to clear the lot or to pay for it. The plaintiffs brought an action against him for the purchase price. The defendant contended that under the conditions of sale the auctioneers were bound to re-sell the lot in question and that he could be charged only with any deficiency upon such re-sale.

F

G

Held: the words “all lots uncleared . . . shall be re-sold” must be construed, not as imposing an obligation on the plaintiffs, but as conferring an option on them of re-selling at their discretion, and, therefore, the plaintiffs were entitled to recover the purchase price.

Notes. As to particulars and conditions of an auctioneer's sale, see 2 HALSBURY'S LAWS (3rd Edn.) 79–80; and for cases see 3 DIGEST 15–16.

H

Appeal from West London County Court.

The plaintiffs, who were auctioneers, sued the defendant for £56, the price of goods bargained and sold at a public auction. The goods were put up for sale by auction at Willis's Auction Rooms, St. James's Square, on Dec. 9, 1925, and were offered for sale on certain conditions of sale printed in the plaintiffs' catalogue. The material conditions were as follows:

I

“4. The purchasers to give in their names and places of abode, and to pay down 5s. in the £, or more, in part of payment, or the whole of the purchase-money, if required; in default of which, the lot or lots so purchased to be immediately put up again and re-sold. 5. The lot to be taken away and paid for, whether genuine and authentic or not, with all faults and errors of description, at the buyer's expense and risk, the day after sale; neither [the plaintiffs] nor the sellers being responsible for the correct description, genuineness, or authenticity of, or any fault or defect in, any lot; and making no warranty whatever. 7. Upon failure of complying with the above conditions,

the money deposited in part of payment shall be forfeited; all lots uncleared within the time aforesaid shall be re-sold by public or private sale, and the deficiency (if any) attending such re-sale shall be made good by the defaulter at this sale."

The defendant, who was a carpet dealer, intended to bid for lot 62, a Persian carpet, but was absent in the smoking-room when this lot was put up for auction: he returned to the saleroom after lot 63 had been put up and its description announced. Under the impression that lot 62 was still being offered he bid £56, with the result that lot 63, another Persian carpet, was knocked down to him at that price. On discovering his mistake, he asked the plaintiffs to put up lot 63 again for sale, but they refused, and they again refused a similar request on the following day. The defendant declined to pay or to remove the lot, and, on an action being brought against him by the plaintiffs for the purchase price, pleaded in his defence that the lot had been sold to him under a mistake. Alternatively, he contended that, on his refusal to remove the lot on the following day, the auctioneers were by condition 7 of the conditions of sale, obliged to re-sell, and that he could be called on only to make good the deficiency, if any, on such re-sale. The county court judge found that the defendant had been negligent and could not plead mistake, and decided the other point also in favour of the plaintiffs. He gave judgment for the plaintiffs for £56. The defendant appealed.

J. D. Casswell for the defendant.

W. H. Moresby for the plaintiffs.

AVORY, J.—This was a claim by the plaintiffs, who are auctioneers, for £56, the price of goods bargained and sold on Dec. 9, 1925. The particulars of claim are as follows: "The £56 is the amount of the defendant's bid for a Persian carpet (being lot 63) at an auction sale by the plaintiffs held on Dec. 9, 1925, at Willis's Rooms, King Street, St. James's Square, S.W. 1. The bargain and sale relied on is the said sale at the said auction." It appears that the defendant intended to purchase another lot, lot 62, but that, owing to his own negligence, he made a mistake and purchased lot 63 for £56. *Primâ facie*, therefore, there was no answer to this claim; the defendant did not dispute that he had, in fact, bid for this particular lot, and that it had been knocked down to him. It was, however, contended on his behalf that he was not liable in this action by reason of the conditions of sale printed on the catalogue. The argument presented is a curious one, and it means that, if a man has bought something and afterwards regrets it, he can insist under condition 7 of these conditions of sale on the lot being re-sold and the deficiency, if any, being made good by the defaulter. It might happen that, in such a case, there would be no deficiency, and that the lot would be sold at an enhanced price, and the court is not told what would be the contention in such circumstances. The argument is that, because under condition 5 "The lot is to be taken away and paid for, whether genuine and authentic or not, with all faults and errors of description, at the buyer's expense and risk, the day after sale," and because this lot was not taken away the day after sale, it thereupon became compulsory on the plaintiffs to re-sell and debit the defendant with the deficiency or, as I have suggested, credit him with any surplus. Counsel for the defendant has strenuously argued that condition 7 is mandatory and compulsory, and that it is impossible to give any other meaning to it. Looking at conditions 4, 5 and 7, I have no hesitation in coming to the conclusion that the words "shall be forfeited," "shall be re-sold," in condition 7 are not mandatory or compulsory on the plaintiffs, but permissive, and must be read in that sense; in other words, condition 7 confers on the plaintiffs an option to exercise the powers conferred on them by its terms, and the defendant is not entitled to insist on the performance of these conditions, but was, in the circumstances, liable to pay. I am of opinion, therefore, that the learned county court judge rightly decided that the plaintiffs were entitled to recover, and that this appeal ought to be dismissed.

A **MACKINNON, J.**—I agree. I think it is clear that condition 7 of the conditions of sale conferred an option and not an obligation on the plaintiffs.

Appeal dismissed.

Solicitors: *Stanley O. Matthews; Haslewood, Hare & Co.*

[*Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.*]

B

C

THOMAS AND OTHERS v. NEWINGTON LICENSING JUSTICES

[KING'S BENCH DIVISION (Lord Hewart, C.J., Salter and Talbot, JJ.), December 15, 16, 1926]

[Reported 136 L.T. 638; 91 J.P. 37; 43 T.L.R. 181; 25 L.G.R. 109]

D *Licensing—Renewal of licence—"Refusal to renew"—Adjournment of application till after end of licence and of licensing year—Licensing (Consolidation) Act, 1910* (10 *Edw. 7 & 1 Geo. 5, c. 24*), s. 16 (1).

The appellants, the licensee and the owners of a public house, applied to the licensing justices on Mar. 1, 1926, for a renewal of the licence which was due to expire on April 4, 1926. The justices, on the ground that summonses were pending against the licensee for supplying during non-permitted hours intoxicating liquor for consumption on the premises, adjourned the consideration of the application to the next transfer sessions to be held on April 12, 1926. The appellants gave notice of appeal to quarter sessions, and the Commissioners of Customs and Excise, under s. 89 of the Licensing (Consolidation) Act, 1910, granted permission to carry on the business during the pendency of the appeal. On Mar. 4, 1926, the licensee was convicted on the summonses, and on April 12, 1926, the licensing justices refused the renewal. The appellants contended that the justices had no power to adjourn the consideration of the renewal till a date after the expiry of the licence and of the licensing year; that on Mar. 1, 1926, they had, in effect, refused the renewal; and that there was before them no evidence on which they could do so.

G **Held:** as the application had been made within the licensing year, the licence remained in force by virtue of s. 16 (1) of the Licensing (Consolidation) Act, 1910, and the adjournment did not amount to a refusal of the renewal.

Notes. The Licensing (Consolidation) Act, 1910, was repealed by the Licensing Act, 1953, s. 168 (1) and Sched. X. Section 16 (1) of the Act of 1910 has been replaced by s. 11 (1) of the Act of 1953. Section 89 of the Act of 1910 has not been re-enacted in the Act of 1953.

H As to renewal of a justices' licence, see 22 HALSBURY'S LAWS (3rd Edn.) 549 et seq.; and for cases see 30 DIGEST (Repl.) 32 et seq. For the Licensing Act, 1953, s. 11, see 33 HALSBURY'S STATUTES (2nd Edn.) 157.

Cases referred to:

- I**
- (1) *Webber v. Birkenhead Justices* (1897), 61 J.P. 664; 30 Digest (Repl.) 23, 145.
 - (2) *R. v. Denbigh Justices, Ex parte Fisher* (1895), 40 Sol. Jo. 12; 59 J.P.Jo. 708, D.C.; 30 Digest (Repl.) 23, 144.
 - (3) *R. v. Tower Justices* (Jan. 16, 1920), unreported.
 - (4) *R. v. Anglesea Justices* (1895), 65 L.J.M.C. 12; 12 T.L.R. 4; 40 Sol. Jo. 35; 15 R. 614; sub nom. *R. v. Anglesea Justices, Ex parte Williams*, 59 J.P. 743; 30 Digest (Repl.) 17, 96.

Case Stated by the County of London Quarter Sessions, on an appeal by Mr. Richard William Thomas, as licensee, and Meux's Brewery, Ltd., as owners, of

the Peacock public house, Holland Street, Blackfriars, against the alleged refusal of the respondent licensing justices on Mar. 1, 1926, to renew the licence of the premises.

The following facts were admitted on the hearing of the appeal. The licence of the premises was transferred to the appellant licensee in February, 1924, as tenant of the premises, and was duly renewed to him in February, 1925. On Feb. 11, 1926, certain summonses were issued from the Tower Bridge Police Court, returnable on Feb. 25, 1926, charging that the appellant licensee on certain dates in December, 1925, and January, 1926, at the said premises during other than permitted hours unlawfully supplied to divers persons intoxicating liquor to be consumed on the premises. On Feb. 19, 1926, a notice was served on the appellant licensee by the respondent justices requiring his attendance before them on Mar. 1, 1926, on account of there being summonses pending against him. On Feb. 25, 1926, an application was made to the magistrate on behalf of the appellant licensee for the adjournment of the summonses, it being alleged that, owing to pressure of licensing business, it was found impossible to present his case properly by that date, and with the consent of the Commissioner of Police the summonses were adjourned by the magistrate to Mar. 4, 1926. On Mar. 1, 1926, at an adjournment of the general annual meeting of the respondent justices, an application was duly made for the renewal of the licence. Both the appellant licensee and the appellant owners appeared by separate legal representatives. As the police court summonses had not at that date come on for hearing, the respondent justices were, on grounds both of fact and law, strongly pressed to renew the licence, and were referred to the various provisions of the Licensing (Consolidation) Act, 1910, relating to the matter. Undertakings were unreservedly offered on behalf of both the appellant licensee and of the appellant owners that, whatever might be the result of the summonses, the appellant licensee, if called on by the justices, would attend at the then next transfer sessions on April 12, 1926, and that the whole facts would then be brought before them and a new tenant would be found for the premises if they desired it. The justices retired to consider their decision. They refused to adjudicate finally on the application for renewal, and, notwithstanding the objection raised that they had no power so to do, they adjourned, or purported to adjourn, the consideration of the renewal to the then next transfer sessions on April 12, 1926, a date subsequent to the expiration of the existing justices' licence. At the hearing, no evidence was given on which the renewal of the licence could have been refused. The renewal of the licence not having been granted before it expired, both the appellant licensee and the appellant owners gave notice of appeal to quarter sessions. On an application under s. 89 of the Licensing (Consolidation) Act, 1910, the Commissioners of Customs and Excise granted permission to carry on the business during the pendency of the appeal. On Mar. 4, 1926, the police court summonses were heard. The appellant licensee pleaded guilty and was convicted on three summonses for offences which took place on Jan. 16, 1926, and was fined ten guineas and ordered to pay ten guineas costs. On April 12, 1926, the justices purported to refuse the renewal of the licence.

It was contended for the appellants before quarter sessions that, as the respondent justices had abstained from granting the renewal of the licence either on Mar. 1, 1926, or subsequently during its currency, they had in law and in fact refused the renewal of the licence; that they were wrong in law in so refusing, as there was no evidence before them on which they could in law refuse; that they had no power to adjourn the consideration of the renewal to April 12, 1926, on which date the licence would be no longer in existence and there would, consequently, be nothing in respect of which they could grant a renewal; and that a renewal of a licence must be either granted or refused within the licensing year, which expired on April 4, 1926. The appellants relied on s. 10, s. 16, s. 41 and s. 89 of the Licensing (Consolidation) Act, 1910, and cited *Webber v. Birkenhead Justices* (1), *R. v. Denbigh Justices, Ex parte Fisher* (2), and *R. v. Tower Justices* (3). It was contended for the respondent justices that they had jurisdiction to

A act as they did, and that, in any case, an appeal to quarter sessions was not the proper remedy. It was submitted that, on Mar. 1, 1926, there had been no refusal but merely an adjournment. *Webber v. Birkenhead Justices* (1) was relied on as showing that the appeal to quarter sessions was wrong. Reference was also made (in addition to the cases mentioned above) to *R. v. Anglesea Justices* (4).

B The court of quarter sessions was of opinion that the decision of the respondent justices on Mar. 1, 1926, to adjourn the application to April 12, 1926, did not amount to a refusal to renew the licence, and that, even if the respondent justices were wrong in refusing to adjudicate on Mar. 1, 1926, the proper remedy was by application to the High Court for a mandamus. The appeals to quarter sessions were accordingly dismissed.

C *Whiteley, K.C.*, and *S. H. Lamb* for the appellant licensee.

R. O. B. Lane for the appellant owners.

Joy, K.C., and *H. L. Murphy* for the respondent justices.

LORD HEWART, C.J.—In the course of an extremely interesting discussion, various questions have been raised which it does not seem necessary to determine. It is sufficient to say that, in my opinion, the court of quarter sessions rightly held D that the decision of the respondent justices to adjourn the application for renewal was not a refusal to renew. It clearly was not in terms a refusal. But it is said that, because the date fixed was after April 5, it was, in effect, a refusal. That view does not seem to me correct, because, by s. 16 (1) of the Licensing (Consolidation) Act, 1910, a renewal of a licence means

E “the grant of a justices’ licence at a general annual licensing meeting by way of renewal of a similar licence which is in force in respect of the premises at the date of the application.”

The application having been made within the licensing year, the licence remained in force.

F Attention has been directed to various cases. It is not contended on behalf of the respondent justices that an adjournment beyond April 5 is part of the normal jurisdiction of justices. It is admitted that the power, though it exists, is a power only to be exercised in emergency—I will add, in real and urgent emergency. Among the inconveniences resulting from the exercise of that power may be mentioned that it has the effect of involving the licensee, and possibly other persons, in expense. But on the question raised in the Case, whether the adjournment G amounted to a refusal of the renewal, quarter sessions were right, and the appeal must be dismissed.

SALTER, J.—I entirely agree. I think there has been some confusion about the meaning of “refusal to renew.” A refusal to renew, to give rise to an appeal to quarter sessions, must be a refusal on the merits, and a decision in favour of the objector.

H TALBOT, J.—I am of the same opinion. If the adjournment had been such that the application would have had to be for a new licence, I think the justices would have been wrong, but, in view of s. 16 (1) of the Act, the application in this case would have been for a renewal. I desire expressly to agree with what my Lord has said as to the exposure of an applicant to what must necessarily be an I embarrassment and may involve inconvenience and expense.

Appeal dismissed.

Solicitors: *Hunters; G. T. Whiteley.*

[Reported by J. F. WALKER, Esq., Barrister-at-Law.]

KEATING v. HORWOOD

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Shearman, JJ.), April 18, 1926]

[Reported 135 L.T. 29; 90 J.P. 141; 42 T.L.R. 472; 24 L.G.R. 362; 28 Cox, C.C. 198]

Weights and Measures—Bread—Deficiency in weight—Loaves remaining after delivery finished—Offer for sale—Exposure for sale—Sale of Food Order, 1921 (S.R. & O. 1921, No. 1305).

The appellant, an inspector of weights and measures, saw the respondents, who were bakers, delivering bread from a motor car. On weighing the bread which was left in the car, he found that the loaves fell short of the nominal weight of an even number of pounds. The respondents had finished their delivery and none of the weighed bread was sold or offered for sale, but was all taken back to the bakehouse. The appellant summoned the respondents (i) for offering for sale bread otherwise than by weight, and (ii) for exposing for sale bread not of a weight of one pound or an even number of pounds, contrary to the Sale of Food Order, 1921.

Held: as all the bread was put in the car for the purpose of delivery, there was an exposure for sale, and (SHEARMAN, J., dubitante) an offering for sale, both of the bread expected to be required by the regular customers and of that left over.

Notes. The Sale of Food Order, 1921, was made under the Ministry of Food (Continuance) Act, 1920. It was extended until Dec. 31, 1925, by the Expiring Laws Continuance Act, 1924. See, now, in this connection, the Sale of Food (Weights and Measures) Act, 1926, s. 3 and s. 6 (as amended by the Bread Order, 1953 (S.I. 1953, No. 1283)).

As to provisions relating to the weight of food, see 33 HALSBURY'S LAWS (2nd Edn.) 665 et seq.; and for cases see 25 DIGEST 116 et seq. For the Sale of Food (Weights and Measures) Act, 1926, s. 3 and s. 6, see 26 HALSBURY'S STATUTES (2nd Edn.) 1293, 1297.

Case Stated by justices for Wiltshire.

Two informations were preferred by the appellant, Charles Keating, under the Sale of Food Order, 1921, made under the Ministry of Food (Continuance) Act, 1920, and extended to Dec. 31, 1925, by the Expiring Laws Continuance Act, 1924, against the respondents, John Francis Thomas Horwood and Elizabeth Annie Horwood, charging that (i) they being bakers of bread unlawfully did offer for sale bread otherwise than by weight, and (ii) they being bakers of bread unlawfully did expose for sale bread which was not of a weight of one pound or an even number of pounds, the said bread not being such bread as is usually sold under the denomination of French or fancy bread or rolls.

On the hearing of the informations on Sept. 3, 1925, the following facts were proved or admitted: (i) The appellant was an inspector of weights and measures employed by the Wilts County Council. (ii) The respondents carried on a bakers' business at Lacock, in Wiltshire. (iii) On the afternoon of Aug. 6, 1925, the appellant saw the male respondent, accompanied by his mother, at Notton, a hamlet about two miles from Lacock, delivering bread from an open touring motor car. The appellant saw him call at a cottage. (iv) After a conversation with the male respondent, the appellant weighed the bread which was then in the motor car. There were seven nominal 2 lb. loaves, one 4 lb. loaf, and one 1 lb. loaf, and the following deficiencies in weight were alleged to have been found: Two of the 2 lb. loaves were $2\frac{3}{4}$ oz. deficient, one of the 2 lb. loaves was 2 oz. deficient, four of the 2 lb. loaves were $1\frac{1}{2}$ oz. deficient, and the 4 lb. loaf was 3 oz. deficient. The 1 lb. loaf was not weighed, as the appellant had not a pound weight. The appellant admitted that he did not write down any note of the weights of the

A loaves until after he had weighed them all, and he believed that he was stating before the justices the actual weights, but the paper produced was not the original paper on which he had made his notes of the weights. The weights were originally noted on an old envelope, on which he "put down what he remembered of the weights." The appellant also admitted in cross-examination that the male respondent's mother, who was present, called his attention to the fact that the appellant's
B scales were bearing on the back of the motor car and did not balance, and that loaves touched the back of the car. These facts (stated in cross-examination) were confirmed by the inspector's assistant (called by the prosecution), who stated that his attention was called to them by the male respondent's mother, and that, after weighing, "the inspector proceeded to put down what he remembered of the weights." (v) The appellant did not offer to purchase and the respondents did
C not offer to sell any bread to the appellant, and there was no sale to the appellant or to anyone after the bread was weighed. (vi) After the bread was weighed the appellant saw the male respondent go to a customer's cottage further along the road, but no bread was delivered. The male respondent swore that he had no bread with him, but that he went to inquire for orders for the next delivery. (vii) The male respondent had finished his delivery. None of the weighed bread
D was sold or offered for sale. It was all taken back to the bakehouse.

It was contended on behalf of the appellant that the taking of the bread in the motor car by the male respondent on his usual delivery round constituted an offer and an exposure for sale. It was contended on behalf of the respondents that there was no case to answer, and no evidence of any offer or exposure for sale or of a request to purchase; that the bread weighed by the appellant was neither offered
E nor exposed for sale; that, at the time when the bread was weighed, the delivery was completed and the bread was being returned to the bakehouse; and that the male respondent was not prosecuted for not carrying scales for weighing bread, and this was the only offence (if any) that might have been proved.

The justices dismissed the informations, being of opinion that the bread was not being hawked by the respondents but was being taken by them in their private car for delivery to their regular customers; that the difference between this case and that of any tradesman delivering to customers goods ordered by them was that, the exact quantity to be delivered not having been previously ascertained, a baker when he started on his round did not know how many loaves his customers would want on that particular day and, therefore, had to allow a margin; that had
F someone other than a regular customer approached the respondents they might or might not have supplied him according to the state of their sales and probable requirements; that the intention of the respondents in taking out the bread was to deliver it to their regular customers; and that, until such customers were actually approached, the bread was neither offered nor exposed for sale. The justices were of opinion that the bread weighed by the appellant was neither offered nor exposed for sale. They were also of opinion that, though the facts proved as to the method
G of weighing and recording the weights were unsatisfactory and raised doubts as to the correctness of the weights alleged by the appellant, whose evidence was unconvincing, they were justified in concluding that there was some deficiency in the weight.

H *G. M. Welsford* for the appellant.

I The respondents did not appear.

LORD HEWART, C.J.—This seems to me to be a clear case. On the facts as found the male respondent was selling bread from an open car. The appellant weighed the bread remaining in the car and in the case of seven loaves he found a deficiency. The evidence as to the weighing was not very satisfactory, but the justices have come to the conclusion that there was a deficiency. The question is whether, on the facts, there were (i) an offering, and (ii) an exposure, for sale. In my opinion, there were both. It is said that the male respondent had finished his delivery, but he put the bread in the car for the purpose of being delivered.

When the journey begins it does not appear which, if any, of the loaves will be left. The margin, no less than the rest, is offered and exposed for sale. I think the justices came to an erroneous decision in point of law, and that the case should go back with a direction to convict of exposing for sale bread which was not of one pound or an even number of pounds.

AVORY, J.—I agree.

SHEARMAN, J.—I am of the same opinion. I am quite clear that this bread was exposed for sale, but have had some doubt whether it can be said to have been offered for sale until a particular loaf was tendered to a particular customer. It is, however, unnecessary to decide that.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, for *W. L. Bown*, Trowbridge.

[*Reported by J. F. WALKER, Esq., Barrister-at-Law.*]

BUCKLE v. HOLMES

[COURT OF APPEAL (Bankes, Warrington and Atkin, L.JJ.), March 2, 3, 1926]

[Reported [1926] 2 K.B. 125; 95 L.J.K.B. 547; 134 L.T. 743;

90 J.P. 109; 42 T.L.R. 369; 70 Sol. Jo. 464]

Animal—Cat—Trespass—Damage done while trespassing—Liability of owner.

The owner of a cat is not liable for a trespass by the cat which results in damage unless he has knowledge of some abnormal propensity beyond the natural propensity of a cat to cause damage when trespassing. No distinction is to be drawn between a dog and a cat in the law of trespass.

Notes. Considered: *Wormald v. Cole*, [1954] 1 All E.R. 683. Referred to: *Cutler v. United Dairies (London), Ltd.*, [1933] All E.R. Rep. 594; *Tallents v. Bell and Goddard*, [1944] 2 All E.R. 474.

As to trespass by animals, see 1 HALSBURY'S LAWS (3rd Edn.) 668 et seq.; and for cases see 2 DIGEST (Repl.) 309 et seq.

Cases referred to:

(1) *Manton v. Brocklebank*, [1923] 2 K.B. 212; 92 L.J.K.B. 624; 129 L.T. 135; 39 T.L.R. 344; 67 Sol. Jo. 445, C.A.; 2 Digest (Repl.) 331, 229.

(2) *Cox v. Burbridge* (1863), 13 C.B.N.S. 430; 1 New Rep. 238; 23 L.J.C.P. 89; 9 Jur.N.S. 970; 11 W.R. 435; 143 E.R. 171; 2 Digest (Repl.) 334, 240.

Appeal from a decision of the Divisional Court.

The plaintiff was a fancier of pigeons and poultry, and kept both on his premises. Certain valuable racing and homing pigeons were kept by him in a dovecot thereon, and there were also bantams and other fowl in a poultry-run. The defendant, who was a neighbour of the plaintiff, owned a cat. In March, 1925, the plaintiff observed that some of his pigeons were disappearing, and on his premises he saw a cat carrying a pigeon in its mouth. On another occasion he saw the same cat catch a bantam on his premises. He communicated with the defendant, believing the cat to be his, and the defendant advised him to trap the cat. The plaintiff did this and called in the defendant, who admitted that the cat was his and destroyed it on the spot. The plaintiff subsequently brought an action for £8 against the defendant, being the damage caused to him through the destruction of thirteen pigeons and two bantams by the defendant's cat. The Divisional Court

A held, affirming the decision of the county court judge, that a cat was in the same position as was a dog at common law with regard to its unprovoked trespasses, and the owner could not be liable for damage caused by it while so trespassing, unless this damage was due to some special character distinguishing it from cats in general and the owner was aware of that acquired character.

B The plaintiff appealed.

Joy, K.C., and *G. Russell Vick* for the plaintiff.

Sandlands for the defendant.

C **BANKES, L.J.**—We gave leave to appeal in this case, not because we had any doubt as to what the decision ought to be, but because it was represented to us that the case was one of very general importance, and the society of which one of the parties was a member were anxious that the case should be further argued. Every consideration of the circumstances has been adduced in support of the appeal, but I am clearly of opinion that the view of the Divisional Court was the right one. It would be an interesting study to trace the development of the common law as to the responsibility of individuals for damage done by animals belonging to them, but I do not propose to do anything of the kind. Practically all the authorities on this point have been considered in *Manton v. Brocklebank* (1), where they are all very fully set out. I shall endeavour to state my view of the law without reference to these cases, because I think that the position will be better appreciated if stated in this way without reference to the authorities.

E It seems to me that the responsibility of individuals for damage done by animals belonging to them has run on quite separate lines, one depending on the law of trespass, the other depending on the responsibility of individuals who are owners of dangerous animals. As to the law dealing with dangerous animals, they may be divided into two classes; first, animals *feræ naturæ*, such as a tiger or a gorilla, which obviously are animals dangerous to mankind, although occasionally they F may be tamed. The person who keeps animals of that class must keep them at his own risk, and it is his duty to keep them under control, otherwise, if damage is done by them, the owner would be responsible. The other class is the class of domestic animals represented by the dog, cow or horse, animals not naturally dangerous to mankind but which may develop dangerous propensities. Unless and G until they do develop those dangerous propensities, the owner is not bound to keep them under control and would not be responsible for any damage done by them when trespassing or not under his control. It is quite plain, however, that this class of animal may cease to belong to what may be termed the protected class where the owner would not be responsible for damage done, if to the knowledge of the owner, the animal has indicated that it has some particularly dangerous disposition. When this is the case, the animal passes from the protected class to the unprotected class; hence the popular theory that every dog is entitled to his H first bite. With that branch of the law we have nothing to do, because it is impossible to say that the domestic cat comes within the unprotected class.

I I now pass to the law relating to trespass. Speaking generally, an owner is liable for an act of trespass causing damage committed by an animal belonging to him. There are certain exceptions which may be said to be due to the common-sense view of the common law as applied to existing conditions. Among these exceptions is the case of the dog, and for the reasons why the owner is exempted from the class for which the owner is responsible I cannot do better than refer to the statement of WILLES, J., in *Cox v. Burbidge* (2), where he says (13 C.B.N.S. at p. 440):

“I can quite understand a distinction being drawn between animals which from their natural tendency to stray, and thereby to do real damage, require to be and usually are restrained, and a dog, which is not usually kept confined:

and there may be good reason besides 'de minimis non curat lex' why an action should not lie against a man whose dog without the will of its master enters another's land, though it is different in the case of a horse or an ox."

To expand the reasoning a little, one realises why the owner of a horse or an ox should be held responsible, because any trespass by such an animal must cause some substantial damage, even when it is merely wandering about and eating what attracts it. It is different with the case of a dog, because the trespass by a dog following its natural propensity to roam about is not likely to cause substantial damage, although it might do so in some particular case as, for example, if it got loose in a well tended garden. It does, however, seem to me that, in developing the law, those persons who have administered it have had regard to the ordinary consequences of a dog's action. They have taken into account, as appears from the judgment of WILLES, J., in *Cox v. Burbidge* (2), that a dog, being a useful animal, is not generally shut up, but is allowed a reasonable amount of liberty, and if those are the underlying reasons why a dog is put into an exceptional class of animal in respect of whose trespass or escapades the owner is not responsible, I can see no reason why a distinction should be drawn between a dog and a cat. Every argument that has been put forward on behalf of a dog applies equally to a cat. It is not material when dealing with the question of trespass to apply the test of animals *feræ naturæ* to cats, or to consider whether the cat has a natural propensity to pursue pigeons. In dogs there is a natural propensity to chase sheep; and counsel for the plaintiff has admitted that the true test is whether the animal is dangerous to mankind. In my opinion, it is quite impossible, apart from legislation, to suggest that the owner of a cat is responsible for a trespass which results in damage to an adjoining owner's pigeons. For these reasons, I think that the appeal fails and must be dismissed with costs.

WARRINGTON, L.J.—I agree.

ATKIN, L.J.—I agree. I think it is a very interesting question, and, if it had not been discussed two years ago in *Manton v. Brocklebank* (1), one would, perhaps, have to deal with the authorities; but in that case the authorities were reviewed from Exodus downwards. In this case, I think it is unnecessary to take the authorities further back than *Manton v. Brocklebank* (1). It appears to me, from the result in that case, that the result in this case, as has been stated by my Lord, follows, and I have nothing to add, and could not add anything to enforce what my Lord has stated. The only point on which I should like to say just one word is this. I do not think it has been argued that the defendant here is liable merely because he is the owner of a domestic animal which has a natural propensity to injure pigeons, because the animal not being one of the class *feræ naturæ*, *Manton v. Brocklebank* (1) makes it plain that the mere fact that an animal *mansuetæ naturæ* has a natural propensity to cause damage in some circumstances is not sufficient to make the owner liable. In such cases the liability arises only where the owner is liable for damage done when such an animal is trespassing. In those cases where the owner is liable for an animal *mansuetæ naturæ* which trespasses it is material, I think, to consider whether the damage done when trespassing is damage which is the result of the natural propensity of the animal. If it is the result of an abnormal propensity not known to the owner, then the latter would not be liable, even although the animal were trespassing. But in this particular case, the question arises whether the owner is liable for damage done by a cat when trespassing. Now the owner of a dog is not liable for damage done by a dog when trespassing, though the damage it does is the result of the natural propensity of a dog of that species. For the reasons given by my Lord, it appears to me that a cat must be placed in the same category as a dog as far as the question of the liability of the owner of the cat for damage done by the cat when trespassing goes, even though the damage, as is the case here, is the result of the

A natural propensity of the cat. In these circumstances, it appears to me to follow that the owner is not responsible. Therefore I think that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Hamblins, Grammer & Hamlin*, for *Harland & Plackett*, Leeds; *Collyer-Bristow & Co.*, for *Alfred Masser*, Leeds.

[Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.]

ANDERSON v. EQUITABLE ASSURANCE SOCIETY OF UNITED STATES

D [COURT OF APPEAL (Bankes, Warrington and ATKIN, L.J.J.), February 9, 10, 11, 12, 1926]

[Reported 134 L.T. 557; 42 T.L.R. 302]

Insurance—Payment of policy money in foreign currency in England—Payment in sterling at appropriate rate of exchange—Profits ascertained at former rate—Estoppel—Election.

E By a policy of insurance on the life of the assured, issued in 1887 by the defendants, the assured agreed to pay in London an initial premium of 2,149.80 Reichsmarks, and thereafter quarterly payments of 570 Reichsmarks for twenty years, and the insurers undertook to pay in London 60,000 Reichsmarks on the death of the assured. The policy, which, it was agreed, was to be governed by English law, became fully paid in 1907. Throughout the period of the policy the assurers kept their accounts and calculated the profits due to the assured without reference to any depreciation of the mark which might occur. After the war of 1918 a very great fall occurred in the value of the mark. In 1922 the assured died. At about that time the Supreme Court at Leipzig held that when a debt had been incurred in gold marks a creditor could not be compelled to accept payment in the depreciated paper marks then current. In an action by the widow of the assured for a declaration that she was entitled to payment of the sum assured, with the due profits, at a rate of exchange appropriate to gold marks,

H **Held:** the decision of the court at Leipzig, relating, as it did, to the "valorisation" of debts and not to the currency value of the mark, did not affect the application to the present case of the general rule, applicable to commercial contracts subject to English law where the payment was to be made in this country of a sum in foreign currency, that the amount to be paid in this country should be paid in sterling at the rate of exchange existing on the day when the payment became due with reference to the particular currency to which the contract referred, i.e., in the present case, paper marks; the assurers were not estopped from paying at this rate by having previously paid profits to the assured at parity, nor by so doing had they elected to make the final payment under the policy at the rate appropriate to gold marks; and, therefore, the plaintiff was not entitled to the declaration which she sought.

Re Chesterman's Trusts (1), [1923] 2 Ch. 466, applied.

Notes. Referred to: *Buerger v. New York Life Association* (1927), 43 T.L.R. 601; *Heisler v. Anglo-Dal, Ltd.*, [1954] 2 All E.R. 770.

As to payment under life policies, see 22 HALSBURY'S LAWS (3rd Edn.) 285 et seq.; and for cases see 29 DIGEST 387 et seq.

Cases referred to:

- (1) *Re Chesterman's Trusts, Mott v. Browning*, [1923] 2 Ch. 466; 93 L.J.Ch. 263; 130 L.T. 109, C.A.; 35 Digest 169, 12.
- (2) *Smith v. Hodson* (1791), 4 Term Rep. 211; 100 E.R. 979; Smith, L.C. 139; 4 Digest 404, 3681.
- (3) *Scarf v. Jardine* (1882), 7 App. Cas. 345; 51 L.J.Q.B. 612; 47 L.T. 258; 30 W.R. 893, H.L.; 36 Digest (Repl.) 489, 588.
- (4) *Codling v. John Mowlem & Co., Ltd.*, [1914] 3 K.B. 1055; 83 L.J.K.B. 1727; 111 L.T. 1086; 30 T.L.R. 677; 58 Sol. Jo. 783; 7 B.W.C.C. 786, C.A.; 36 Digest (Repl.) 217, 1147.

Appeal from an order of ACTON, J.

The plaintiff, a widow, claimed a declaration that on the true construction of a policy of assurance issued by the defendant society on Feb. 16, 1887, she was entitled to payment by the defendant society of the amount of the policy and accrued profits, namely, 62,524.80 gold marks with interest. The defendants claimed to be entitled to pay that amount in paper marks, one billion marks being at the time equivalent to one English shilling. The policy was a semi-tontine policy on the life of Robert Anderson, the plaintiff's husband. In consideration of the payment in London of an initial premium of 2,149.80 Reichsmarks and thereafter quarterly payments of 570 Reichsmarks for twenty years, the defendants agreed to pay to the plaintiff 60,000 Reichsmarks sixty days after notice and proof of the death of Robert Anderson. The policy was negotiated in St. Petersburg by a sub-agent of the manager of the Hamburg branch of the defendants' business. From the date when the policy became fully paid, which took place in 1907, there were certain profit-sharing rights. Robert Anderson died on Mar. 24, 1922, and the plaintiff then claimed the amount of the policy and accrued profits. It had been agreed that the plaintiff's interest under the policy should be governed by English law. At the trial Dr. Paul Barandon, an eminent German jurist and German government agent at the Anglo-German Mixed Arbitral Tribunal, gave evidence for the plaintiff to the following effect. From 1871, when the German Empire was established, to the outbreak of the war of 1914-18, a Reichsmark was one-tenth of a gold coin to be coined at the rate of 139½ to one pound weight of pure gold. Creditors were entitled to demand payment in gold, though in practice notes backed by gold were accepted. Notes were made legal tender irredeemable until further order, by the emergency laws of August, 1914. The loss arising from the depreciation of the mark was at first borne by the creditor, but at a later date, which could not precisely be defined, the position became impossible. Article 242 of the Civil Code required the observance of the principles of good faith and custom in claims between debtor and creditor, and the conflict between this provision and the principle of the emergency laws of August, 1914, came to be considered by the German courts in November, 1923. The Supreme Court at Leipzig then held that, when a debt had been incurred in gold marks, a creditor could not be compelled to accept payment in paper marks at their then value, but that the debt must be "valorised" in such a way as to have regard to the rights of both parties. This decision was regarded, not as making new law, but as being declaratory of the law as it then existed. In 1924 Germany adopted a gold basis again.

ACTON, J., was of opinion that the contract expressed by the policy was not expressed sufficiently clearly to be a "gold mark" contract, although neither party to it ever contemplated that it would ever be dealt with on any other basis; but that the defendant society, with their eyes open to the facts, had elected to treat it as such in such circumstances and over such a period of time that they had waived their right to treat it otherwise. The plaintiff was, therefore, entitled to a declaration that the defendant society were liable to pay her the sum insured on the basis that 20.43 Reichsmarks were the equivalent in value of the £ sterling, and the surplus or profits upon the like basis, i.e., upon the basis upon which they

A had in fact been calculated. He entered judgment accordingly, with costs, and the defendants appealed.

W. A. Jowitt, K.C., and St. John G. Micklethwait for the defendants.

Sir Malcolm Macnaghten, K.C., and Theobald Mathew for the plaintiff.

B **BANKES, L.J.**—This is an appeal from a judgment of ACTON, J. One cannot help feeling, taking the view which I take, that one is bound to give a decision which, in this particular case, works great hardship upon the plaintiff. Speaking for myself, I hope, in spite of what has been said (which I hope will be forgotten), that this rich and powerful company may see its way to do something eventually to mitigate the hardship to the plaintiff. That is, of course, by the way; all we have to do is to deal with the questions of law which are raised by this appeal.

C The action is brought by the executrix of the deceased man upon a policy which he took out with the defendant company in 1887. The policy provided, inter alia, that it should be governed by English law, and that the payment of the policy moneys should be made at the office of the society in England, but the policy itself and the policy moneys were expressed to be in German currency. The amount insured was 60,000 Reichsmarks. During recent years there has been a number of cases before the courts in which difficulties have arisen owing to the enormous depreciation in the rate of exchange in some of the European countries. In my experience, I have never heard the proposition challenged that, where a person has entered into an ordinary commercial contract which is to be governed by English law and has entered into an obligation to pay in foreign currency a certain sum in this country, the true construction of the contract is that when the time comes for payment the amount having to be paid in this country will be paid in sterling, but at the rate of exchange of the day when payment is due, applicable to the particular currency to which the contract refers. I have heard nothing in this case which would lead me to doubt for a moment that that is the true and real construction of this contract. I think that counsel for the plaintiff agrees with my view to this extent, that upon the true construction of this contract, the policy moneys become payable in this country in sterling, and the only question as between the view that he is contending for and my view is at what rate of exchange is the amount of the payment to be calculated. If it is calculated at the rate of exchange of the day, then the view taken by the insurance company is correct; but counsel contends, as I understand it, that upon the true construction of this contract, that question does not become material, because what the parties were contracting about was gold Reichsmarks, and that it was quite immaterial, therefore, what the rate of exchange of the German mark was on the day when payment became due. The answer to that, apart from authority, would seem to be that what the contract speaks about is Reichsmarks, not gold Reichsmarks, as tokens of the exchange. Taking that point by itself, I think the case is governed by the authority of *Re Chesterman's Trusts* (1). There the contract was to pay Reichsmarks. The argument for the mortgagee was exactly the same up to this point as that of counsel for the plaintiff in the present case, namely that the contract was for gold Reichsmarks. That contention was not accepted either in the court below or in the Court of Appeal, and LORD STERNDALÉ, M.R., says ([1923] 2 Ch. at p. 478):

I "The appellant's contention really amounts to this: That in these mortgages, Reichsmarks are to be read, not as units of account, but coins of one-tenth the value of the gold coin."

That contention was rejected. I think upon authority, therefore, as well as on my own view, it must be rejected here. But, counsel for the plaintiff says—I do not agree with his view that that authority can be read as an authority in his favour—that case is distinguishable from the present case, because after that decision was given, there was a judgment of the German court at Leipzig which interpreted the German law in a way in which it had not been interpreted before *Re Chesterman's*

Trusts (1) and so was not before the court in that case. *Re Chesterman's Trusts* (1) is relied on by counsel for the plaintiff who says that it did at least decide that one test of what the parties were contracting about in this foreign currency was whether the currency was legal tender in the country of origin. His contention is that the effect of the Leipzig judgment on the German law was that, as from the date of that judgment, the mark was no longer legal tender, and that in those circumstances he is entitled to contend, not only that *Re Chesterman's Trusts* (1) is not binding on us in this case, but also that, if he is not right in his contention that the contract was for gold Reichsmarks, at any rate it was a contract for what, according to German law was, after the Leipzig decision, the equivalent of Reichsmarks. Of course, that could not be ascertained until some decision had been given with reference to the obligation under this particular policy.

In my opinion, that decision and the law as then declared is immaterial for the purpose of this case, because I think the true interpretation of that decision is that it does not affect the currency and does not affect the question of legal tender. What it does affect is what is called in the decision the valorisation of the debt. In substance, I think the effect of that decision was to rip up the transaction between the parties, and to say that so far as the amount or the obligation to pay is concerned, it shall no longer be the contract amount, but that there shall be substituted for that contract amount an amount to be ascertained according to what is reasonable and in good faith. When once the debt is valorised in that sense, then the amount of marks to be tendered will be the amount which according to their face value is sufficient to meet the valorised debt. That being so, it seems to me that the contention founded upon that decision has no material bearing on the question which we have to decide. In my opinion, to quote the language of the witness who gave his evidence very clearly when he expressed himself shortly but very precisely in explaining the position, "mark is mark." In my opinion, the true construction of this contract is that the insurance company undertook to pay at their office in this country upon the due date, 60,000 Reichsmarks at the rate of exchange applicable to the German mark on the day of payment.

I ought now, perhaps, to deal with the point upon which we have not heard much in this court. As I understand the judgment, the learned judge came to the conclusion, although the witness had never been forced to any admission on the point, except that he really did not know, that for their own purposes in calculating the amount of profits attributable to this policy the insurance company had calculated the profits divisible among the various policy holders either at the gold standard, if that expression may be used, or at the par value of the mark, and that having done that they should not afterwards be heard to say that they should not pay the amount of the policy moneys arrived at by the same method. With great submission to the learned judge, I do not know whether the facts supported his conclusion or not, but I feel sure that the principle which he applied had no application to the particular facts of the case. The principle which he summarises as the law which does not allow a man to blow hot and cold is stated in the notes to *Smith v. Hodson* (2) in SMITH'S LEADING CASES at p. 146:

"The important principle, which *Smith v. Hodson* (2) is here inserted as establishing, is, that a man who has his option whether he will affirm a particular act or contract, must elect either to affirm or disaffirm it altogether: he cannot adopt that part which is for his own benefit, and reject the rest. He cannot, to use LORD KENYON'S expression, 'blow hot and cold.'"

Then he quotes LITTLETON "Electio semel facta patitur regressum" (Co. Litt. 146n). "Quod semel placuit in electionibus amplius displicere non potest": see per LORD BLACKBURN in *Scarf v. Jardine* (3). The question whether an election has been made may be one of fact: see per ATKIN, J., in *Codling v. John Mowlem & Co., Ltd.* (4), [1914] 2 K.B. at p. 66. The principle as there stated may depend upon an estoppel properly so called; it may depend upon an election properly so called; it may depend upon the terms of the contract. I am not at all sure that there is

A not a further view that the court will not allow a man from the equitable point of view to take one line to his own advantage up to a point to the knowledge of the other party to the contract, and then whip round and take another view which he had up to that moment repudiated, because it was to his advantage. But we need not consider that, because in this case there are no materials, it seems to me, to which to apply the doctrine from whatever point of view it is regarded. The policy
B was a partial tontine policy; at any rate, it contained a provision that the policy holder should be entitled with others to a share of the divisible profits, and the policy itself contained conditions. Under those conditions the policy holder had an opportunity of election as to how he would desire to have his share of the profits on the completion of the tontine period to be dealt with, and a formal notice was sent out year by year, because they were annual profits divisible, asking
C him to declare his election as to which, and in what way, he desired the annual dividends applied. For the purpose of this case we must assume that no intimation was given of election, and in those circumstances the provision is that the amount should be applied in accordance with the terms of the general policy. When one turns to the general policy, cl. 7 is the material one. That provides that

D "this policy during its continuance shall be entitled to participate in the distribution of the surplus of this society by way of increase of the amount insured according to such principles and methods as may from time to time be adopted by this society for such distribution, which principles and methods are hereby ratified and accepted by and for every person who shall have, or claim, any interest under this contract."

E It seems to me, in these circumstances, that it was a term of the contract that if no election was made the profits should be divisible at the discretion of the society in this sense, that they were distributable according to such principles and methods as they from time to time adopted. That means to say, that they adopt one method one year, and another method another year, and so on. That being the contract, it seems to me that it is almost impossible to conceive circumstances
F in which the doctrine as applied by the learned judge could apply. But apart from that, and assuming that the method adopted was one which gave the assured the full benefit of the particular exchange in ascertaining the amount of the annual profits, how can the doctrine be applied merely because, in distributing the profits as among the policy holders, the society were more generous with regard to this particular policy than possibly they need have been? It seems to me that in those
G circumstances, unless one can show something in the nature of an actual estoppel, it does not lie in the mouth of the man who has been receiving presents year by year to say: "You must keep on giving me those presents, and when it comes to paying me the final amount you must treat me as generously as you have been doing in the past, apart from your contractual obligations." With respect, I cannot accept that argument. It does not seem to me that the facts here warrant
H the application of the doctrine of blowing hot and cold, from whatever point of view you regard that doctrine.

The last doctrine which counsel for the plaintiff raised was the question of account. I think when this is looked into, it is only the first question approached from a different aspect, because what is the good of an account if all it establishes is that the deceased policy holder was treated generously, or, if you please, contractually, in receiving or being allotted the amount of this profit year by year? What he did was to ask that the amount should be added to his policy, and being added to his policy, it became payable in the same way as the policy money. It is part of the policy money. There cannot be two obligations, one to pay the original principal policy money at one rate of exchange, and another contract to pay an amount with added profits at another rate of exchange. There is but one contract, and that applies both to the policy money and to the sums of money which are added to the policy money annually by way of profits. For these reasons, I think the appeal succeeds, and that judgment must be entered for the defendants, but

in saying that, I again repeat that I hope this great and powerful company, having had their rights decided, may show some considerations for the representatives of this policy holder. A

WARRINGTON, L.J.—I am of the same opinion. I join in the regret which we all must feel in respect of the extreme hardship which has fallen upon the plaintiff in consequence of a notorious collapse, in the material years, of the German currency, and I join also in the hope that the rich and powerful company, who are the defendants, having obtained the decision they have asked for as to their strict legal position, will see their way to do something substantial to mitigate that hardship. But that is by the way only; our duty is confined to the determination of the strict legal rights between these parties. B

The contract in the present case was a contract to pay in a certain event so many Reichsmarks. The Reichsmark is a unit of account for the purposes of German currency. Except for one point, which I will mention directly, the case seems to me to be entirely indistinguishable from *Re Chesterman's Trusts* (1). In that case the contract in question was a contract of mortgage whereby, in a mortgage of an English trust fund, the mortgagor covenanted to pay so many German marks to the mortgagees, an English firm, and it was provided, in the way usual in an English mortgage, that upon that payment being made the mortgagor should be entitled to redeem. RUSSELL, J., and this court rejected the argument addressed to both those courts, and addressed to us, that by Reichsmarks was meant, not the unit of currency, but Reichsmarks payable in gold, or, as it was put, being one-tenth of the gold piece, which is called a ten-mark piece. In the judgment of LORD STERNDALE, M.R., it will be found, and, indeed, in the judgments of all three of the judges who constituted the court on that occasion, that the liability of the mortgagor was confined to the payment of a specified number of Reichsmarks according to the rate of exchange for that unit of currency, or unit of exchange at the time when the payment ought to be made. I am quite unable up to this point to distinguish this case from that case, and, therefore, the general principle thereby enunciated must be applied to the present case, and the payment having to be made in London would be a payment in sterling at such rate of exchange as prevailed upon the day at which the payment ought to be made. C D E F

The point which does distinguish this case from *Re Chesterman's Trusts* (1) is a curious one. Sometime between 1920 and 1923—the German lawyer who gave evidence could not specify more precisely—the mark had so depreciated in value that the court at Leipzig, resting itself upon a provision of the code to the effect that all contracts were to be performed according to good faith and custom, came to the decision that it was not according to good faith to tender in performance of a mortgage contract (that was the particular case with which they were dealing) the precise number of marks which corresponded to the amount of the debt as specified on the contract, but that in order to comply with the requirements of that section of the Code, and to act in good faith, the debt must be valorised, that is to say, some arbitrary value—arbitrary only in this sense, that it is not specified in the contract, but is a value to be fixed by the court in the interests of both the payer and the payee—must be put upon the debt, and that the number of marks which corresponded with that value alone would discharge the obligation. The result of the decision is expressed by Dr. Barandon in these terms: “The court decided that one ought not only to take into consideration the provisions of the mint laws [by that he must of course mean the laws relating to currency and so forth in Germany] but also that provision of the German Civil Code, para. 242, dealing with the requirements of good faith; and decided, furthermore, that the debt had to be valorised, and only against payment of a valorised debt the mortgagor could claim cancellation of the mortgage of the Land Registry.” I think it is perfectly plain that the decision did not in any way affect or interfere with the fiscal law which fixes what shall be the currency of the country. He distinguishes between those laws and that which was applied by the court. It in no way inter- G H I

A fered with that. But in the extreme circumstances then prevailing it said that a value must be put upon the debt, and the obligation of the debtor was to be discharged only by payment of that value in accordance with the ordinary currency laws.

In my opinion, this contract which we have to deal with—which is an English contract, to be performed according to English law—has to be carried out in accordance with English law, and the decision of the court in Leipzig is not one which affects its performance. I may say, by the way, as a matter of some interest, that the decision, as Dr. Brandon told the court, of the Leipzig court, was found to create so much inconvenience and so much uncertainty, both on the part of the debtor and the creditor, that the Reichstag have thought fit since to pass an Act dealing definitely with debts, according to certain classes and categories, and fixing in those classes or categories the amount at which those debts are to be valued for the purpose of payment in paper marks. In my opinion, therefore, the law of Germany, as expressed in the Leipzig decision, does not affect the performance of this contract, and, therefore, notwithstanding that additional fact, this case is indistinguishable from *Chesterman's Case* (1), and, on the construction of the contract, the obligation will be discharged by the payment of such sum in sterling as represents, at the rate of exchange of the day, the marks then current in Germany, which were paper marks.

There is only one point upon which one ought to say something, because although not much has been made of it in this court, the learned judge founded his decision in favour of the plaintiff upon it. It was this. In arriving from time to time at the sum to be added to this policy as the share of the policy holder in the profits of the society, the defendants valued their assets, and—this is the more important point—they valued their contingent liabilities, on a conservative basis; that is to say, where their contingent liabilities were in marks they have not valued them, having regard to the extreme depreciation of the mark, but they have taken the ordinary par value without reference to that extreme depreciation. It is assumed that they have acted on that principle, and that on that assumption they have calculated the amount of the profits due to their several policy holders, including the plaintiff's husband, the assured; but I can find in that practice of the company nothing which amounts to any election, still less is there anything which amounts in law to an estoppel, something which would compel them to act on the same footing now when the time for payment has arrived. That that is so I think is made quite clear by the production of what is called an ordinary policy of the company which regulates the right of the assured under the policy to participate in the profits, because it provides that the policy holder shall be entitled to participate in the distribution of the surplus of this society by way of increase to the amount insured according to the principles and methods as may from time to time be adopted by the defendants for such distribution, "which principles and methods are hereby ratified and accepted by and for every person who shall have or claim any interest under this contract." It seems to me, therefore, that the assured was entitled only to profits, however they might be ascertained, if they were ascertained in accordance with the principles and methods from time to time adopted by the society. But the result of that was to show that the assured was entitled to so many marks, and being entitled to so many marks, and so many marks in addition to the sum assured, it seems to me that the same principles which apply to the sum assured must apply to the marks distributed as the result of participation in the profits.

With regard to the suggestion that the plaintiff is entitled to an account of profits, I have nothing to add to what was said by BANKES, L.J., except this. It was suggested that it might be to the advantage of the plaintiff to have the amount due to her in respect of participation in the profits ascertained by the result of taking an account, because, if it were so ascertained, the amount might then be payable at some late date when the German currency had been stabilised, and she would not be affected by the depreciation of the Reichsmark. All I can say

about that is that it is not the practice of the court to direct an account merely for the purpose of having an amount ascertained at a later date where there is not some reason to suppose that the account already taken has not been accurately taken. The object of the account is to ascertain what is really due. I, therefore, agree that the appeal ought to be allowed and that judgment must be entered for the defendants. A

ATKIN, L.J.—I also agree that the appeal should be allowed, and I should not add anything if it were not for the fact that we are differing from the learned judge who, on one part of the case, appears to have taken a very strong view in favour of the plaintiff's case. B

On the first part of the case, namely, the law applicable to the case where a man contracts to pay to his creditor in England a sum expressed in a foreign currency, the learned judge was in favour of the defendants, and I do not think that there is any reason further to discuss that topic, because in this court I conceive that we are bound by the decision in *Re Chesterman's Trusts* (1), and it seems to me to be of no advantage to discuss that case. It binds us, for it is not, I think, distinguishable upon the ground suggested, namely that the court in that case acted upon the supposition that the debts were in fact payable in Germany. C D

In my opinion, the judgment, at any rate, of the majority of the court did not turn upon that view of the case.

The only other matter which I think requires a word or two, is the view of the German law which is now put forward, no doubt with complete accuracy, by the learned expert who was called on behalf of the plaintiff, namely, the section of the code which compels the court in certain cases to valorise the debt so that it is not discharged by the tender of paper notes in marks to the face value of the debt. The question is, whether that rule of German law can affect the decision in *Re Chesterman's Trusts* (1), which is that a debt payable in England in a foreign currency is to be paid in sterling at the rate of exchange of the day on which it was due in this country. In my opinion, it cannot. It seems to me to be impossible to suppose, and I think it is not proved, that that law in any way affected the currency value of the mark, or, indeed, affected what we know as the legal tender. It seems to me to be obvious that that is a law not affecting the currency, but one affecting the particular contracts that come within the scope of it, and it is conceded that in applying the law, contracts would be treated in a different way in accordance with the nature of the contract, and, as I gather, the circumstances of the parties to the contract. Under that law, a paper mark in Germany may now completely discharge a debt at its face value if it has been contracted since the fall in the mark; but in respect of other debts, the debts can be discharged by a tender of marks to the nominal value, at varying rates. In other words, it is the debt that is valorised and not the currency; and, if that is so, it is obvious that the German law cannot affect the operation of the rule of English law which is laid down in *Re Chesterman's Trusts* (1). It is true that the odd result is arrived at that the defendants are better off because they made a debt in marks payable in England than they would have been if they had made the debt in marks payable in Germany, but that is one of the advantages that they get under the terms of their bargain, and that advantage they are entitled to have. E F G H

The view upon which the learned judge decided was upon what appears to me to be a combination of estoppel and election. With great respect to the learned judge, he has expressed his proposition of law in terms which seem to me to combine the two principles, and to assume that it is necessary to show that the assured in this case acted upon some representation made to him by the defendants. It is not very easy to follow the exact argument that was put forward by the plaintiff and accepted by the learned judge, but I think I do it justice in saying that it is, that in accordance with the terms of the policy, the assured I

“shall be entitled to participate in the distribution of the surplus of this society by way of increase of the amount insured, according to such principles and

A methods as may from time to time be adopted by this society for such distribution."

I think what is said is, that in order to estimate the profits of the company, two things have happened—the company, in estimating its profits or surplus—as the word is used in the policy—had to take into account its contingent liabilities or its reserves upon the policies which were current, and in estimating those liabilities in respect of policies which they had to pay in marks, they estimated their liability on the footing that eventually they would have to pay their mark policy at parity, that is to say, on a gold basis, and in that way they got their profit or surplus for the year, which they would calculate no doubt in America in dollars. Then it is said that under the policy they had to distribute that surplus among the policy holders, and it is said that for that purpose it must be assumed that each policy became entitled to a proportionate share of so many dollars, and that those dollars, for the purpose of this policy were converted into marks again for the purpose of indicating what increase should be attributed to the policy year by year. Again it is said that that increase was appropriated to this policy at parity, and that the profits having been calculated or distributed in that way at parity, the company are bound to pay the increase so arrived at, when they come to pay, also at parity.

D I think that the complaint, with great respect to what has been said, is not that the assured has been treated generously, or too generously, during the currency of the policy; as I understand what is said, it is that the profits coming to the policy are reduced by the fact that the exchange is taken at parity and not taken at the exchange for the day. I think that that would be so. Then it is said—and I understand that this is the ground for taking the account—that if you were to take an account upon the footing that is adopted in payment, namely of the exchange, the profits and the increases would be very much greater. With great respect, I think that that argument gives no effect at all to the terms of the clause in the policy, which merely provides that the policy is to participate in the distribution of the surplus by way of increase of the amount insured according to such principles and methods as may from time to time be adopted by the society for that distribution. It appears to me that the society is perfectly entitled to estimate its future liabilities on the view that eventually it will have to pay at parity, and it is entitled to maintain its reserves on that footing. Indeed, although I speak as a person who knows nothing about the insurance business, of which the fifty-two directors of this society know very much, I should have thought that any other course would probably be an unbusiness-like course to adopt; and although, no doubt, that limited the amount of surplus to which the policy holders are entitled, it ensured stability, and it increases eventually the value of the insurance, marked by the stability of the insurance company. So much for the estimation of their surplus.

H Then comes the question of how they were to distribute it, and it appears to me that they were not obliged and they did not in fact, so far as I can see from the evidence, purport to distribute so many dollars to each policy holder. What they did was to adopt a particular method of making each policy derive a benefit from the surplus. They might adopt any reasonable course that they thought fit, and in this case they seem to have taken a fixed ratio for each policy, or perhaps for each part of the policy. In this case it appears that for years it had been something like 4-3 per cent., by which they had increased the value of the policy, subject to a deduction for mortality costs which I do not think matters. If they choose to fix the participation in that particular way, it appears to me that nobody can complain of it. That was done, and the reserve was maintained on that footing; and if that is so, it appears to me that the contract was strictly performed. But supposing that they do that, is there any reason, if they do it, to say that if they adopted that method for the purpose of calculating the profit, they must, therefore, adopt the same rate of exchange for the purpose of payment? It appears to me that that is quite an unreasonable view. I eliminate estoppel altogether, because

it seems to me that here there was no communication to the assured of the fact either that the profits were estimated on the basis of parity, or that there was any distribution of the profits to the policy on that footing. There is no evidence that the assured ever knew anything at all about it. All that he got, if he did get it, was a statement of the precise amount upon their calculations which they would allow him to take in cash, or by which they would increase his policy. There is nothing to indicate that he inferred, or would infer from that, that that was being done on the footing of parity, or that he altered his position upon that basis, and, therefore, estoppel seems to me to be entirely gone. On the question of approbation and reprobation, it seems to me to be impossible to say that, because a man who has to pay at a rate of foreign exchange in future years chooses in this year and next year and until his liability is complete to estimate his liability on the terms that the exchange remains constant, he is precluded thereafter from paying at what is the proper rate of exchange. It would be ridiculous to suppose that that view is correct, and business, to my mind, would be made impossible if that view were adopted. It seems to me to be quite consistent with good and careful business-like management, and, therefore, there is nothing objectionable in it.

For these reasons, it appears to me that the defendants are right in their construction of the policy; but as we were invited to say something about the position of the parties, I should like to say that this policy was taken out in 1887 by the assured in favour of his wife, and it is perfectly obvious that he intended to make provision for her. I suppose that at that time, or at the present time, there is no society through which a man could more reasonably rely upon being able to make a thoroughly reliable and stable provision for his wife than the Equitable Life Assurance Society of the United States, by taking out a policy in that company. Owing to the law of this country, those expectations have entirely failed, and the expectation which the assured might reasonably have had of making a provision amounting to something like £3,000 sterling for his wife, has been reduced to a sum which cannot be expressed in English coinage. That is due to the operation of our law. It would not be the case in Germany; whether it would be the case in the United States, I do not know. But it appears to me that the directors of this great society, who have received very large sums from the assured, might consider whether they might not pay their bond at its intrinsic value and not at its face value, or rather, they might consider whether the face value and the intrinsic value of the policies of the Equitable Life Assurance Society of the United States should not be one and the same thing.

Appeal allowed.

Solicitors: *Burn & Berridge; F. J. Macnaghten.*

[Reported by T. W. MORGAN, Esq., Barrister-at-Law.]

A

CUNARD STEAMSHIP CO., LTD. v. BUERGER

[HOUSE OF LORDS (Lord Sumner, Lord Parmoor, Lord Phillimore, Lord Carson and Lord Blanesburgh), May 13, 14, June 21, 1926]

B

[Reported [1927] A.C. 1; 96 L.J.K.B. 18; 135 L.T. 494; 42 T.L.R. 653; 17 Asp.M.L.C. 92; 32 Com. Cas. 183]

Shipping—Deviation—Overcarriage of goods—Discharge of goods at wrong port—Effect on conditions in bill of lading limiting shipowner's liability—Construction of conditions contra proferentes.

C

In March, 1919, the respondents shipped eight cases of cloth, the value of which was about £3,000, to Odessa in the appellant company's steamship. By cl. 2 of the bill of lading the appellants reserved liberty to deviate from the intended voyage "although in doing so the vessel may be altogether departing from the customary or advertised route from the port of shipment to the port of discharge or may be making in substance another and different voyage or voyages". Upon the arrival of the ship at Constantinople it was discovered that the Soviet army was approaching Odessa, and it was agreed between the representatives of the parties that five cases should be discharged at Batoum and that three cases should be discharged at Constantinople on the return voyage. The five cases were not discharged at Batoum, but remained on board when the ship left that port and had never been heard of since. The three cases were landed at Novorossisk, the ship's last port of call, and after a period of two months nothing more was heard of them. In an action by the respondents to recover damages for the non-delivery and loss of the eight cases,

E

Held: stipulations in a contract of carriage limiting or negating the liability of carriers, by land or water, for loss of or damage to goods entrusted to them for carriage did not apply when such loss or damage had occurred outside the route or voyage contemplated by the parties when they entered into the contract of carriage, unless the intention that such limitations should apply was expressed in clear and unambiguous language, which was not so in the present case; when the ship left Batoum it was not a deviation in the course of the agreed voyage between the port of shipment and the port of destination, but the start of a new voyage after the agreed voyage had been finally determined; and, therefore, the overcarriage of the five cases beyond Batoum constituted such a deviation from the contract voyage that cl. 2 of the bill of lading, which must be construed contra proferentes, did not apply, but the appellants were subject to the ordinary liabilities of a common carrier, and so were liable to the respondents for the loss of the goods.

G

Held, further: the discharge of the three cases at Novorossisk constituted such a deviation from the contract of carriage that the conditions and exceptions contained in the bill of lading limiting the liability of the appellants with regard to these goods had no application.

H

Notes. Considered: *The Albion, France Fenwick and Tyne and Wear Co., Ltd. v. Swan, Hunter and Wigham Richardson, Ltd.*, [1953] 2 All E.R. 679. Referred to: *Rotterdamse Bank N.V. v. British Overseas Airways Corpn.*, [1953] 1 All E.R. 675.

I

As to deviation, see 30 HALSBURY'S LAWS (2nd Edn.) 293 et seq.; and for cases see 41 DIGEST 483-490.

Case referred to:

(1) *Glynn v. Margetson & Co.*, [1893] A.C. 351; 62 L.J.Q.B. 466; 69 L.T. 1; 9 T.L.R. 437; 7 Asp.M.L.C. 366; 1 R. 193, H.L.; 41 Digest 311, 1715.

Appeal by the defendants from an order of the Court of Appeal (SIR ERNEST POLLOCK, M.R., ATKIN and SARGANT, L.JJ.), reported [1925] 2 K.B. 646.

The facts appear from their Lordships' opinions.

Jowitt, K.C., and James Dickinson for the appellants.

Sir John Simon, K.C., and Van den Berg for the respondents.

The House took time for consideration.

June 21. The following opinions were read.

LORD SUMNER.—This was an action by owners of cargo, the respondents to this appeal, against voyage-charterers of the steamship *Verentia*, the present appellants, for non-delivery of eight cases of textile goods. Except for a small sum not now in dispute or material, ROWLATT, J., decided in the appellants' favour, but in the Court of Appeal the cargo-owners were held to be entitled to judgment for a large sum as the agreed value of the goods. The story of this adventure is curious.

The *Verentia* was, it is said, the first ship to pass the Dardanelles after the Armistice with a large general cargo for Constantinople and Black Sea ports. The plaintiffs, enterprising and hopeful export merchants, had shipped by her for Odessa eight bulky cases, worth nearly £3,000 under one bill of lading, and they sent out a Mr. Macdonald to meet the ship and represent their interests with regard to this and other cargo. On reaching Constantinople at the end of April, 1919, he found that the *Verentia* had arrived there, that French troops had evacuated or were just evacuating Odessa, and that, accordingly, the voyage to that port was to be abandoned. He was told by the appellants' agents that the ship would proceed to Batoum and Novorossisk, and, partly on their advice, he decided that Batoum would be the best port to which to send five of the cases. The other three he sold to a Stambuli firm. A question has been raised as to the contract terms for the altered voyage—namely, whether the bill of lading voyage was put an end to by consent and such goods as went forward were carried under a fresh contract on the terms of a common carrier's liability and without the protection of bill of lading exceptions, or whether the arrangement made was simply to substitute other destinations for Odessa in the bill of lading, that document remaining otherwise in force. Both courts below have found that the latter was the true arrangement, and with this I agree. Except by extreme inadvertence, I cannot imagine an arranged voyage of this kind being made without such terms, and it would require much stronger evidence than any that we have here to make such a case even plausible. When Mr. Macdonald asked for immediate delivery at Constantinople of the three cases sold to the Stambuli firm, he was told that they were stowed underneath a great quantity of other cargo, and that, if they could not be got at (as, in fact, they were not) before the *Verentia* sailed, they must go the round of the ship's Black Sea ports of call and would then be delivered at Constantinople on her return. For the other five, Batoum was agreed to be the destination.

Your Lordships have re-examined with much care the evidence, which was elaborately examined in the Court of Appeal, and I need not now review it in detail. At the trial, as is very usual, the whole of the correspondence which was forthcoming was by consent, along with sundry other documents, read as evidence of the truth of the statements contained in it without any objections as to admissibility, hearsay, and otherwise, and I think we are free to draw reasonable inferences from the facts thus appearing. The result is this. The *Verentia* reached Batoum without having parted with any of the cases. The five consigned to Batoum remained on board, when the ship left that port, and have never been heard of since. She did not bring them back to Constantinople, and nothing is known of their fate. The three cases which were to have been brought back to Constantinople were landed at Novorossisk, her last port of call, no one knows why, but it was done contrary to express instructions and without any evidence of necessity or even any attempt at an explanation. Two months afterwards they were still in the hands of the appellants' agents there, who wrote on Aug. 31, 1919, that they would be forwarded to Constantinople by the next ship. Nothing more has been heard of them. Though much has been made of the indignant letters of Mr. Macdonald, according to which Batoum (and Constantinople, too) must have been a den of thieves, and much also of the gradual advance of the Soviet forces, which eventually

A reached Novorossisk, it is noticeable that no proof of actual capture, seizure, theft or pillage of these cases has been offered, and the appellants' agents felt themselves so unable to affirm any of these things as facts that they refused, and properly so, to certify to that effect in order to assist a claim upon underwriters. The present action was not begun till April, 1924. To the plaintiffs' claim for non-delivery the defence was raised that, by the bill of lading, the defendants were not to be B accountable for any goods, which were not above the value of £20 per package, unless the value was expressed in the bill of lading and extra freight paid, a precaution which, rather short-sightedly, the plaintiffs had not taken. This was met by a plea of deviation in reply, and on the request of the defendants' solicitors a letter was written by the solicitors acting for the plaintiffs which stated as particulars of this plea that the deviation consisted of the carriage of three bales of cloth C past their destination, Constantinople, and five bales of cloth past their destination, Batoum.

An objection has been raised on these particulars which I must explain, so that it can then be briefly disposed of. It is a mistake to say, as was said in argument, that the Court of Appeal found that mere misdelivery had occurred, and then treated misdelivery as equivalent to a deviation. LORD HANWORTH, M.R., and D SARGANT, L.J., came to the conclusion that the three cases were not landed at Novorossisk for any temporary purpose, but as goods reaching their destination, and that no resumption of the transit was intended. ATKIN, L.J., dwelt on the fact that they were left there for at least eight weeks, as being such a delay in the course of their agreed transit as would support the plaintiffs' reply. Put into technical language the first view is that there was an abandonment of the voyage, E on which these three cases were adventured, and the second is that there was such unreasonable delay in forwarding them as constituted a deviation, to say nothing of abandonment of its further continuance. The appellants' counsel drew attention to the fact that the particulars above mentioned referred neither to delay amounting to deviation nor to total abandonment of the transit, and objected to the admission of such contentions on the ground that, if they had been raised on the F pleadings, evidence in rebuttal might have been obtained. I think that this objection ought not to prevail. I am satisfied that no further evidence could have been got. The singular feature about this case is that, either because they did not choose to seek it, or because they found that they could not get it, the appellants' Constantinople agents throughout produced no evidence of the fate of these goods. They met complaints by evasion, and when they made inquiries of the G other agents received only evasive replies. The course of post continued between Constantinople and Novorossisk, though probably it was subject to delays. Emis-saries were sent to Novorossisk and Batoum to try to trace these and other goods, but nothing came of it. The whole eight packages were only a matter of six tons weight. It is useless to say that no means of forwarding such a parcel were available. We know that there was a mail and passenger service, and the Novorossisk H agents evidently treated it as a fairly frequent one. I decline to believe that any credible evidence could have been found to account for the delay on the ground that all means of conveyance failed, or to modify the inference that any further transit to Constantinople had long been given up.

I In the next place it is clear that these particulars were, even at the trial itself, tacitly treated as insufficient, and were largely laid on one side. ROWLATT, J., had before him, apparently without objection, the evidence that the three cases went on to Batoum and Novorossisk with Mr. Macdonald's consent and on the terms that they should come back to Constantinople and be discharged there on the ship's return, yet on the face of the particulars this was new matter and was outside the pleaded deviation, consisting in any carriage of the three cases past their destination, Constantinople, at all. Thirdly, this is at most only a matter of amendment, and I think that, in their discretion, the Court of Appeal virtually allowed any necessary amendment. After all, deviation by delay and abandonment of the voyage, so far from being new matters, arise obviously on the dates and on

the face of the letters written by the appellants' agents. Some objection was taken A
by their counsel in the Court of Appeal, in what precise terms we do not know,
but in spite of this all the members of the court dealt with these matters as if
they were properly open to the plaintiffs. I think that we cannot now exclude
them.

In the absence of special provisions in the bill of lading the overcarriage of the B
five cases beyond Batoum and the landing of the three at Novorossisk, without
re-loading them on the *Verentia* at once or otherwise promptly forwarding them
to their destination would be a complete answer to the defence that for want of a
declaration of the value of the cases the appellants were not accountable. Each
would constitute a fundamental departure from the course of the agreed transit,
after which such a clause of exception would cease to apply. Of course, however,
this bill of lading contains special provisions on the point, and the question is C
whether they suffice for the appellants' protection under the circumstances.

The first and principal clause is No. 2, where a formula is elaborated, strongly
reminiscent of *Glynn v. Margetson & Co.* (1) and other familiar cases on liberties
to deviate. The words are:

"The company reserves liberty for the steamer . . . before or after proceeding D
towards her port of discharge, to proceed to and stay at any port or ports
wheresoever, although in a contrary direction, once or oftener, in any order
backwards or forwards, for loading or discharging cargo or passengers or any
purpose whatsoever, and all such ports, places and sailings shall be deemed
included in the said intended voyage, although in doing so the vessel may be
altogether departing from the customary or advertised route from the port of
shipment to the port of discharge or may be making in substance another and E
different voyage or voyages."

For any particular parcel of goods "her port of discharge" means the port at which
the ship is to discharge those goods, though she may have a comprehensive itinerary
to perform afterwards. The acts complained of with regard to the five cases—
namely, the overcarrying beyond Batoum—were not done "before or after proceeding F
towards her port of discharge," but after leaving it. As to the three cases
which she landed before proceeding towards her port of discharge for them—that
is, Constantinople—the best words to be found in cl. 2 are these: "Reserves liberty
to land and store, for such time as may be deemed expedient, and thence to
re-ship." Now the landing of these three cases (we do not know if there was any
storing or not) was a landing once and for all, not followed by any re-shipment and G
not explained by any evidence to show why there was no re-shipment, but effected,
as a matter of fair inference, without any real intention of re-shipping them at all.
Clause 2 accordingly affords no answer to the allegation of deviation.

There are some further casual references to deviation in cl. 5, which clearly do
not apply. The chief reliance is, however, placed on the following passage in cl. 4:

"In case the whole or any part of the goods specified herein are not from any H
cause, including negligence on the part of the company's servants, found for
delivery, or it is inconvenient for the ship's purposes to deliver during the
vessel's stay at their port of destination, the company is only bound to forward
them to such port of destination from any subsequent port by any other steamer
or steamers either belonging to the company or to other persons, and proceeding
either directly or indirectly to such port, such carriage to be at the company's I
expense but the merchant's risk in every respect, and the company shall be
under no further responsibility."

I think that upon two grounds this clause is of no avail. First, it applies only in
specified circumstances, which are not proved to have occurred, and it does not
expressly reserve to the company the right to act under these words without the
consequent overcarriage of goods being deemed to be a deviation. In a clause
framed so arbitrarily in the company's favour, this further and equally arbitrary
term cannot be implied. In the second place, the burden is, in any case, on the

- A appellants to prove that the events occurred which would bring this protective clause into operation, however we construe it. Neither ROWLATT, J., nor the Court of Appeal found this issue in the appellants' favour. It would require clear evidence indeed before your Lordships would consent to do so now for the first time. The evidence is this and no more. A letter is produced from the appellants' agents at Batoum, dated two days before the ship sailed, which informs the captain that
- B five parcels of goods, loaded from Constantinople for Batoum, are missing, and among these occurs "P. K. & Co., five cases of cloth." The mark on the cases in question was really "P. & Co.," but as the manifest contains no entry of goods marked "P. K. & Co." it is suggested that "P. K. & Co." is an inexact reference to the goods marked "P. & Co." The letter concludes by asking the captain to "take the necessary measures to find same, if possible." There the whole proof
- C stops. There is no evidence at all that it was inconvenient for the ship's purposes to make delivery, nor is there any that the goods were not found for delivery, nor do these two expressions between them necessarily exhaust all the possibilities of such a situation. The goods may have been found and forgotten again. Accordingly, it is not self-evident that the words of the clause must have been satisfied, and it is not proved that events happened to which this clause would apply. So
- D much for the facts. Further, on construction, the clause itself is framed so as to define the limits of the obligation, falling on the company in the named event, with regard to sending the goods back to their port of destination from a subsequent port. As to the company's liability the terms are that the carriage back is to be at the company's expense but the merchant's risk. Thus the limited liability provided is in respect only of transit from the subsequent port to the port of
- E original destination. During the overcarriage between that original port and the subsequent port nothing is stipulated, and the liability of the company must, therefore, be such as the general law imposes—that is, that during this deviation by overcarriage the protection of the £20 clause does not apply. To eke out the company's reservations of liberties by implying the reservation of a right to extend the contractual voyage beyond the original port of destination to the subsequent
- F port, so as to prevent a deviation, is too much to be allowed contra proferentes, nor is an ambiguous clause, for such it is at best as regards this overcarriage, any protection to them. The bill of lading, accordingly, leaves the appellants without answer both as to the delay in and the ultimate abandonment of the transit of the three cases, as well as to the overcarriage of the five. I move your Lordships to dismiss the appeal with costs. I am requested to state that my noble and learned
- G friend **LORD CARSON** agrees with the motion I have proposed and in the reasons which I have just given.

- LORD PARMOOR.**—The appellants are shipowners and at all material times the steamship *Verentia* was running under charter in their line. The respondents consigned eight cases of cloth in the *Verentia* which, at that time, was intended to
- H sail to Odessa, under the terms of a bill of lading dated Mar. 24, 1919. During April it became evident that the steamship *Verentia* could not safely proceed to Odessa. In consequence an arrangement was made at Constantinople under which Batoum was substituted as the port of destination for five of the cases of cloth and Constantinople was substituted as the port of destination for three of the cases of cloth either on the outward or return voyage. In all other respects the
- I bill of lading was not altered, and, so far as it was applicable, covered the carriage both of the five cases and of the three cases of cloth. The bill of lading contained a clause under which the appellants became not accountable for any goods of whatever description which were above the value of £20 per package, unless the value be expressed in the bill of lading and extra freight agreed on and paid. The cases of cloth did exceed £20 in value, but the value thereof was not expressed in the bill of lading and no extra freight was agreed on or paid. If this clause covers the goods conveyed by the appellants at the time and under the conditions when the loss occurred, then the appellants would succeed in this appeal. It has, however,

been held by the Court of Appeal that the appellants are not protected by the clause and that the eight cases of cloth were lost under conditions such that the terms of the bill of lading did not apply, and that in substance the appellants were liable to the ordinary liabilities of a common carrier. If the appellants are liable, outside the terms of the bill of lading, the amount of damages has been agreed between the parties. A

It will be convenient to consider, in the first place, the relevant facts in reference to the five cases of cloth of which the port of destination was Batoum. It is difficult to form an exact conclusion, but there is sufficient evidence to support the case of the respondents in the absence of any explanation on behalf of the appellants. At one time the respondents asked for a certificate from the appellants that the cases of cloth had been stolen in order to recover against the underwriters, but such certificate was not given, and on May 23, 1921, the appellants write: "At C present we have been unable to obtain any definite evidence that these goods were stolen. Such evidence as we have is to the contrary effect, as we are informed that three of the cases were actually discharged at Novorossisk."

There is evidence that the five cases of cloth were not discharged at Constantinople on the outward journey. Only two days before the ship left Constantinople on her outward voyage, on May 17, the agent of the respondents wrote to the agent of the appellants: "It is also understood that three cases of cloth will be discharged here and the remaining five cases in Batoum." The accuracy of this quotation was not questioned. The ship on leaving Constantinople sailed to Constanza, stayed at Constanza from May 18 to 20, and reached Batoum on May 23, staying there until June 13. There is no suggestion that the five cases of cloth were discharged at Constanza. On June 30 the agent of the respondents wrote to the agent of the appellants at Batoum: "We have your letter of to-day's date stating that this parcel (the five cases of cloth) has not been discharged." The accuracy of this quotation was not challenged by the appellants, and, on the evidence generally, I come to the same conclusion as ATKIN, L.J., that the five cases of cloth were in fact carried beyond Batoum and that this is sufficient to establish the liability of the appellants. D E F

It is a well-established principle that stipulations in a contract of carriage limiting or negating the liability of carriers, by land or water, for loss of or damage to goods entrusted to them for carriage do not apply when such loss or damage has occurred outside the route or voyage contemplated by the parties when they entered into the contract of carriage, unless the intention that such limitations should apply is expressed in clear and unambiguous language. Counsel for the appellants argued that the limitations of liability contained in the bill of lading did apply to the carriage of the five cases of cloth beyond Batoum, and that such carriage was within the route and voyage contemplated when the bill of lading was signed. They relied upon cl. 2, 4, and 5 of the bill of lading in support of their case. No doubt cl. 2 of the bill of lading gives a wide power of deviation between the port of shipment and the port of destination, but there is no suggestion that the steamship *Verentia* after leaving Batoum would return again to that port as the port of destination for the discharge of the five cases of cloth. In other words, when the steamship *Verentia* left Batoum, it was not a deviation in the course of the agreed voyage between the port of shipment and the port of destination, but the start of a new voyage after the agreed voyage had been finally determined. As to cl. 4 of the bill of lading, there is no evidence on behalf of the appellants that the whole or any number of the five cases of cloth were not from any cause, including negligence on the part of the servants of the appellants, found for delivery at Batoum or that it was inconvenient for the ship's purposes to deliver during the *Verentia's* stay at their port of destination. Clause 5 might have applied to the port of Odessa, but is not applicable to the port of Batoum, where the steamship *Verentia* stayed from May 22 to June 13. In the result I agree with ATKIN, L.J., that the five cases of cloth were carried beyond Batoum, and that this constituted a deviation from the route contemplated in the contract of carriage, such that the G H I

A limitation of liability to an amount of £20 per package unless the value be expressed in the bill of lading and extra freight agreed on and paid has no application.

The three cases of cloth were carried on the agreed voyage down to the time of their arrival at Novorossisk. At Novorossisk they were not temporarily put on shore, but were detained by the agents of the appellants as goods reaching their destination. This is sufficient to constitute a deviation from the contract of carriage, such that the conditions and exceptions contained in the bill of lading limiting the liability of the appellants have no application. In my opinion the appeal should be dismissed with costs.

C **LORD PHILLIMORE** (read by LORD BLANESBURGH): Upon the whole I think that your Lordships should agree with the conclusion of the Court of Appeal that the five cases of draperies were not landed at Batoum, but were carried forward. If this be so, the contract of carriage had, as far as they were concerned, terminated, and the special conditions of the bill of lading no longer remained to protect the Cunard company unless the company can avail itself of the provision in the bill of lading to the following effect:

D "In case the whole or any part of the goods specified herein are not from any cause, including negligence on the part of the company's servants, found for delivery, or it is inconvenient for the ship's purposes to deliver during the vessel's stay at their port of destination, the company is only bound to forward them to such port of destination from any subsequent port by any other steamer or steamers, ship or ships either belonging to the company or to other persons, and proceeding either directly or indirectly to such port, such carriage to be at the company's expense but the merchant's risk in every respect, and the company shall be under no further responsibility."

F I should not be disinclined to hold that these goods were not "found for delivery" within the meaning of this clause, but this does not much help the company because there is a failure of all proof as to what happened to them afterwards. They were probably landed at Poti or at Novorossisk, but whether for the purposes of being forwarded in compliance with the terms of the bill of lading or otherwise we do not know. At any rate, by the time the writ in this action was issued (three and a half years later) they had not been forwarded, and this unreasonable delay amounts to a deviation and puts the parties outside the contract contained in the bill of lading and leaves the Cunard company unprotected. As to the three cases, G we know that instead of being brought on to Constantinople they were landed at Novorossisk, and that when last heard of they were in the custody of agents of the Cunard company, holding them apparently for the Cunard company. This being so, the same long delay in forwarding (for which it is possible there was some excuse, but for which no excuse is proved in evidence) amounts to a deviation. Therefore it seems to me that the judgment of the Court of Appeal was right.

H **LORD BLANESBURGH.**—I have had the advantage of reading the judgment which my noble and learned friend on the Woolsack has just delivered. I entirely concur in it.

Appeal dismissed.

Solicitors: *William A. Crump & Son; Cosmo Cran & Co.*

I [Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

HOWARD-FLANDERS v. MALDON CORPORATION

[COURT OF APPEAL (Lord Hanworth, M.R., Scrutton and Sargant, L.JJ.), March 1, 1926]

[Reported 135 L.T. 6; 90 J.P. 97; 70 Sol. Jo. 544; 24 L.G.R. 224]

Highway—Statutory powers—Exercise by authority—Widening of road—Need to have reasonable regard for rights of frontager—Removal of footway making access to street dangerous—Public Health Act, 1875 (38 & 39 Vict., c. 55), s. 149.

A highway authority, in exercise of its powers under the Public Health Act, 1875, s. 149, widened a street by removing a raised and kerbed footway on one side and throwing its site into the carriage-way without having given any notice to or obtained the consent of the plaintiff, who was the owner of the adjoining house and premises. Evidence was given that the plaintiff's premises were depreciated in value by the removal of the footpath, that the pathway had contributed to the safety of persons stepping out of gateways in the wall of the plaintiff's property, and that the gutter running alongside the path had carried off rain water which, after the removal of the path, would run along the bottom of the wall and might damage its foundations.

Held: a local authority was bound to exercise its statutory powers with reasonable regard for the rights of other persons, and if it failed to do so its conduct could be reviewed by the courts; in the present case the county court judge had rightly directed himself in law and there was evidence on which he could find that the highway authority had not acted reasonably; and, therefore, he had rightly granted the plaintiff a declaration that the removal of the path was unlawful and made a mandatory injunction directing that it be replaced.

Notes. Referred to: *Symes and Jaywick Association Properties, Ltd. v. Essex Rivers Catchment Board*, [1936] 2 All E.R. 551.

As to the statutory powers of a highway authority, see 19 HALSBURY'S LAWS (3rd Edn.) 309 et seq; and for cases see 26 DIGEST 386 et seq. For Public Health Act, 1875, see 19 HALSBURY'S STATUTES (2nd Edn.) 56.

Appeal by the defendants from an order of a Divisional Court of the King's Bench Division (SANKEY and MACKINNON, JJ.) on an appeal from His Honour Judge MARCHANT at Chelmsford County Court.

The plaintiff, William Flanders Howard-Flanders, claimed in Chelmsford County Court against the defendants, Maldon Corporation, (i) a declaration that the removal by the defendants, the highway authority, of a raised footpath and kerb running along the side of the highway known as Cromwell Hill (which was within the district of the defendants) nearest to a dwelling-house and land owned and occupied by the plaintiff was unlawful, and (ii) an order directing the defendants to replace the footpath. The county court judge held that the defendants had exercised their statutory powers with relation to the highway unreasonably so as to cause unnecessary damage to the plaintiff, and he granted the declaration and mandatory injunction claimed. On an appeal by the defendants the Divisional Court held that the county court judge had directed his mind to the proper principles of law and had come to a conclusion of fact on evidence on which he could so decide, and they dismissed the appeal. The defendants appealed to the Court of Appeal.

Cases referred to:

- (1) *East Fremantle Corpn. v. Annois*, [1902] A.C. 213; 71 L.J.P.C. 39; 85 L.T. 732; 67 J.P. 103; 18 T.L.R. 199, P.C.; 26 Digest 455, 1711.
- (2) *Roberts v. Charing Cross, Euston and Hampstead Rail. Co.* (1903), 87 L.T. 732; 19 T.L.R. 160; 42 Digest 728, 1423.

- A (3) *British Cast Plate Manufacturers' Co. v. Meredith* (1792), 4 Term. Rep. 794; 100 E.R. 1806; 26 Digest 454, 1709.
- (4) *Boulton v. Crowther* (1824), 2 B. & C. 703; 2 L.J.O.S.K.B. 139; 107 E.R. 544; sub nom. *Bolton v. Crowther*, 4 Dow. & Ry.K.B. 195; 26 Digest 334, 657.
- B (5) *Sutton v. Clarke* (1815), 6 Taunt. 29; 1 Marsh. 429; 128 E.R. 943; 38 Digest 22, 122.
- (6) *Southwark and Vauxhall Water Co. v. Wandsworth Board of Works*, [1898] 2 Ch. 608; 67 L.J.Ch. 657; 79 L.T. 132; 62 J.P. 756; 47 W.R. 107; 14 T.L.R. 576, C.A.; 26 Digest 488, 1997.

C *Montgomery, K.C.*, and *C. E. Jones*, for the defendants, referred to *East Fremantle Corpn. v. Annois* (1), and *Roberts v. Charing Cross, Euston and Hampstead Rail. Co.* (2).

J. A. Hawke, K.C., and *Randolph Glen*, for the respondent, were not called upon to argue.

D LORD HANWORTH, M.R.—This appeal must be dismissed. It raises a question which is no doubt of some importance, but in truth the matter was decided by the county court judge, and when he had come to his decision I agree with the Divisional Court that there the matter must rest.

E It appears that the mayor, aldermen, and burgesses of Maldon, the highway authority for the borough, were minded to widen the road on Cromwell Hill, a narrow road with a steep gradient, by removing the pathway immediately contiguous to the plaintiff's garden wall. That pathway gave certain advantages to the plaintiff, especially to anyone stepping out of the gateway, and other advantages, such as keeping the drainage away from the wall. The defendants removed the whole of the footway which abutted on the garden wall. They did this without notice to or consent of the plaintiff, or discussion. The plaintiff brought his action, and the learned county court judge heard a considerable body of evidence on both sides. There was evidence that the plaintiff's premises were depreciated in value F by the removal of the footpath. It was suggested that another way of dealing with the matter, and at the same time to safeguard foot passengers on the road would have been to take off part of the footpath on the other side of the road. The local authority were not compelled to adopt the course they did, and the learned county court judge came to the conclusion that they had not acted reasonably.

G We have had our attention drawn to various cases beginning with *East Fremantle Corpn. v. Annois* (1). In that case LORD MACNAGHTEN said:

H "The law has been settled for the last hundred years. If persons in the position of the appellants, acting in the execution of a public trust and for the public benefit do an act which they are authorised by law to do, and do it in a proper manner, though the act so done works a special injury to a particular individual, the individual injured cannot maintain an action. He is without remedy unless a remedy is provided by the statute."

He starts by accepting the law from the source from which it is derived, *British Cast Plate Manufacturers' Co. v. Meredith* (3) and *Boulton v. Crowther* (4). He specially refers to those decisions of KENYON, C.J., BULLER and GROSE, JJ., and ABBOTT, C.J., and BAYLEY, HOLROYD, and LITLEDALE, JJ. He goes on:

I "At the same time ABBOTT, C.J., observed that if in doing the act authorised the trustees acted arbitrarily, carelessly or oppressively,"

the law in his opinion had provided a remedy. Those words "arbitrarily, carelessly or oppressively" were taken from the judgment of GIBBS, C.J., in *Sutton v. Clarke* (5), but in a number of other cases other language has been used. FARWELL, J., in *Roberts v. Charing Cross, Euston and Hampstead Rail. Co.* (2) said: "A local authority must also act reasonably."

Prima facie the defendants would be right in improving the highway, but they must not act unreasonably, arbitrarily, oppressively or wantonly. Who is to

determine whether they have done so? Is it for them to determine? Are they the last word in such a matter, or can their conduct be called in question? No doubt, here no suggestion has been made which casts a doubt upon their bona fides. They have purported to act, and intended to act, as the highway authority in the interests of the public, but it is clear from the cases which I have referred to, and in particular *Boulton v. Crowther* (4), that the question whether or not they did act in a manner which was not negligent or unreasonable or arbitrary or careless or oppressive, is a matter which is not to be determined finally by themselves, but can be submitted, upon proper evidence, to the verdict of a jury. In *Boulton v. Crowther* (4) it was so submitted, and the jury did find a verdict for the defendant. That proposition is equally established in a number of other cases, that is to say, the judge, if he is trying the case alone, the jury if there is a jury, is or are to consider the facts and come to a conclusion whether or not the conduct of the defendants can be impugned on the grounds which I have suggested. The result is that it is not for the defendants to say: "We have acted bona fide, and that concludes the matter." Their conduct can be examined before a tribunal, be it a judge or a jury, or a judge alone, who has to go into the relevant facts and come to a conclusion upon them.

That being so, it appears to me that the learned county court judge rightly directed himself in law, considered a number of authorities which were brought to his attention by counsel on either side, and came to a conclusion to which it was his duty to come. He had to determine upon the relevant facts whether or not the defendants' conduct could be described by one of the adjectives which I have catalogued. He came to the conclusion upon evidence which was sufficient to enable him to do so, that the conduct of the defendants was not, in the proper sense of the word, reasonable. He, therefore, found that the plaintiff had a good cause of action, and he found himself able to correct the course adopted by the defendants in a manner which his judgment indicates, that is to say, he is giving specific directions as to what ought to be done. That judgment was based upon his examination of the evidence which was before him. It was, in my opinion, sufficient for him to come to his conclusion, and it was his duty to come to his conclusion. It is no part of the duty of the Divisional Court or of this court to vary the facts or a conclusion of fact found by the county court judge, whatever may be the individual opinion of the judges who are sitting in the Divisional Court or this court, and I, therefore, express no opinion one way or the other. It is sufficient to say that the matter was within the sphere of fact which belongs to the county court judge. He has determined the case, and I agree, therefore, with the learned judges in the Divisional Court that the matter was a question of fact and could not be reviewed by them, and equally in this court I think that their decision on that ground must stand, and the appeal be dismissed with costs.

SCRUTTON, L.J.—I also have come to the conclusion that we cannot interfere with the decisions of the county court judge and the Divisional Court, and I do so on the ground that there is no appeal from the county court judge on questions of fact provided there is any evidence on which he might reasonably come to the conclusion of fact at which he has arrived. If there is any such evidence, it is quite immaterial that this court might have come to a different conclusion of fact on the evidence.

The case arises under s. 149 of the Public Health Act, 1875, which, giving the soil of the street to the urban authority, empowers them from time to time to cause all such streets to be levelled, paved, &c., &c., as occasion may require, and they may from time to time cause the soil of any such street to be raised, lowered or altered as they think fit. The plaintiff had a house and garden abutting on a steep and narrow lane in the borough of Maldon. He had two gates or exits from his garden on to this lane, and where his exits on to the highway appeared there was a narrow raised footway, which had, among other advantages, certainly two—that when he exercised his right of coming out from the land on to the highway, he

A had the protection of the raised footpath from passing motors, motor bicycles or other vehicles, which could not come quite close to his wall or exit because of the footway; and also when, as usual in heavy rains, the water ran down the steep hill, the raised footpath kept it from running against the foundations of the wall, with probably disastrous consequences. The corporation of Maldon, being minded to exercise their powers under s. 149, conceived that the right way to improve the highway was entirely to take away that footpath. In the course of taking it away, they discovered a lamp there, and they decided that the proper thing to do was to affix it to the plaintiff's premises without asking him, or inquiring whether he wanted it, and it seems to be clear that they proceeded with their road repairing operations without any particular consideration of the rights of people whose property abutted on the highway. The plaintiff brought his action complaining that this taking away of the footpath was not covered by s. 149.

There has been a formula which for about one hundred years has appeared in all the cases and text books, and was used by ABBOTT, C.J., when he said: "If in doing the act, [people acting under an Act of Parliament] acted arbitrarily, carelessly or oppressively, the law, in my opinion, has provided a remedy." HOLROYD, J., made it a little more complicated by saying: "acted arbitrarily, wantonly or oppressively." One would, very respectfully have liked to cross-examine that judge as to what is his distinction between arbitrary action and wanton action, and how they both differ from oppressive action, and I respectfully concur in the criticism of the Privy Council in *East Fremantle Corpn. v. Annois* (1) that that string of adjectives is not so enlightening as it might be, and at any rate not so enlightening that everybody should go on repeating it time after time and think they get some satisfaction from doing so. I notice BAYLEY, J., in the same case translated it into: "They have acted without malice and according to their best skill and diligence." That seems to come to acting carefully and bona fide, that is to say, in the interests of those using the highway, including those whose premises adjoin it. I myself much prefer the way in which it was put by LORD COLLINS, M.R., in *Southwark and Vauxhall Water Co. v. Wandsworth Board of Works* (6), as collated by FARWELL, J., in *Roberts' Case* (2):

"... where statutory rights infringe upon what but for the statute would be the rights of other persons, they must be exercised accordingly so as to do as little mischief as possible."

Again the Master of the Rolls says:

G "But it must be admitted that the defendants are bound to exercise their statutory powers with reasonable regard for the rights of other persons."

That seems to me a much more intelligible and satisfactory way of putting it than the string of adverbs which appears in *Boulton v. Crowther* (4).

H If that is so, this being an appeal from a county court judge, the question is not whether we should have come to the conclusion that the defendants had been unreasonable in the exercise of their statutory powers in the sense explained. The question is: Was there any evidence on which it was possible to come to that conclusion, because, supposing the evidence is such that one might come to either conclusion reasonably, according to the weight one attaches to particular parts of it, there is no appeal from the county court judge. The county court judge is the sole judge of fact. That is the line the Divisional Court took in this case, and it is the line on which I think this court must approach the case. Whatever I might have done myself, and I do not express an opinion as to what I might have done myself, I do not find myself able to say it was impossible to come to the conclusion the learned county court judge came to as regards the action of the corporation, who, on their own showing, were proceeding without considering the plaintiff's rights at all. They put the lamp on his premises without his permission, and it appears to me that they have made the access to his premises more dangerous and less convenient and have run the risk of ruining the foundations of his wall by allowing water to run down it. I cannot say that is evidence on which it is

impossible to find they acted unreasonably. That being the view which I take of the case, it comes within the principle that we cannot interfere with the finding of the county court judge on matters of fact if there was evidence on which it was reasonably possible for him to come to that conclusion. A

SARGANT, L.J.—I am of the same opinion. I take the test in the words of **LORD COLLINS, M.R.**, as cited and approved in the *East Fremantle Corpn. v. Annois* (1), that the obligation of the local authority was to use reasonable care to do no unnecessary damage to the plaintiff. It seems to me clear from the cases that have been cited that the question whether they did use reasonable care to do no unnecessary damage to him, was a question of fact, and I agree that there was evidence before the learned county court judge on which he might come to his conclusion. That being so, the matter is one within his sphere, and the courts are not entitled to interfere with the result of his judgment. B

Solicitors: *F. H. Bright*, Town Clerk, Maldon; *Bridgman & Co.*, for *Crick & Freeman*, Maldon. C

[Reported by **H. LANGFORD LEWIS, Esq., Barrister-at-Law.**] D

ADMIRALTY COMMISSIONERS *v.* CHEKIANG (OWNERS). THE CHEKIANG E

[HOUSE OF LORDS (Viscount Dunedin, Lord Sumner, Lord Phillimore, Lord Carson and Lord Blanesburgh), June 18, 1926]

[Reported [1926] A.C. 637; 95 L.J.P. 119; 135 L.T. 450; 42 T.L.R. 634; 17 Asp.M.L.C. 74; 32 Com. Cas. 91] F

Shipping—Collision—Damages—Measure—Damage to warship—Refitting of ship while in dock for collision repairs—Refitting not then actually necessary and not brought about by negligence of ship contributing to collision.

Public bodies, e.g., the Admiralty, who are owners of ships employed in the public service may, when their vessels have been damaged by collision, recover, among other sums, damages for their detention while under repair, although no gain which could be measured in money accrues to such bodies by the use of their ships or is lost by reason of their being put out of action. G

The defendants admitted liability for a collision between their vessel and a light cruiser belonging to the Lords Commissioners of the Admiralty, and the question of damages was referred to the registrar and merchants for assessment. After the collision the cruiser was sent for repairs to a dockyard. She was due for her annual refit within four months of going into dock to perform the collision repairs, and after it had been decided that repairs of the collision damage must be effected it was decided by the naval authorities that she should go through her refit while the collision repairs were being carried out. The two sets of repairs, accordingly, proceeded simultaneously. The registrar allowed damages for twenty days' detention, that being the length of time which, in his opinion, could be properly allocated to the repairs. H

Held: (i) the fact that the Admiralty Commissioners had taken the opportunity of the vessel being detained in dock for the repairing of the collision damage to refit the ship, which at that time was not actually necessary and had not been brought about by any negligence of the ship contributing to the collision, did not preclude them from recovering from the defendants damages for the total deprivation of the vessel during the period of the collision repairs: I

A *Ruabon Steamship Co. v. London Assurance* (1), [1900] A.C. 6, applied; (ii) it being presumed that ships of war were worth to the State what it cost the State to construct and maintain them, the amount of the damages was properly calculated by taking the original cost of the ship written down for depreciation to the date of the collision and allowing thereon interest at the rate of five per cent.

B Decision of the Court of Appeal, [1925] P. 80, reversed.

Notes. Considered: *Admiralty Comrs. v. Susquehanna (Owners)*, *The Susquehanna*, post, p. 124; *The West Wales*, [1932] P. 165; *Carslogie Steamship Co. v. Royal Norwegian Government*, [1952] 1 All E.R. 20. Referred to: *The Ikala*, [1928] P. 86; *The Edison*, [1933] All E.R.Rep. 144; *Admiralty Comrs. v. Valverda (Owners)*, [1938] 1 All E.R. 162; *Sunley & Co. v. Cunard White Star, Ltd.*, [1939] 3 All E.R. 641.

C As to the measure of damages in collision cases, see 30 HALSBURY'S LAWS (2nd Edn.) 855 et seq.; and for cases see 41 DIGEST 800 et seq.

Cases referred to:

- D (1) *Ruabon Steamship Co. v. London Assurance*, [1900] A.C. 6; 69 L.J.Q.B. 86; 81 L.T. 585; 48 W.R. 225; 16 T.L.R. 90; 44 Sol. Jo. 116; 9 Asp.M.L.C. 2 5 Com. Cas. 71, H.L.; 29 Digest 245, 1981.
- (2) *The Acanthus*, [1902] P. 17; 71 L.J.P. 14; 85 L.T. 696; 18 T.L.R. 160; 9 Asp.M.L.C. 276; 41 Digest 807, 6679.
- E (3) *Mediana (Owners) v. Comet (Owners, etc.)*, *The Mediana*, [1900] A.C. 113; 69 L.J.P. 35; 82 L.T. 95; 48 W.R. 398; 16 T.L.R. 194; 44 Sol. Jo. 259; 9 Asp.M.L.C. 41, H.L.; 41 Digest 811, 6733.
- (4) *Mersey Docks and Harbour Board v. Marpessa (Owners)*, *The Marpessa*, [1907] A.C. 241; 76 L.J.P. 128; 97 L.T. 1; 23 T.L.R. 572; 51 Sol. Jo. 530, H.L.; 41 Digest 808, 6690.
- F (5) *No. 7 Steam Sand Pump Dredger (Owners) v. Greta Holme (Owners)*, *The Greta Holme*, [1897] A.C. 596; 66 L.J.P. 166; 77 L.T. 231; 13 T.L.R. 552; 8 Asp.M.L.C. 317, H.L.; 41 Digest 808, 6689.
- (6) *The Haversham Grange*, [1905] P. 307; 74 L.J.P. 115; 93 L.T. 733; 53 W.R. 675; 21 T.L.R. 628; 10 Asp.M.L.C. 156, C.A.; 29 Digest 246, 1982.
- (7) *The Surf* (1910), unreported. Cited in Roscoe's Measure of Damages in Maritime Collisions (2nd Edn.) App., Part III, p. 179.
- G (8) *The Astrakhan*, [1910] P. 172; 79 L.J.P. 78; 102 L.T. 539; 26 T.L.R. 329; 11 Asp.M.L.C. 390; 41 Digest 804, 6653.
- (9) *Clydebank Engineering and Shipbuilding Co. v. Yzquierdo y Castaneda (Don Jose Ramos)*, [1905] A.C. 6; 74 L.J.P. 1; 91 L.T. 666; 21 T.L.R. 58, H.L.; 17 Digest (Repl.) 149, 489.

H **Appeal** by the Lords Commissioners of the Admiralty from an order of the Court of Appeal (BANKES and ATKIN, L.J.J., and LAWRENCE, J.), reported, [1925] P. 80.

The plaintiffs were the Admiralty Commissioners, and the defendants were the owners of the steamship *Chekiang*. The defendants admitted liability in respect of a collision which took place at Hankow, on the Yang-tse-Kiang, on Aug. 22, 1921, between the *Chekiang* and H.M.S. *Cairo*, a light cruiser on the China station. After the collision H.M.S. *Cairo* proceeded to Hong Kong dockyard to undergo repairs, where she arrived on Sept. 3, 1921. On Sept. 7 she went into dry dock, where the work of repairing the collision damage was carried out. She was due to undergo her periodical general refit in December, 1921, and it was decided that the refit should be performed at the same time as the collision repairs. The repairs found to be necessary during the periodical overhaul, which involved an expenditure of some £4,000, were, therefore, carried out simultaneously with the collision repairs. H.M.S. *Cairo* remained in the dockyard until the first week in November, 1921, during which time working parties were kept on board. The following sums were respectively claimed and allowed in his report by the registrar.

	Claimed.			Allowed.			A
	£	s.	d.	£	s.	d.	
1. Cost of repairs, <i>Cairo</i>	675	1	1	675	1	1	
2. Loss of use of H.M.S. <i>Cairo</i> for the period Aug. 28 to Sept. 27, 1921, inclusive, i.e., thirty-six days at £100 per day	3,600	0	0	2,000	0	0	B
3. Pay and allowances of officers and men for above period	7,460	17	4	3,800	0	0	
4. Survey fee and superintendence of repairs ...	15	15	0	15	15	0	
5. Office and incidental expenses	21	0	0	5	5	0	
				£6,496	1	1	C

Interest was allowed thereon at 5 per cent. per annum from Oct. 19, 1921, until paid. The registrar gave the following reasons for his report:

In this reference, the Lords Commissioners of the Admiralty claimed damages arising from a collision between the light cruiser *Cairo* and the *Chekiang*, which occurred at Hankow on Aug. 22, 1921, and for which the *Chekiang* was to blame. The *Cairo* was temporarily repaired at Hankow and left that place on Sept. 3 for Hong Kong, where she was permanently repaired. The *Cairo* was due for her annual refit in December, 1921, but it was decided that, as the collision repairs would take some time, the annual refit should be done at the same time. The combined work was finished on Nov. 2, but the Admiralty did not claim for loss of time in respect of the collision repairs beyond Sept. 27. The defendants contended that they were not liable for any loss of time, or, in the alternative, for a shorter time than that claimed by the plaintiffs. As regards the time from Aug. 22 to Sept. 2, I am of opinion that this period cannot be taken into account in estimating the damages for loss of time. The *Cairo*, so far as can be ascertained, after the collision still fulfilled the purpose for which she was stationed at Hankow, and no evidence has been given to prove any loss to the Crown during that period. As regards the later period, it is clearly proved that the decision at once to refit the *Cairo* was not taken until after it was decided to repair the collision damage. The question, therefore, resolves itself into one as to the length of time which can be properly allocated to the collision work. The estimate of Mr. King-Salter, who was in charge of the work, was three weeks, and he is in a position to form a judgment. On the other hand, this estimate is an assumption only, and is not corroborated by any independent evidence. For the defendants two very competent witnesses estimated the time as seven days, which again is an assumption, and by gentlemen who did not see the work being done. The evidence of a person who has had charge of the work for the plaintiffs naturally, but unconsciously, has a bias in their favour, and the weight of the defendants' evidence cannot be altogether passed over. The conclusion to which the merchants and myself have come is that a reasonable time to allow from Sept. 3 is twenty days. As regards the items in respect of officers' and crew's wages, there is evidence that they were employed to some extent on the refitment of the *Cairo* and, having regard to this fact and to the time allowed, the amount allowed for this item is reduced to £3,800.

The defendants having appealed against the allowance of items 2 and 3, SIR HENRY DUKE, P., dismissed the appeal and confirmed the report. The Court of Appeal, allowing an appeal by the defendants, held (i) that the damages in collision cases being measured in accordance with the ordinary principles of common law, the registrar had proceeded upon a wrong principle in applying a fixed rule and ignoring considerations relevant to the question of the actual loss sustained by the plaintiffs by being deprived of the use of their chattel; (ii) that there was no rule of general application for the assessment of damages for a non-profit earning vessel; (iii) that,

A if it could be shown that the period of collision damage enabled the owners to execute owner's repairs, the completion of which would otherwise with reasonable certainty have deprived the owners of some period of beneficial use, the time so saved may properly be taken into account in determining the loss sustained. The Admiralty Commissioners appealed.

B *The Attorney-General (Sir Douglas Hogg, K.C.), Raeburn, K.C., and Balloch* for the appellants.
Dunlop, K.C., and R. F. Hayward for the respondents.

The House took time for consideration.

June 18. The following opinions were read.

C **VISCOUNT DUNEDIN.**—In this case *H.M.S. Cairo*, a light cruiser, was being employed in the China waters by the Admiralty when she had her stern injured by a collision with the *Chekiang*, for which collision the *Chekiang* is admittedly to blame. The occurrence took place on Aug. 22, 1921, the *Cairo* being at that time at Hankow. There are no facilities at Hankow for permanent, although there are for temporary, repairs. Temporary repairs were effected at Hankow, but the *Cairo* sailed on Sept. 2 for Hong Kong, where permanent repairs could be executed. The *Cairo*, according to Admiralty instructions, had to undergo an annual refit, and that refit was due to begin, unless unforeseen circumstances arose, on Dec. 11, 1921. Accordingly, when the authorities found that the *Cairo* was necessarily in dock at Hong Kong for the purpose of making the permanent repairs rendered necessary by the collision, they decided that the annual refit should be anticipated, and take place concurrently. In consequence of this decision the *Cairo* remained in dock from Sept. 7, 1921, when it entered, until Oct. 29, 1921. The Commissioners of the Admiralty having raised an action against the owners of the *Chekiang* for the damages occasioned by the collision, the defendants admitted the fault and proceeded before the registrar and merchants for the assessment of damages. The registrar found the facts as above quoted, and, further, found that the collision repairs demanded a detention of twenty days. The plaintiffs claimed the cost of repairs, survey fee, and superintendent's office and incidental expenses; all those were admitted. But they further claimed thirty-six days' loss of the use of the *Cairo* at £100 a day, this sum representing interest on the capital value of the ship at the time of the collision, and pay and allowances of the officers and men for the like period, these being the actual amounts expended. The registrar allowed for loss of time for twenty days only at £100 a day, and allowed a sum in respect of the pay and allowances of the officers and crew for that period after making a deduction in respect of the work done by them in connection with the refit. The defendants objected, but the learned president confirmed the report. On appeal the Court of Appeal recalled the judgment and remitted to the registrar for reconsideration of the sum due. Against that judgment the present appeal has been brought.

I It seems to me that there are here two questions, and two questions only, to be considered. The first is: Was it right for the registrar to allow damages as for the total deprivation of the vessel for the period of twenty days during which the vessel was undergoing collision repairs, while, at the same time, refit repairs were going on? The second, if the first be answered in the affirmative, is whether the damages have been properly calculated.

As regards the first question, I think it is concluded by authority of a case in your Lordships' House. I refer to *Ruabon Steamship Co. v. London Assurance* (1). In that case a ship having been put into dock for repairs rendered necessary by a collision, the owners took advantage of her being there to have her classification made, there being at the time no actual necessity for having classification made. The underwriters who were liable for the damage ensuing on the collision claimed to have a contribution from the owner from the dock dues. This was refused and

the judgment was put on the general proposition that where the damaged vessel is perforce kept in dock for the expense of which detention the wrongdoer who caused the damage is liable, no liability to contribute is created by the fact that the owner takes advantage of the situation to do what he pleases with his own vessel, such act not interfering with the necessary operations for which the wrongdoer is liable. This decision was applied by Sir FRANCIS JEUNE in *The Acanthus* (2) where, a vessel being dry-docked for collision repairs, the owner took the opportunity to fix bilge keels on her, that not being a work of necessity, and was held not liable to contribute towards the dock expenses. If the act of the owner was of necessity it would be otherwise. It follows, in my opinion, that, inasmuch as it is found in fact that there was no necessity to make the refit, the Admiralty were entitled to take advantage of the vessel being in dry dock without being called on to contribute to the expense of docking or to forgo the payments in full to which they were entitled as for the loss of the use of the vessel for the period of detention due to the collision during which the vessel was rendered unfit for her active service. This period, as already mentioned, was fixed at twenty days.

There remains the second question, whether the damages had been properly calculated. My Lords, in the case we are about to decide [*Admiralty Comrs. v. Susquehanna (Owners)*: post, p. 124] I have discussed the subject of the calculation of damage, and I shall not repeat what is there said. In the present case the registrar and merchants, acting as a jury, might have arrived at a certain sum based on a calculation of a percentage of the actual value of the ship. There is no absolute rule enjoining such a calculation. I can imagine in some circumstances it would bring out an extravagant sum, but in the present case I cannot say that it has that effect. I do not consider that the registrar has worked on any absolute or fixed rule, and, viewing the award as a jury award, I do not think we should interfere with it. The expenses of the officers and men have not been allowed in full. I, therefore, move to recall the judgment of the Court of Appeal and to restore the judgment of the president which confirmed the report of the registrar. The respondents to pay to the appellants their costs in this House and in the courts below.

LORD SUMNER.—I agree. It is with lively satisfaction that I concur with the noble and learned viscount in thinking that the time has come when your Lordships may, without any sacrifice of dignity, devote some short time to the rules applicable to the measure of damages in collision actions. After all, little as this question has engaged the attention of the courts, parties take more interest in it than in any other issues in litigation, and they are not alone in thinking that it is one in which platitudes and rules of thumb are no good. Damages may be a "jury question"—that is, a question of fact for the jury, if there is one—but they must be measured under a proper direction as to what the law requires. To say, as judges have come as near to saying as decorum permits, that juries must find a figure as best they can and escape criticism by being anonymous and dumb and accordingly proof against everything but "perversity" is a poor position in which to leave the matter. In this class of case there is an opposite system of practice, and, in lieu of a jury, a highly important and experienced official of the court acts judicially in the first instance. He has to arrive at a conclusion without any previous directions upon the law from the learned judge, and then to state that conclusion in writing, and, unless he risks such a criticism, erroneous as I venture to think, as was passed on him in this case by the Court of Appeal, namely, that he had proceeded on a rule of thumb as if it was binding law in all cases, he must give the legal reasons which support his conclusion. The measure of damages ought never to be governed by mere rules of practice, nor can such rules override the principles of the law on this subject. I find the following passage in the learned registrar's excellent work on this topic (ROSCOE'S MEASURE OF DAMAGES IN MARITIME COLLISIONS, 2nd Edn., p. 106), alluding first to *The Mediana* (3) and next to *The Marpessa* (4):

- A "The House of Lords, though it has established a rule, has not given any practical assistance towards the difficult question of formulating a standard of damages in cases to which such a rule is applicable, which difficulty was chiefly responsible for the doubt as to the propriety of a claim for demurrage by a non-trading body. Indeed, the tribunal somewhat ostentatiously put this difficulty on one side, stating in this last decision that, though it did not agree with the registrar's report, it would not vary its conclusions."

I acknowledge with contrition the justice of these strictures. In *The Greta Holme* (5), LORD WATSON says ([1897] A.C. at p. 604):

- C "The data for estimating the amount of substantial damages are not precise. In cases like the present that difficulty is sometimes inevitable and is of common occurrence; but it is a difficulty which can be easily and is often satisfactorily overcome by a jury under proper directions. Personally I have a dislike, which I have reason to believe is shared by other judges, to the task of assessing damages."

In *The Mediana* (3), LORD HALSBURY, L.C., says:

- D "What right has a wrongdoer to consider what use you are going to make of your vessel? . . . The broad principle seems to me to be quite independent of the particular use the plaintiffs were going to make of the thing . . . except . . . when you are endeavouring to establish the specific loss of profit, or of something that you otherwise would have got, which the law recognises as special damages. . . . When we are speaking of general damages no such principle applies at all, and the jury might give whatever they thought would be the proper equivalent for the withdrawal of the subject-matter then in question."

LORD LOREBURN, L.C., observes in *The Marpessa* (4) ([1907] A.C. at pp. 244 and 245):

- F "The plaintiffs were entitled to put their case in another way. They might say: 'The cost to us of maintaining and working this dredger, while it is working, amounts to so much per day, and its depreciation daily amounts to so much more. We take the total daily sum which it costs us as a fair measure of the value of its daily services to us. Those services are at least worth what we are habitually paying for them year after year, including what we sacrifice in depreciation.'"

- G I would point out that, as examination of the reports of the case before the president and the Court of Appeal will show, this was not by any means the way in which the plaintiffs had actually put and proved their case. LORD LOREBURN proceeds:

- H "There is a confusion in the registrar's award in these respects, and also in regard to general damage in the circumstances of this particular case. . . . In my opinion, though there is error in the registrar's report, there is no case for the interposition of this House. We cannot correct every minute mistake."

It must be admitted that the learned registrar, as the tribunal before whom the assessment of damages takes place, did not get very ample guidance from these declarations.

- I When the *Chekiang* ran into the *Cairo*, she imposed on the Admiralty, as the direct consequence of this wrong, the necessity for docking the *Cairo* at Hong Kong during the repair of the collision damage. Why should not the *Chekiang* pay for that docking? Her overhaul was not then due. It had not been determined upon for that time, and the programme of overhauls was itself liable to alteration. The overhaul imposed no extra burden on the *Chekiang* when it took place; in fact, the dock charges are claimed only to the end of the collision repairs and not till the *Cairo* left the dock. There is abundant authority for saying that the fact that the owners of an injured ship take the opportunity of the docking required for collision

repairs to do work on their own ship, which had not already become necessary at the time of the collision, nor was brought about by the owners' negligence contributing to the collision, is no ground for reducing the wrongdoer's liability to make good the damage his wrongdoing has caused. It is not, like *The Haversham Grange* (6), a case of both to blame and of a second collision following a first one, which had already made docking inevitable. The proposition of LORD MACNAGHTEN in *Ruabon Steamship Co. v. London Assurance* (1) ([1900] A.C. at p. 15), no doubt, is applicable, viz.:

"There is no principle of law which requires that a person should contribute to an outlay merely because he has derived a material benefit from it,"

but the present matter depends on the law relating to liability for damage caused by wrongdoing, not on anything arising out of a contract of indemnity, and in this case at any rate the dock dues were not a "common factor." Nor is there here any question of minimising the damages. The object of that principle is to prevent a tort-sufferer from recovering for damage which is really self-inflicted, because with reasonable effort he could have avoided it. This does not extend to investing the tort-feasor with a right to call on him to do things which do not follow from the collision in order to diminish liability for the wrong.

The precise question, therefore, comes to be this: Was there evidence before the learned registrar which justified him in law in measuring, as he did, that part of the claimants' damage, which consisted in the loss of the use of the *Cairo* during the time occupied in repairing the collision damage? He took the *Cairo's* original cost, written down for two years' depreciation to the date of the collision, and allowed 5 per cent. per annum on it. Such a measure was applied with approval to craft in non-trading civil employment in *The Marpessa* (4), though neither the rate of interest nor the rate of depreciation nor the mode of reckoning it was there defined. In the Admiralty Registry, as instances quoted in ROSCÖE'S book show, varying rates of interest have been allowed according to circumstances, and this ought also to be done when depreciation is reckoned. I think, therefore, it becomes crucial to ask whether, and if so, on what ground, such a calculation can be applied to a King's ship.

That a tort-sufferer is not to go short of compensation for damage at a tort-feasor's hands merely because he does not trade for profit is well settled. Equally little can the tort-feasor escape because his wrong is done to a King's ship. This has been recognised for some fifteen years in *The Surf* (7), and other cases in the Registry and in *The Astrakhan* (8), by DEANE, J. The plan on which the damage is to be calculated is a different matter. King's ships differ among themselves very widely; and, even as a class, they differ as much from the dredgers and light-ships of the Mersey Docks and Harbour Board as these do from common tramps. What, then, is the principle on which the present calculation was made, and is it applicable to King's ships in general and to the *Cairo* in particular? *The Marpessa* (4) was a decision which was consequent on *The Mediana* (3), and *The Mediana* (3) professed to follow the "principle" of *The Greta Holme* (5). The only principle as to this measure that I can find there stated is in LORD HERSCHELL'S word ([1897] A.C. at p. 605):

"How can they the less be entitled to damages because, instead of hiring a dredger, they invested their money in its purchase? The money so invested was out of their pockets and they were deprived of the use of the dredger, to obtain which they had sacrificed the interest on the money spent on its purchase. A sum equivalent to this, at least, they must surely be entitled to."

To this I would add LORD LOREBURN'S words above quoted:

"Those services are at least worth what we are habitually paying for them year after year, including what we sacrifice in depreciation."

Interest is, in any case, a thing that has little to do with non-commercial transactions and, apart from cases of contract, is always a highly fictitious factor in

- A calculations. Further, a calculation based on the cost of construction of a ship written down to the date of the collision is, of course, much more appropriate to the case of a total loss than to demurrage during repair, and although, by manipulating the percentage of depreciation and the percentage assumed for annual value, a flexibility is obtained, which theoretically is almost infinite, the calculation must be a very uncertain test of the true daily value of the user lost. The assumption
- B on which this calculation seems to rest according to the two passages above quoted is that in a well-conducted business the machinery which you buy will generally be found in use to be worth what you spend on it, and this is emphasised by the fact that LORD HERSCHELL's proposition was not really a statement of anything that the Mersey Docks and Harbour Board had actually sacrificed, but was rather directed to the position of a private firm, trading for profit with its own capital.
- C I think, however, that when one gets away from personal trading, this assumption may quickly become unsound. For a dredger, working at a limited task under settled local conditions, or a lightship always discharging the same duty in the same place, it may well be that an admirably managed dock authority, aided by the best engineering advice, can insure that they get full value for what they spend, and may reasonably reckon both depreciation and annual value by dividing expense
- D into the prospective life of the vessel. For some Admiralty craft the same assumption may reasonably be made, for tugs for example, and oilers, or harbour launches and ferry boats, or floating docks, or even, it may be, for the old Indian troopships. There is a regularity of duty and a close analogy to commercial undertakings in these cases that justify the assumption. Beyond such craft the analogy tends quickly to vanish. There is no presumption that ships of war are worth to the
- E State what was spent on building them, or that their daily user is worth the cost of running them, for outlay on the Navy is not a matter of commercial investment of money but of State policy. What, for example, is the daily value of the user of a mine-layer or a submarine in time of peace, or what can be made of interest on the capital laid out on the guns and armour of a battleship? In ships of war fashion changes, or, perhaps, I should say the science of war advances; ships are
- F built in a hurry or when prices are high, or are continued in service when they are obsolescent or have proved to be failures, and this for reasons of policy and not of economics. Much depends on the kind of ship; more on the existence of profound peace or the imminence of the outbreak of war. In the last event the value of the time, when collision makes a man-of-war unavailable, may truly be at once vast and inestimable; in some of the others the value of the user may really be no
- G more than that of floating accommodation for officers and crew, who have among other things to be kept under discipline and busy. To all these matters in the appropriate case the registrar would have to direct his mind. No formula can fit them all and no formula could fail to vary in regard to its factors from time to time. The practical question is whether it can be said that, in applying the principle of *The Greta Holme* (5) to the case of the *Cairo*, the learned registrar mis-
- H directed himself in law. On the record the learned registrar had very little evidence about the *Cairo* before him, but there are two things always to be borne in mind about proceedings in the registry. The great experience of the registrar and the knowledge of the merchants, who assist him, make evidence on many topics quite superfluous, and the participation in the proceedings of experienced counsel constantly justifies the conclusion that, by tacit, if not by express consent, statements
- I are accepted of which no formal proof appears on the note. I think that on the present point there was a large measure of consent, nor was this much contested. It seems to me reasonable to conclude that, whether by the knowledge which he had acquired in the course of his duties or by the advice of the gentlemen who assisted him, or by the acquiescence of counsel, specially familiar with such matters, or by all of these, the learned registrar was warranted in assuming that the *Cairo*, a ship about two years old, performing duties and designed to perform duties inter alia which appear to have consisted in patrolling the Yang-tse-Kiang near Hankow and in giving moral rather than material support to British interests,

was doing work for which the outlay upon her was economically well designed, and that in allowing a rate of interest, not I think excessive, upon what is really a wasting security he was committing no error in law. A

I am of opinion that, in the present case, there is no ground for interfering with the conclusion of the learned registrar, but I think that, except in cases very strictly comparable with the present case, or in cases where admissions are made, the Admiralty should be required, as part of their claim, to give evidence of the character of the ship, to explain what her duties are and the true relation of the original cost to her duties at the time of the damage, and so to enable a clear judgment to be formed of the appropriate rates of depreciation and of interest. B
I think also that the limit of comparable cases will soon be reached, and that beyond it some modified calculation will have to be found. C

LORD PHILLIMORE.—Public bodies who are owners of ships employed in local public service may, when their vessels have been injured by collision, recover, among other sums, damages for their detention while under repair, although no gain which could be measured in money accrues to such bodies by the use of their ships or is lost by reason of their being put out of action. This has been decided by your Lordships' House in three cases: *The Greta Holme* (5), *The Mediana* (3), and *The Marpessa* (4). D
It has not yet been settled by your Lordships' House that the same principle extends to men-of-war and to Sovereigns as owners of men-of-war. But this step has been taken in the Admiralty Division in *The Astrakhan* (8), and, as your Lordships have been informed, in several unreported cases. Men-of-war are not built or commissioned or put on their station except for purposes of utility to the State which owns them; and the principle which your Lordships have applied to local public bodies seems logically to extend to the Crown and to other Sovereigns, and I presume that your Lordships will take this opportunity of giving your sanction to the practice which has been followed in the Admiralty Division. E
I might add that it seems to have been anticipated by LORD HALSBURY in *Clydebank Engineering and Shipbuilding Co. v. Yzquierdo y Castaneda (Don Jose Ramos)* (9) that such would be the case. This determines the first point under consideration in the case of the *Chekiang*. F

A period of twenty days has been fixed by the registrar as the probable time which repairs to H.M.S. *Cairo* for the damage caused by the collision would take. He has not allowed for the period while she was undergoing temporary repair at her station at Hankow, because he conceives that, even in her damaged state, she sufficiently represented the power of Great Britain; and no claim appears to have been made for the two days lost in steaming to Hong Kong, where her permanent repairs were done. G
The registrar has estimated that these repairs at Hong Kong would, in any event, have taken twenty days, and for this estimate there is sufficient warrant in the evidence, and your Lordships have not had any serious challenge of its finding on this point. But it is contended on behalf of the owners of the *Chekiang* that in reality the repairs of the *Cairo* caused no detention, because the opportunity of her being in dry dock was taken for submitting her to the periodical overhaul to which ships in H.M. Navy are submitted, and this overhaul ran pari passu with the repairs and lasted longer than the twenty days which the repairs in normal course would have taken. H
This contention has been accepted by the Court of Appeal. It appears that the usual rule is that this periodical overhaul or refit should take place at intervals of twelve months, that the period of twelve months would have expired at the end of November or early in December, 1921, and that the *Cairo* went into dry dock for her repairs on Sept. 7. I
But it is not a rigid rule that directly on the expiration of a twelve months' period the refit should begin. All such matters are subject to the exigencies of the public service and the orders of the commander-in-chief of the station. The time is approximate only. It was found by the registrar, and must now be taken to be the case, that the *Cairo* was not sent to Hong Kong with a view to this refit, and that the idea of combining the repairs and refit was not accepted by the authorities till after she

A had got to Hong Kong. It was not a case where collision or no collision she would have gone into dock then for her refit. It is a case where the going into dock for repairs being necessary, the authorities on the whole thought it convenient to advance the period of refit (though that advance is itself open to some objection) and combined the two operations, or it may be said superadded the refit on the repair. This being so, there is no question that the detention for twenty days was due to the collision, and all that can be said on behalf of the owners of the *Chekiang* is that the Admiralty employed the time profitably and thereby saved a part of the period which would at some later date, if no accident had happened and nothing special had supervened, have been taken up for a refit.

It seems to me, as indeed to all your Lordships, that a wrongdoer cannot claim to have the damages given to him reduced by any such consideration. The principle laid down by your Lordships' House in *Ruabon Steamship Co. v. London Assurance* (1) applies, notwithstanding the way in which the lords justices have distinguished it. The decision of SIR FRANCIS JEUNE in *The Acanthus* (2), where advantage was taken of the vessel being in dry dock to add the improvement of bilge keels and yet the whole period of detention was allowed against the wrongdoer, was, I think, sound. The decision in the Court of Appeal in *The Haversham Grange* (6), when rightly understood, is an authority to the same effect. In that case the injured vessel was the subject of two collisions, in both of which the other ship was the wrongdoer, and the repairs occasioned by the second collision proceeded simultaneously with and took a shorter time than the repairs due to the first. In the action against the second ship a claim was made for demurrage during the time taken for the repairs due to the second collision, and the court expressed itself so strongly against this claim that it was given up. But it was not the contention of anybody that the owners of this injured vessel should not have this period of detention. The claim against the second ship was disallowed because the first ship had got to pay it. The owners of the injured ship were entitled to claim the full period of detention against ship No. 1, though they utilised part of it for repairing damage caused by ship No. 2. It is true that the Court of Appeal did make ship No. 2 pay a proportion of the charges due for the use of the dry dock; but the court distinguished this charge from the charge for detention on a ground which it is not very easy to appreciate, that the charge for the dry dock must be considered as part of the charge for repair. This point may some day have to be reconsidered; but on the question of detention the case is an authority in favour of the Admiralty. I think that the point may be put quite shortly as follows. If a vessel has got to go into dry dock for a periodical survey for class, or in the case of King's ships by the practice of the Admiralty, or to repair previous damage, her detention for repairs due to some collision which occurs after the previous damage or after the determination to put her into dry dock has been made will not be a charge against the wrongdoer; otherwise it will. This covers the second point in the case.

H The third point is as to the amount of compensation estimated day by day during the twenty days. The registrar has arrived at this in accordance with the practice which apparently has obtained in other similar cases. There being no other measure to guide him, he has allowed interest at a certain rate upon the estimated value of the vessel, this value being arrived at by taking prime cost and deducting depreciation from the time when she was launched. As I have ventured already I to observe, ships of war are not built, commissioned, or put on station for idle purposes, and it is to be presumed that they are worth to the State which owns them what it has cost the State to construct and to run them. To this interest the registrar has added a further sum for the pay and allowances of the officers and crew, after making a deduction which must be rough and ready for their assistance during the work of repair. It might be observed with some force that his deductions here are hardly large enough. I do not, for instance, see that he has reckoned for the fact that at any rate the commissioned and higher warrant officers were entitled at least to half-pay whether actively employed or not. But the

deductions to be made would be small, nor have they been seriously insisted upon at this stage of the case. From the nature of things, both items of the estimate must be arrived at by what is, to use the old Admiralty phrase, a *judicium rusticum*, and I think that your Lordships need not interfere, and that the registrar's report, confirmed as it was by the president, should stand, and the judgment of the Court of Appeal should be reversed.

LORD CARSON and **LORD BLANESBURGH** concurred.

Appeal allowed.

Solicitors: *Treasury Solicitor; Waltons & Co.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

ADMIRALTY COMMISSIONERS *v.* SUSQUEHANNA (OWNERS). THE SUSQUEHANNA

[HOUSE OF LORDS (Viscount Dunedin, Lord Sumner, Lord Phillimore, Lord Carson and Lord Blanesburgh), April 16, 19, June 18, 1926]

[Reported [1926] A.C. 655; 95 L.J.P. 128; 135 L.T. 456;
42 T.L.R. 639; 17 Asp.M.L.C. 81; 33 Com. Cas. 1]

Shipping—Collision—Damages—Measure—Application of principles of common law—Damage to Admiralty tanker—Loss of use.

On the question of damages in a collision action there is no difference between the position in Admiralty law and that of the common law. The damages due either for breach of contract or tort are such as will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act. If there be any special damage which is attributable to the wrongful act, it must be averred and proved, but if the damage be general, the quantification of such damage is a jury question. Regarding a jury question no rigid rules, or rules that apply in all cases, can be laid down, but in each set of circumstances certain relevant considerations will arise which it would be the duty of a judge in a case to bring before the jury.

An oil tanker belonging to the Admiralty Commissioners was withdrawn from the service of the Admiralty for a period during which collision repairs were being performed. On the question of the damages payable by the defendants who were liable in respect of the collision,

Held: the commissioners were entitled in respect of their being deprived of the use of the vessel to damages assessed on the basis laid down in *The Chekiang* (ante, p. 114), but not to any sum based on the assumption that the vessel could have been profitably chartered by the Admiralty during the time occupied by the repairs if she were not then in use by the Admiralty.

The Greta Holme (1), [1897] A.C. 596, applied.

Decision of the Court of Appeal, [1925] P. 596, affirmed.

Notes. Considered: *Strathfillan (Owners) v. Ikala (Owners)*, *The Ikala*, [1929] A.C. 196. Referred to: *The Edison*, [1933] All E.R. Rep. 144; *The West Wales*, [1932] P. 165; *The Kafristan*, [1937] 3 All E.R. 747; *Sunley & Co. v. Cunard White Star, Ltd.*, [1939] 3 All E.R. 641; *Monarch Steamship Co. v. A/B Karlshamm-Oljefabriker*, [1949] 1 All E.R. 1; *The Susan v. Luckenbach*, [1951] P. 197.

As to the measure of damages in collision cases, see 30 HALSBURY'S LAWS (2nd Edn.) 855 et seq.; and for cases see 41 DIGEST 800 et seq.

A Cases referred to:

- (1) *No. 7 Steam Sand Pump Dredger (Owners) v. Greta Holme (Owners)*, *The Greta Holme*, [1897] A.C. 596; 66 L.J.P. 166; 77 L.T. 281; 13 T.L.R. 552; 8 Asp.M.L.C. 317, H.L.; 41 Digest 808, 6689.
- (2) *Mediana (Owners) v. Comet (Owners, etc.)*, *The Mediana*, [1899] P. 127; 68 L.J.P. 26; 80 L.T. 173; 15 T.L.R. 205; 8 Asp.M.L.C. 493, C.A.; affirmed, [1900] A.C. 113; 69 L.J.P. 35; 82 L.T. 95; 48 W.R. 398; 16 T.L.R. 194; 44 Sol. Jo. 259; 9 Asp.M.L.C. 41, H.L.; 41 Digest 811, 6733.
- (3) *The City of Peking v. Compagnie des Messageries Maritimes*, *The City of Peking* (1890), 15 App. Cas. 438; 59 L.J.P.C. 88; 63 L.T. 722; 39 W.R. 177; 6 Asp.M.L.C. 572, P.C.; 41 Digest 805, 6657.
- (4) *Mersey Docks and Harbour Board v. Marpessa (Owners)*, *The Marpessa*, [1907] A.C. 241; 76 L.J.P. 128; 97 L.T. 1; 23 T.L.R. 572; 51 Sol. Jo. 530, H.L.; 41 Digest 808, 6690.
- (5) *The M. J. Hedley* (1905), unreported. Cited in Roscoe's Measure of Damages in Maritime Collisions (2nd Edn.), p. 98.
- (6) *Admiralty Comrs. v. Chekiang (Owners)*, *The Chekiang*, ante, p. 114; [1926] A.C. 637; 95 L.J.P. 119; 135 L.T. 450; 42 T.L.R. 634; 17 Asp.M.L.C. 74; 32 Com. Cas. 91, H.L.; 41 Digest 805, 6663.
- (7) *The Kingsway*, [1918] P. 344; 87 L.J.P. 162; 122 L.T. 651; 14 Asp.M.L.C. 590, C.A.; 41 Digest 806, 6671.
- (8) *Admiralty Comrs. v. Valeria (Owners)*, [1922] 2 A.C. 242; 92 L.J.K.B. 42; 128 L.T. 97; 16 Asp.M.L.C. 25, H.L.; 41 Digest 803, 6635.

E **Appeal** from an order of the Court of Appeal (BANKES, SCRUTTON and ATKIN, L.JJ.) reported, [1925] P. 196, on the defendants' objection to the registrar's report, referring the report back to the registrar for re-assessment of the damage sustained by the plaintiffs by reason of the loss of the use of their oil tanker *Prestol*.

F The plaintiffs were the Admiralty Commissioners, owners of the oil tanker *Prestol*, and the defendants were the United States Shipping Board, owners of the steamship *Susquehanna*. On Nov. 20, 1920, the *Prestol*, then engaged in the supply of oil fuel to the fleet, was lying moored with her port side to the wharf on the east side of the Neufahrwasser, at Danzig, when the steamship *Susquehanna*, which was bound up-river, struck her stern, carrying away her after moorings and cutting in between the *Prestol* and the wharf so that the *Prestol* sustained considerable damage. The plaintiffs, among other items, claimed £7,200 for loss of use of the *Prestol* from Dec. 17, 1920, to Jan. 17, 1921, being the time during which it was admitted she was detained in dock for repairs. The registrar allowed £6,400 in respect of this item. In his reasons for his report the registrar said:

H "There is clear evidence that such a vessel as the *Prestol* has a commercial value and that she could be profitably chartered, if not in use by the Admiralty, who, in fact, from time to time do charter some of their oilers."

I The Court of Appeal held, affirming the decision of LORD MERRIVALE, P., to refer back the report of the registrar, that the damage sustained by the Admiralty owing to the detention of their vessel was not measured by the market rate of hire for such vessel prevailing during the period of repair, since the Admiralty Commissioners would not in any case have chartered the vessel. The plaintiffs appealed.

The Attorney-General (Sir Douglas Hogg, K.C.), Raeburn, K.C., and Balloch for the appellants.

Dunlop, K.C., and Stenham for the respondents.

The House took time for consideration.

June 18. The following opinions were read.

VISCOUNT DUNEDIN.—The *Prestol* was an oil tank steamer belonging to the Admiralty, and was being used to supply the needs of the oil-driven ships of the British Navy which were stationed in the Baltic. While on this service she was injured in collision with a steamer called the *Susquehanna*, near Danzig. It was admitted that the *Susquehanna* was to blame for the collision. In consequence of the injury the *Prestol* had to be sent home to Rosyth. The repairs occupied thirty-two days. The place of the *Prestol* was filled by the *Benzol*, another oil tank steamer belonging to the Admiralty, which, for that purpose, was withdrawn from her service on the Clyde. The owners of the *Susquehanna* admitted liability to pay (i) for the necessary repairs, (ii) for the pay and victualling of the crew of the *Prestol* during the period of repairs, and (iii) for survey and office expenses, but the Commissioners of the Admiralty further claimed a sum of £225 a day for the period of thirty-two days. This was not admitted by the owners of the *Susquehanna*, and the present action is as to that sum. The matter was in the ordinary course remitted to the registrar and merchants; they, having regard to the fact that if the *Prestol* had been let on a time charter she would have earned a sum slightly less than £225 a day and also to the fact that she was in dock, where she was secure, allowed an overhead sum of £6,400 as damages for the detention of the *Prestol*, that is to say, at the rate of £200 a day. The facts on which they based their judgment were these. There is a good commercial demand for oil tank ships, and they held that if the Admiralty had gone into the market and offered an oil tanker of the class of the *Benzol* for hire they would have got it taken on those terms. On appeal to the president, that learned judge referred the case back to the registrar and merchants. He held that the naked fact that a vessel of that sort could, if let out, have earned the money was not per se a sufficient reason for finding the defendants liable in that sum, but that various other elements fell to be considered. On appeal the Court of Appeal unanimously upheld the judgment of the learned President, and the appeal has now been taken by the Admiralty to your Lordships' House. The actual question for decision is, therefore, only whether the judgment referring back the case to the registrar for further consideration should stand, or whether the registrar's award of £200 a day should be confirmed simpliciter; but, inasmuch as the decision involves the general question of the proper method of calculating damages in such cases, it will, I think, be right that your Lordships should express your opinion on the principles on which such cases should be decided.

As a preliminary to any opinion which I would wish to give it will, I think, be well to see exactly how the authorities stand which have received the imprimatur of this House and are consequently binding upon us to-day. It would not, I think, serve any useful purpose to cite other decisions where the ground has been covered by the decisions in this House. The first case that need be quoted is *The Greta Holme* (1). That case laid down that damages were due for the period during which a ship was rendered useless, even though the ship was not a ship of the kind which could secure commercial employment and earn consequent reward. That, and that alone, was the true point of the case. It is true that a sum was then fixed, but it was fixed by your Lordships much as a jury would fix it. The *Greta Holme* was a dredger. Her services were lost during the period which was occupied in her repair. She could not be, and was not, replaced by any other dredger. There was evidence that if anyone had had a dredger of the same sort he could have let it out at the rate of £100 a day. The dredger was disabled for fifteen weeks. Their Lordships, really acting as a jury, assessed the damages at £500.

The next case was *The Mediana* (2). The *Mediana* was a lightship used by the Mersey Docks and Harbour Board for the lighting of the Mersey. They had need of four lightships, but they kept six; one of the extra ones, namely, the fifth, was used when a periodical overhaul of each of the four was undertaken. The other, or sixth, was kept as an extra one for contingencies. The result was that, one being injured, No. 6 was brought into play and the Mersey Board were put to no extra expense. It was not a case like that of *The Greta Holme* (1) of the work of

A the authority being partly suspended. The board claimed £4 4s. a day for the deprivation of the services of the lightship which had been put hors de combat by a collision for which the defendants were responsible. PHILLIMORE, J., before whom the action depended, held that he was bound by four authorities in Admiralty to find nothing due. This was admittedly so unless *The Greta Holme* (1) had displaced the earlier authorities. He held that it did not, looking to the difference of circumstances as above described, but his judgment was reversed by the Court of Appeal and that judgment was upheld, by this House. They held that *The Greta Holme* (1) did apply. The sum awarded, however, was taken as admitted, so that there was no discussion in either the Court of Appeal or in this House on the precise principles upon which the sum awarded was fixed. It was taken as if it had been found by a jury. Nevertheless, LORD HALSBURY, L.C., gave a long opinion on the general question of the ascertainment of damages. I analyse his opinion as follows: Small damages are not synonymous with nominal damages; damages which are not nominal may be either small or large; no exact rules for the valuation of damages can be given; special damage must be specially proved, but general damages only admit of such evidence as is in the circumstances available, and the amount becomes a jury question; depriving a person of the use of his chattel is a ground for real and not for nominal damages. I am not here concerned with that part of his judgment which explains and distinguishes the judgment in *The City of Peking* (3).

Then came *The Marpessa* (4). This was the case of a dredger employed by a harbour board, and the point of dispute was what allowance was to be made for the days during which, owing to the necessary repairs due to the collision, the dredger was hors de combat. It was not replaced during that time by any other dredger, and no direct pecuniary loss could be proved. The claim as made was for £102 a day, which was based on a theoretical calculation which first of all took what had been paid in the past for another vessel which had been hired, and, adding the expenses of running, brought out an owner's profit of 27 per cent. after allowing 7 per cent. for depreciation. Then, applying the same method to the dredger in question and taking the original cost as the sum on which depreciation was to be calculated, the sum of £102 per day was arrived at. The registrar refused to accept this method, and dealt with the claim in much the same way as a jury would have done. He reduced the amount to £35 a day. In doing so he made his own calculations, in particular allowing 7 per cent. to cover establishment charges, owner's profit and general damage, and calculating that 7 per cent., not on the original value, but on the depreciated value of the vessel. His award was upheld by the president, by the Court of Appeal and by this House, LORD LORE-BURN, L.C., pointing out that in some respects the judgment was wrong, e.g., in calculating for owner's profit; in others inadequate, e.g., in taking the upkeep as what it was in dock instead of what it was on service, but with the registrar's decision, as a jury finding, he would not interfere, as he did not see that it was based on principles that were absolutely wrong.

I think that the result of the decisions may be stated in the following propositions: (i) There is no difference in this matter between the position in Admiralty law and that of the common law, and the common law says that the damages due either for breach of contract or for tort are damages which, so far as money can compensate, will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act. (ii) If there be any special damage which is attributable to the wrongful act that special damage must be averred and proved, and, if proved, will be awarded. (iii) If the damage be general, then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question. (iv) For a jury question no rigid rules, or rules that apply to all cases, can be laid down, but in each set of circumstances certain relevant considerations will arise which, were the matter before a judge, it would be the duty of the judge in the case to bring before the jury. Now the registrar and merchants are not a jury; in one sense they have the

advantage of a jury, for they have great experience, whereas a jury may be composed of persons who never had the opportunity of being in a case before the case in which they are called. None the less, the functions of the registrar and merchants are those of a jury. That being so, I consider that I am doing no despite to their experience, which I cheerfully admit if in this case I make to them the same class of remarks as I should make if I had a jury before me.

I, therefore, come straight to the circumstances of the case. This is not a case where special damage has been attempted to be proved. If it could have been shown that the disabled oil tanker had, by contract, been let to some party at a stipulated rate for the period during which it was disabled, or that owing to its disablement it had missed a contract, then the terms of the contract it had secured or would have secured would have served rightly as the basis of the sum to be allowed as damages. This is where, I think, the registrar went wrong in his original judgment. He took it as if there had been proof of special damage, but there is nothing of that sort in the case; the Admiralty were able to supply the gap made by the accident out of their resources. That does not mean that they are not entitled to any damages. If their fleet were sufficient to provide a stand-by, then the expenses of keeping that stand-by may fairly be taken into consideration. Such expenses mean not only the daily upkeep, but something representing the amount of capital which had been parted with in order to have another ship, but the initial figure of cost does not necessarily represent that capital. Not only has there been necessary deterioration by lapse of time, but a vessel's condition may not be worth what was originally paid for it, quite apart from the deterioration. All these are mere considerations; the registrar must do his best to allow a just, but not an extravagant, figure, and compensate, as far as money can do, the detriment which was in the whole circumstances imposed on the Admiralty by the deprivation of the services of the *Prestol* for twenty-two days. I have gone at some length into this matter, but I think that though I have done so, I have not in any way deviated from the view expressed by BANKES, L.J. I find the nucleus of all I have said in the concluding words of his judgment, but, as the authorities are authorities in this House, I thought it right to put the matter in my own words. I move that the appeal be dismissed with costs.

LORD SUMNER.—I agree that this appeal should be dismissed. As the *Prestol* would not in any case have been hired out during the time of repair, the Admiralty did not lose any hire, and, consequently, cannot claim it as damage caused by the *Susquehanna*. Again, no stand-by oiler was substituted for the *Prestol*, and, therefore, calculations based on the value of a non-existent stand-by are irrelevant. Nor is there any evidence that, in consequence of this collision, any other Admiralty oiler refused a charter, which otherwise would have been taken. The whole suggestion of chartering at this time is pure speculation. The fact is that the Admiralty, by prompt effort and economy in consumption, acting in accordance with their obligation to minimise the damages, managed to get through their work without the *Prestol*, and they cannot get damages based on the use of a stand-by when in fact they did very well without one. There is no proof that any ship was without its due supply of oil, when required, or that any service of any ship was foregone or stinted for want of oil in consequence of this collision. If this had been so, it could and should have been proved, for the Admiralty knew the facts. In no case can this be matter of presumption. Unless such loss is proved the reduction of the margin of supply or its total disappearance is not a head of pecuniary damages, for no actual harm was done. All the same, the *Prestol*'s services during the time of repair were lost, and, accordingly, the "principle" of *The Greta Holme* (1) may be applied, with such rates of interest and depreciation as the evidence may justify. In other words, the loss of user for the time of repair, in effect, made the *Prestol*'s then capital value infructuous for the time being, even though by special effort more benefit was got out of other ships, in which other capital was invested than would otherwise have been the case. Apart from this

A I do not think that there is any evidence of cost of maintenance or of any damage beyond the dock dues and the repair bill, nor do we know of any expenditure on officers and crew which can be said to have been thrown away. As to these heads nothing can be presumed. If such loss can be proved, it will be dealt with by the learned registrar on ordinary principles. If, furthermore, any special expense was incurred in making the re-arrangement necessitated by the *Prestol's* injuries, this

B may be taken into account also, but, if the re-arrangement was brought about simply by greater effort on the part of the officers and crews or shore officials, without extra expenditure, the Admiralty can make no claim, not having suffered any loss. I would add that, if this matter were *res integra*, it is the Admiralty which suffered by this collision, not the *Prestol*, and, accordingly, the loss which is material is that suffered by them, taking their business as a whole, and not such as might

C be shown if they owned nothing but the *Prestol* and an isolated account in respect of her were alone taken. Nothing, however, was made of this theoretic view in *The Greta Holme* (1), and the subsequent cases, and the practice of treating the injured ship, by a sort of personification, as a separate claimant is too inveterate to be disturbed now.

D **LORD PHILLIMORE.**—I think that the judgment of the registrar was rightly overruled. I do not think that the case ought to be treated as one where the oil tank ship *Prestol* could have been treated as a ship to be let out on a mercantile charter, or that the Admiralty could claim on the footing that they required a similar vessel to take her place while she was under repair and so get a charter hire of a similar vessel. The facts are against this view. The Admiralty dared

E not have let her out because they would have lost their margin of provision, and they did not require to hire another vessel because they had this margin. But it is a case, I think, in which the court which refers the matter back ought to give assistance and instruction to the registrar and not leave the matter at large. That the Admiralty may have some compensation for the detention of the *Prestol* must be taken as agreed. For if no such compensation were obtainable, the President

F ought not to have made any reference back. But there has been no cross-appeal from his order. Still, when I listened to the argument of the leading counsel for the respondent, it seemed to me to be in logic an argument against any compensation. The only matters for which, according to his argument, any claims could be made, were the cost of letters and telegrams, which I suppose is nil (as they would have been transmitted on the King's service), and possibly the difference

G of expense between sending the *Belgol* to the Baltic from the Clyde instead of from Rosyth—damages which one might almost call contemptuous. The case is not an unusual one. It must arise with every mail packet company which, in order to be sure of carrying out its engagements, must keep some margin of supply beyond its immediate requirements. It may be a definite stand-by ship. It may be only such a luxury of provision that, without serious inconvenience, the service can be

H carried on by re-arrangement. In such cases, the loss is the loss of the margin of safety. If there was a second accident, a ship would have to be hired to fill the gap. If this were a case where there was a definite stand-by ship, the principle in the case cited by counsel for the respondent—*The M. J. Hedley* (5), where interest was allowed on the loss of a stand-by ship—would seem to be applicable. This is,

I I think, the rationale of the allowance made in *The Mediana* (2). It may be said that the present case cannot be put so high because there is no definite stand-by ship. Still, during the period of detention, the Admiralty was without its margin of safety. If another vessel of the Fleet had been put out of action by any marine peril, they would have had to hire. As it was, it is to be presumed that some one or more of the King's ships was or were not supplied with oil at the proper time, and so some loss of service was entailed or some risk run. As was pointed out in the course of the argument, the judgment of BANKES, L.J., seems to indicate this principle, but for myself, I should like to make sure of this. I find some

difference in the expressions used by the other noble and learned Lords in their several opinions, but I desire to adopt the language of LORD SUMNER: A

"The loss of the user for the time of repair, in effect, made the *Prestol's* then capital value infructuous for the time being, even though by special efforts more benefit was got out of other ships in which other capital was invested than would otherwise have been the case."

This, as I understand it, means that the case of *The Greta Holme* (1) applies, and further, as LORD BLANESBURGH says, "The true measure of damage is that adopted by the learned registrar in the case of *The Chekiang* (6)." B

LORD CARSON.—I concur.

LORD BLANESBURGH.—The *Prestol*, the Admiralty unit innocently involved in this collision, is an oil tanker and not a vessel of war. This fact has led the learned registrar to the interesting conclusion that he is justified in basing the sum to be allowed to the Admiralty in respect of the *Prestol's* detention for the necessary repair of her collision damage upon what may be described as her charterable value for the time so occupied. The question whether he was justified in taking that course is the main subject for consideration on this appeal. So regarded, the case, I think, differs from *The Chekiang* (6) only in the fact that the *Prestol*, unlike the *Cairo*, is not a ship of war. A tanker of an ordinary commercial type, she is one of a fleet maintained by the Admiralty for the service of His Majesty's ships in their different stations throughout the world. Distinguished in two relevant respects from an ordinary ship of war in that the latter is both extra commercium and is never let on hire, a tanker, when the needs of the naval service so permit, may be and is occasionally let out by the Admiralty at ordinary commercial rates, and this circumstance—although it is not suggested that such a letting would be other than exceptional, or that any letting was actually in contemplation for the *Prestol* either at the time of collision or during the period of subsequent consequential detention—has led the learned registrar to raise the question already stated and to answer it as he has done. The President and the Court of Appeal have both disagreed with him. C
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A consideration of the ratio decidendi in *The Greta Holme* (1)—the first case in which a sum for demurrage was included in the general collision damage awarded to a public authority in respect of a vessel engaged upon public duty—leads, I think, to the clear conclusion that the learned registrar, in acting as he did here, proceeded upon a wrong principle. The claim, as the noble and learned Viscount on the Woolsack has already pointed out, is one for general and not for special damage; and while *The Kingsway* (7) is an instance of such a claim being allowed in the case of a vessel normally employed by her owners in plying for hire or profit, *The Greta Holme* (1) itself shows that the court does not proceed upon that basis where the money loss sustained by the temporary withdrawal of the damaged vessel cannot be quantified directly, and where the vessel is not maintained and kept by her owners for the acquisition of gain. The damaged vessel, in *The Greta Holme* Case (1), was a dredger belonging to the Mersey Docks and Harbour Board, not intended by the board to be let, but a vessel for which a rent of £100 a week could have been obtained by the board without difficulty had they offered her for hire. The board quantified their demurrage damage at £1,500—the charterable value of the dredger for fifteen weeks during which she was, at the least, under repair for collision damage. This House, however, did not accede to that claim. Their Lordships assessed the demurrage damage at £500 only, acting doubtless as a jury, but rejecting, it would seem, quite clearly the basis on which the harbour board formulated their claim—the basis which the learned registrar has here adopted. This, of course, is not to say that such a basis may not properly be used where the claim is one for special damage. This is shown very neatly in *Admiralty Comrs. v. Valeria (Owners)* (8), where a vessel, chartered by the Admiralty, was at the time employed by them as an ordinary trading vessel for freight. It was G
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A held by this House that the proper measure of damage for repair demurrage was the amount of freight which, but for the accident, the ship would have earned during the period of detention, plus working expenses.

But, if regard is had to the principle upon which in such cases general damage under this head is recoverable at all, the exclusion of such a basis where the claim is for general damage only almost necessarily follows. The question, of course, only arises, where, as here, the value of the service which would have been rendered by the damaged vessel during the period of repair cannot be quantified in money. Are public authority owners in such circumstances to receive no compensation at all for the compulsory withdrawal of their vessel from service? This House, in *The Greta Holme* (1), answered that question in the negative and, as it was put by LORD LOREBURN in *The Marpessa* (4), the daily sum which it costs to maintain the service may in such cases be regarded as the fair value of that service, and may well form the basis of compensation for its withdrawal. In some way or other it must be the value to the owners of the service lost or the cost to them of replacing it which is represented in the sum awarded. So much is required by the rules of the common law which must be followed in such matters. The sum cannot properly represent the value of something else altogether. And while the cost of the service itself may be a good indication of its value, the hire which the vessel employed to render that service may be capable of earning in a totally different milieu can, one would suppose, be no such indication at all.

Accordingly, I reach the conclusion with the rest of your Lordships that the case must go back to the learned registrar for reconsideration. It would, I feel sure, be of great assistance to him if as definite a direction as to his proper course as is possible be now given. I should myself in this case be prepared to say that here the true measure of the main item of damage is that foreshadowed in *The Greta Holme* (1) and adopted, as developed in subsequent cases, by the learned registrar in *The Chekiang* (6). That measure has been approved in many cases; it has been frequently adopted in chambers, as is made apparent in *The Chekiang* (6); and its adoption by the learned registrar in that case is not disapproved of by your Lordships. It seems in no way inappropriate in the present case: it has the merit of simplicity, and it appears to me that in a class of case where, however elaborate the inquiry, the result must always be as applied to the real situation, more or less arbitrary, the application of a measure which has had the sanction of your Lordships' House, which is convenient of application and is not extravagant in result, may well be encouraged in any proper case. If I am not mistaken, my noble and learned friend, LORD SUMNER, is not averse to the application of this principle as applied to quasi-mercantile vessels like the *Prestol*, but if I am in this under any misapprehension I am well content that the learned registrar should take his direction from my noble friend's opinion.

Appeal dismissed.

Solicitor: *Treasury Solicitor; Thomas Cooper & Co.*

[Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]

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BROWNING AND OTHERS *v.* CRUMLIN VALLEY COLLIERIES LTD.

[KING'S BENCH DIVISION (Greer, J.), January 18, 19, 20, 21, 22, 25, 26, 27, 28, 29, February 2, 3, 4, 22, 1926]

[Reported [1926] 1 K.B. 522; 95 L.J.K.B. 711; 134 L.T. 603;
90 J.P. 201; 42 T.L.R. 323; 24 L.G.R. 302]

Master and Servant—Wages—Coal mine—Mine closed for repairs—Right of miners to wages.

The plaintiffs were miners employed by the defendants at a mine of which the defendants were the owners. In 1924 the mine became unsafe, and was closed for some five weeks. The plaintiffs, on behalf of themselves and other workers in the colliery, claimed damages for loss of wages, alleging that there was an implied term in their contract of employment that the defendants should provide them with work and comply with the provisions of the Coal Mines Act, 1911, of which duty they were in breach. The plaintiffs were employed under contracts which contained no provision expressly applicable to the circumstances of the case. The learned judge found that the unsafe condition of the mine was not due to any negligence on the part of the defendants.

Held: (i) no undertaking could be implied in the plaintiffs' contracts of service that the defendants would comply with the provisions contained in the Coal Mines Act, 1911, with regard to safety in mines and so maintain the mine in such a condition that the plaintiffs could work in it, but a term was to be implied that in such circumstances as had arisen the consequences were to be divided between employers and employed, the employers losing the advantages of having their coal gotten and being compelled to undertake expensive repairs and the employees losing their wages for such time as was reasonably required to put the mine in a safe condition.

(ii) the plaintiffs could not recover damages for a breach by the defendants of their duty to comply with the safety provisions in the Coal Mines Act, 1911, since those provisions only applied to mines while they were being worked, and, indeed, imposed on the defendants a duty not to employ men in their mine when it was unsafe, and the plaintiffs suffered damage, not by the defendants' breach of duty, but by the stoppage of the mine while the defendants were fulfilling their statutory duty to restore it to the condition required by the statute.

Notes. The Coal Mines Act, 1911, was repealed and replaced by the Mines and Quarries Act, 1954, for which see 34 HALSBURY'S STATUTES (2nd Edn.) 514.

As to a mine owner's statutory duties, see 26 HALSBURY'S LAWS (3rd Edn.) 564 et seq.; and as to a master's duty to provide work for his servant, see *ibid.*, vol. 25, pp. 467-469. For cases see 34 DIGEST 49-51, 729 et seq.

Cases referred to :

- (1) *The Moorcock* (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 37 W.R. 439; 5 T.L.R. 316; 6 Asp.M.L.C. 373, C.A.; 12 Digest (Repl.) 686, 5274.
- (2) *Burton v. Pinkerton* (1867), L.R. 2 Exch. 340; 36 L.J.Ex. 137; 16 L.T. 419; 31 J.P. 615; 15 W.R. 1139; 2 Mar.L.C. 547; 34 Digest 81, 597.
- (3) *O'Neil v. Armstrong, Mitchell & Co.*, [1895] 2 Q.B. 418; 65 L.J.Q.B. 7; 73 L.T. 178; 11 T.L.R. 548; 8 Asp.M.L.C. 63; 14 R. 703, C.A.; 34 Digest 81, 599.
- (4) *Austin Friars Steam Shipping Co. v. Strack*, [1905] 2 K.B. 315; 74 L.J.K.B. 683; 93 L.T. 169; 53 W.R. 661; 21 T.L.R. 556; 49 Sol. Jo. 537; 10 Asp.M.L.C. 70, D.C.; on appeal, [1906] 2 K.B. 499, C.A.; 12 Digest (Repl.) 457, 3418.

- A (5) *Palace Shipping Co., Ltd. v. Caine*, [1907] A.C. 386; 76 L.J.K.B. 1079; 97 L.T. 589; 23 T.L.R. 731; 51 Sol. Jo. 716; 10 Asp.M.L.C. 529; 13 Com. Cas. 51, H.L.; 12 Digest (Repl.) 458, 3421.
- (6) *Liston v. Carpathian (Owners)*, [1915] 2 K.B. 42; 84 L.J.K.B. 1135; 112 L.T. 994; 31 T.L.R. 226; 13 Asp.M.L.C. 70; 20 Com. Cas. 224; 41 Digest 222, 606.
- B (7) *Horlock v. Beal*, [1916] 1 A.C. 486; 85 L.J.K.B. 602; 114 L.T. 193; 32 T.L.R. 251; 60 Sol. Jo. 236; 13 Asp.M.L.C. 250; 21 Com. Cas. 201, H.L.; 12 Digest (Repl.) 433, 3322.
- (8) *Beale v. Thompson* (1804), 4 East 546; 1 Smith, K.B. 144; 102 E.R. 940; affirmed (1813), 1 Dow, 299, H.L.; 34 Digest 84, 624.
- (9) *Pratt v. Cuff* (1798), cited in 4 East, at p. 43; 102 E.R. 746, N.P.; 41 Digest 230, 689.
- C (10) *Delamainer v. Winteringham* (1815), 4 Camp. 186; 171 E.R. 60, N.P.; 41 Digest 231, 697.
- (11) *Cuckson v. Stones* (1858), 1 E. & E. 248; 28 L.J.Q.B. 25; 32 L.T.O.S. 242; 5 Jur.N.S. 337; 7 W.R. 134; 120 E.R. 902; 34 Digest 71, 483.
- (12) *Hanley v. Pease & Partners, Ltd.*, [1915] 1 K.B. 698; 84 L.J.K.B. 532; 112 L.T. 823; 79 J.P. 230, D.C.; 34 Digest 111, 830.
- D (13) *Devonald v. Rosser & Sons*, [1906] 2 K.B. 728; 75 L.J.K.B. 688; 95 L.T. 232; 22 T.L.R. 682; 50 Sol. Jo. 616, C.A.; 34 Digest 48, 237.

Action tried before GREER, J., without a jury.

The facts and arguments are fully stated in the judgment.

- E *J. B. Matthews, K.C., A. J. James, and Ivor Brace* for the plaintiffs.
Vachell, K.C., Cave, K.C., and Lincoln Reed for the defendants.

Cur. adv. vult.

- February 22. **GREER, J.**, read the following judgment. The plaintiffs in this case are six colliers suing on behalf of themselves and all the underground and surface workmen employed by the defendants at their Crumlin Valley Collieries on Aug. 18, 1924. The defendants are the Crumlin Valley Collieries, Ltd., the employers of the plaintiffs on that date. By their statement of claim, the plaintiffs claimed declarations that the defendants were liable to pay to the plaintiffs wages, or, alternatively, damages, in respect of a loss of wages sustained by them respectively for varying periods of time from Aug. 18, 1924, during which they were absent from work by reason, as they allege, of breaches of contract, or, alternatively, breaches of statutory duty, by their employers, the defendants, and the named plaintiffs claimed payment of the wages or damages to which they are declared entitled. The declarations are claimed separately with regard to the period from Aug. 16 to Sept. 22, 1924, during which there was a complete stoppage of work, and for the period subsequent to that date by reason of a partial stoppage which affected some of the named plaintiffs and some of the unnamed plaintiffs. The right to wages or damages was alleged to arise from (i) An implied term in their contract of employment, that the defendants should, during the continuance of the plaintiffs' contract of employment, provide the plaintiffs with work, so as to enable them to earn wages; (ii) an implied term that the defendants should comply with the statutory provisions contained in s. 36 (1), s. 38, and s. 40 (1), of the Coal Mines Act, 1911, and regs. 79 and 80 of the General Regulations made under that Act [and relating to the provision, securing and maintenance of shafts, outlets and winding apparatus: see now Mines & Quarries Act, 1954, s. 22 (1), s. 30, and s. 28 (1) (3)]; and (iii) a term in the contract that the defendants would keep and maintain their collieries in good, substantial, and safe condition and repair so that the plaintiffs could work and continue to work at the said colliery during the continuance of their said contract with the defendants, and they, the plaintiffs, alleged that the defendants failed to perform their contractual duties and thereby broke their contract and caused to the plaintiffs the damage in respect of which they

claimed damages. They also based their claim for damages on the alleged breach A
of the statutory duties referred to above. In their defence the defendants denied
that they employed the plaintiffs on the terms mentioned in the statement of
claim, and alleged that their contract of employment was subject to an implied
condition that if for any reason it became dangerous and unsafe to continue to
work the colliery, the plaintiffs should not be entitled to demand work from the
defendants during such time as was necessary for executing repairs or alterations B
undertaken in order to render the working of the colliery safe. They put in issue
the other material allegations of the statement of claim, and relied upon the pro-
tection of s. 36 (4), s. 99 (4), and s. 102 (8) of the Coal Mines Act, 1911 [see now
ss. 146 and 157 of Act of 1954].

The material facts as proved by the evidence are as follows. The plaintiffs were
employed by the defendants at the Hafodyrynys Colliery in various capacities on C
the terms, so far as they were expressed, of the Conciliation Board Agreement of
July 1, 1921. On Saturday, Aug. 16, 1924, an accident occurred by the fall of
part of the lining of the west shaft of the mine, causing serious injuries to two
men. On Monday, the 18th, the miners required the manager to permit an exam-
ination to take place of the shaft before they decided whether they would go down
into the mine. The report of the examiners was unfavourable, and before the men D
would resume work they desired the pit to be examined by the district miners'
agent. It was so examined, and as a result the men were advised that the shaft
was not safe, and accordingly they refused to work. The shaft was examined again
on behalf of the men on Aug. 19, 24, 26, 27, and 30, and on several of these exam-
inations government mining inspectors were present and took part. On the first
two occasions the west shaft only was examined, but on the other four occasions E
the east shaft was also examined. After the last inspection, on Aug. 30, the Chief
Inspector of Mines, Mr. H. Walker, after a consultation with two other inspectors
who accompanied him, stated his view in a written statement which he handed to
the owners and the miners' agent, and which reads as follows:

"(i) The west pit to be put in order to the satisfaction of Mr. Carey and Mr. F
Jenkins. (ii) Application for exemption from provisions of s. 36 to be made.
No work to be done underground without exemption, the east shaft not being,
in my opinion, an outlet within the meaning of s. 36."

A great deal of evidence was called with regard to the condition of the two shafts,
and I have come to the definite conclusion, after full consideration of the evidence,
that neither shaft was reasonably safe on and after Aug. 16, and the men were G
justified in refusing to go down until sufficient work had been done to make them
safe. I think that by Aug. 30 the work required to make the west shaft reasonably
safe was nearing completion, and that in the course of two days' further work the
west shaft was in a reasonably safe condition, though it still required some repairs,
which could, in my judgment, be safely done at week-ends. The east shaft was
not reasonably safe at any time before the men came back to work on Sept. 22. H
I find that the unsafe condition of the west shaft was not due to any negligence
or breach of duty on the part of the defendants, that such repairs were done from
time to time as were reasonably required to keep the shaft in a safe condition, but
that the unsafe condition arose from continued and unusual pressure on the lining
of the shaft, which had by Aug. 16 brought the shaft into a condition in which it
could not be rendered safe or kept safe by repairs from time to time, but that it was I
necessary that its use should be discontinued and complete and thorough repairs
carried out before it could be deemed reasonably safe. After the examination of
the west shaft a request was made on Aug. 24 for the examination of the east shaft,
and several witnesses gave an account of its condition. I do not think it necessary
to go into detail with reference to the condition of the shaft, but I find as a result
of all the evidence that it was in fact not reasonably safe, and that it had been
in a dangerous condition for several months before Aug. 18, probably from the
early part of January, 1924. This shaft had been subjected to very great pressure

A by the strata through which the lower part of it passed. The pressure had crushed the inset to the roads at the bottom of the shaft and had greatly constricted the diameter of the shaft, especially that part of it that was below and just above the three-quarter landing. For many years it had required careful watching, and in the year 1920 the mine-owners decided, on the recommendation of the manager, to construct at the bottom of the pit a new inset consisting of a concrete wall and
B iron girders of such size and strength as would form not merely a strong and satisfactory inset, but also would afford a strong foundation for the shaft itself. The carrying out of this work involved very great care and it could only be done safely if done slowly. The work was nearing completion when the mine stopped on Aug. 18 in consequence of the refusal of the men to work. In my judgment, founded upon the evidence, it would have been impracticable and unwise to have
C started any reconstruction of the shaft lining until after the completion of the foundation. The manager, therefore, wisely contented himself with repairing the portions of the shaft that appeared to threaten danger from time to time, and postponed the work of reconstruction of the lower part of the shaft until after the completion of the inset and foundation. In my judgment, the owners were not
D guilty of any negligence in adopting the methods they did in dealing with a very difficult situation. I think it was inevitable from the date when the work was commenced in 1920 that as soon as the new foundation and inset were completed it would be necessary to put the shaft out of commission in order to reconstruct the lower part. Unfortunately, this part of the shaft had, in my judgment, become
E dangerous before the completion of the foundation. I think it had got into this condition by the beginning of the year 1924, but the exact date when it ought to have been put out of commission need not be definitely ascertained. If the defendants had closed their mine for the purpose of reconstructing the lower part of the east shaft at any date earlier than Aug. 18, the mine would have been closed for a longer period than it in fact remained closed at the later date, because it would at the earlier date have taken longer to complete the foundation, and the plaintiffs would have been deprived of work and wages for a longer period of time than in
F fact they were by what happened in August.

I have now to consider the effect of these findings on the plaintiffs' claim for wages or, in the alternative, damages. The plaintiffs' claim for wages or damages was, in the first place, based on implied terms in their contract of employment. There is, undoubtedly, an implied obligation on the part of the employers to exercise reasonable care to keep their ways, works, machinery, and plant in a safe
G condition for the men to work. So far from being satisfied that they had failed in this duty, I think the defendants took all reasonable steps to combat the difficulties created by the forces of nature operating on the shafts, and that the shafts got into an unsafe condition notwithstanding the exercise of reasonable care by the defendants and their agents or servants in that behalf, and that, therefore, the defendants committed no breach of the implied obligation at present under con-
H sideration.

It was contended on behalf of the plaintiffs that there was an implied undertaking in the contract with the employers that the defendants would comply with the statutory provisions contained in the sections of the Act above mentioned. In my judgment, the contract contained no such implied term. I do not think that it would have occurred to anyone that it was necessary to make the statutory provisions in question part of the contract. Certain absolute duties and liabilities
I are expressly imposed on the owners by the statute, and it cannot be assumed that either party, still less both of them, must have intended that they should be part of the contract. It follows that, whatever may be the effect of the statute apart from the contract, there was no absolute duty under the contract to comply with the provisions mentioned in the statement of claim.

What, then, is the position of the workmen faced with an unusual danger such as existed in both shafts on Aug. 18? Were they entitled to refuse work, and, if they refused to work, were they entitled to their wages? In order to decide these

questions it is necessary to determine whether there was in their contract of employment any implied term which would regulate their rights and duties in the events that happened. It must be borne in mind that mining is in any circumstances a dangerous occupation, and that it is generally known that the working of mines is liable to be interfered with and stopped altogether for varying periods of time through damage caused either by the negligence of some of the men or by the forces of nature which the exercise of reasonable care has failed to cope with. The terms of the plaintiffs' contract of employment so far as they are express are contained in what is called the Conciliation Board Agreement for the Coal Trade of Monmouthshire and South Wales. This in origin was a general agreement between representatives of owners and representatives of workmen in Monmouthshire and South Wales. It had been made part of the plaintiffs' individual contracts of employment by having their signatures attached to it in a book kept by the defendants. It contains no provisions expressly applicable to the circumstances of the present case. It provides in cl. 25 that all notices to terminate individual contracts shall be a fourteen days' notice; but as to what is to happen when the workman is unable to work and the employer is unable to provide work without any default on either side, the written agreement does not say. The consideration for work is wages, and the consideration for wages is work. Is it to be implied in the engagement that the wages are to be paid when, through no fault of the employer, the work cannot be done?

The principle that ought to guide the court when asked to say whether any term should be read by implication into a written contract was stated by BOWEN, L.J., in *The Moorcock* (1), and his words have ever since been accepted as the guiding principle. In any case in which it is necessary to ascertain whether any and what term should be implied in a written contract, the correct application of this guiding principle has to be determined. BOWEN, L.J., said:

"Now an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and there are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances."

It seems to me that there must be in the circumstances of the present case some implied term. The men did not work, they were not ready and willing to work in the state the mine was in, and the agreement is silent on the question whether they are in these circumstances entitled to be paid wages. Were the mine-owners to bear "all the chances of failure" due to the operation of natural forces without any fault on their part? Were the perils of the transaction in that event to be all on one side, or must the consequences be divided between the two parties, the employers losing the advantages of continuing to have their coal gotten and being compelled to undertake expensive repairs, and the men on their part losing their wages for such time as was reasonably required to put the mine into a safe condition? The latter I think must be presumed to have been the intention

A of both parties. I am satisfied that no employer would have consented to agree that the workmen should be free to withhold their work if the mine became dangerous through no fault on his part and yet should be entitled to be paid their wages. I think the employer would only have agreed to the workmen's right to withhold their labour in these circumstances subject to the condition that they should not be entitled to their wages. Further, it seems to me clear from the way in which the present case was conducted, and from the evidence given by several witnesses, that this was the usual understanding of the effect of the men's contract of employment. Counsel for the plaintiffs at one period of the case admitted that if a mine was stopped through accident for which the owners were not responsible, the miners would not be entitled to their wages. The admission was made inadvertently and was withdrawn, and I attach no importance to it, but I do attach importance to what the witnesses said, and to the fact that though the point was made quite clearly by counsel for the defendants in cross-examination, not a single witness for the plaintiffs gave any evidence inconsistent with the view of the contract suggested in cross-examination, and either accepted or not disputed by the witnesses to whom it was put.

The view I take of the nature of the implied term in the contract seems to be fatal to the plaintiffs' claim on the contract, whether the claim is for wages or for damages. Counsel for the plaintiffs, however, contended that, having regard to the decided cases, it was impossible in a contract of employment to draw the inference that there was such an implied term as I have mentioned, and cited a number of authorities in support of this contention. Most of these authorities dealt with claims by sailors for their wages. The sailors' cases relied on are as follows: *Burton v. Pinkerton* (2), *O'Neil v. Armstrong* (3), *Austin Friars Steam Shipping Co. v. Strack* (4), *Palace Shipping Co., Ltd. v. Caine* (5), and *Liston v. Carpathian (Owners)* (6). In all these cases except the last it was held that, though the plaintiffs had not served during the whole of the voyage contracted for, they were entitled to recover their wages because the owner had by his own act changed the character of the voyage and substituted one which the plaintiffs were entitled to refuse to take part in as it was not the voyage intended by the contract. They are none of them cases in which, without any fault of the owner, it had become impossible either temporarily or permanently to continue the agreed voyage. They do not go far enough even in the case of a seaman's contract to establish the proposition that where the voyage becomes impossible through no fault of the owner the men are entitled to their wages. Indeed, it has been finally decided that if performance of the contractual voyage be prevented by some cause which is likely to last a long but indefinite time both sides are released from their bargain, and the seaman cannot recover wages in respect of any of the time when it has become impossible for him to continue to serve: see *Horlock v. Beal* (7). The decision of LORD COLERIDGE in *Liston v. Carpathian (Owners)* (6) affords no light on the question I have to decide. That was a case where by frustration of the adventure the contract was dissolved, and it was held that the seaman and the captain were in a position to make a new binding contract, and that the contract made with the men by the master was within the master's authority.

There are, however, three cases with regard to seamen that were not cited to me which appear to be in point unless they are distinguishable on the ground that the seaman's contract is a very special kind of contract to which different considerations apply from those which affect other kinds of employment. The cases I refer to are *Beale v. Thompson* (8), *Pratt v. Cuff* (9), and *Delamainer v. Winteringham* (10). These cases show, at any rate on the law as it stood at the date when they were decided, that, if a seaman's engagement be interrupted by detention of the ship and crew by causes beyond the control of either the seaman or the owner, and the interrupted voyage be resumed even after a delay of six months, the seaman is entitled to his wages for the whole period from the beginning of the voyage to its completion, including the stipulated amount per month while he was detained by circumstances beyond the owner's control. They were decided at a

time when the doctrine that freight is the mother of wages prevailed, and when the main consideration for the wages of the seaman was considered to be that he thereby enabled freight to be earned. Assuming, however, that the law applied in those old cases still applies to a seaman's right to wages, it does not follow that the same rule applies to a contract between a workman at a colliery and his employers. A seaman's contract is usually for a voyage, or, if not, then for some prolonged period of time, and it cannot be determined by notice. From the nature of the case interruptions of the voyage and/or the services of the seaman are frequent, and the seaman has not the opportunity of putting an end to his engagement by notice. If he leaves the ship before the end of the voyage contracted for, he is liable to be prosecuted for desertion. It may well be that in these circumstances it is still the law that a seaman is not disentitled to his wages during the time when, through some external cause for which neither he nor the shipowner is responsible, the voyage is interrupted, if the interruption is only temporary and the voyage is resumed. But, in my judgment, the circumstances relating to a workman's engagement to work on or in a coal mine are so different from those of a seaman that no inference can be drawn from decisions as to a seaman's contract in a case concerned with a coal worker's contract.

The only other cases I need refer to when considering the claim so far as it is based on contract are: *Cuckson v. Stones* (11), *Hanley v. Pease & Partners, Ltd.* (12), and *Devonald v. Rosser & Sons* (13). In *Cuckson v. Stones* (11) the defendant engaged the plaintiff to serve him as a brewer for ten years. In consideration of "due, full and complete service" by the plaintiff, the defendant promised to pay the sum of £20 on execution of the agreement, to furnish the plaintiff with a house and coals during the whole of the said term of ten years, and to pay him the weekly sum of £2 10s. during the said term. The plaintiff fell ill and was ill for six months and unable to attend to his duties, but during that time was supplied with house and coal as agreed, and, when required, advised the defendant as to the carrying on of the business. Though the defendant did not discharge the plaintiff, but treated the contract as continuing, he suspended the payment for the last few months of the plaintiff's illness. The court held that a plea that the plaintiff was not ready and willing to serve was a good answer to the plaintiff's claim if proved, but it meant that "he voluntarily and wilfully refused or omitted to serve" and that the plaintiff was entitled to recover. LORD CAMPBELL, C.J., said:

"The contract being in force, we think that here there was no suspension of the weekly payments by reason of the plaintiff's illness and inability to work."

The contract was a very special one and it seems to me the decision does not apply to the facts of the present case. *Hanley v. Pease & Partners, Ltd.* (12) decides that, if a workman misconducts himself, but the employer does not discharge him, the employer cannot keep him to his contract and dispense with his services for a day as a punishment. In that case the suspension was the voluntary act of the employer and was not caused by circumstances beyond his control. That case had no bearing on the question raised by the present case. Great reliance was placed by counsel for the plaintiffs on the decision in *Devonald v. Rosser & Sons* (13), but in that case the defendant's failure to provide work for the plaintiff so as to enable him to earn his piecework pay was due to the employer deciding that owing to bad trade it would pay him better to close down. It was not due to a cause over which he had no control. It was neither illegal nor impossible for him to continue to find work for the plaintiff, and the court expressly left open the question whether the plaintiff could have succeeded if the stoppage had been due to such a cause, indicating, I think, that they were inclined to think that he could not; see per LORD ALVERSTONE, C.J., [1906] 2 K.B., at p. 740, and per SIR GORELL BARNES, P., at p. 742, where the learned President uses these words:

"I can quite understand that having regard to a certain set of circumstances, such as breakage of machinery, it may be reasonable to hold that it was the

A intention of the parties that those risks should be shared, that risks of that character which are known to both parties, and which prevent both from doing what was contemplated, should excuse from the obligation to maintain the continuance of the work."

I think these observations apply a fortiori to contracts between mine-owners and their work people.

B The conclusion I draw from a perusal of the authorities is that there is no case which decides that as a matter of law I cannot infer that there was implied in the plaintiffs' contract such a term as I have stated above. For reasons already stated, I am of opinion that in this case the contract was subject to such an implied term. It is true that the defendants committed a breach of their implied
C obligation to exercise reasonable care to maintain the shafts in a reasonably safe condition when they continued to employ the workmen in the mine after the east shaft became unsafe at the beginning of 1924. But the plaintiffs' loss of wages was not due to the postponement of the necessary work till after the stoppage in August. If the mine had been stopped in January and kept closed until the needed work of reconstruction was completed, the plaintiffs' loss of wages would have
D been more serious than it was. The postponement of the work, so far from causing loss to the plaintiffs, in fact diminished the loss sustained by them by their rightful refusal to work in August and September.

The claim for damages for breach of statutory duty can be shortly dealt with. No doubt, ss. 36, 38, and 40 of the Coal Mines Act, 1911, imposed on the defendants absolute duties the breach of which followed by damage would give plaintiffs a
E good cause of action without proof of negligence, but there are several defences to this claim: (a) The safety of the plaintiffs was not, in fact, interfered with by the breach. No personal injuries were suffered by any of them, and so far as the claim for loss of wages is concerned, it is successfully met by the implied term in the contract of employment which I have already held to be part of their contract. (b) The damage was not due to breach of the defendants' statutory duty. The
F duties imposed by the statute only apply to mines while they are being worked. The statutory provisions may be paraphrased by saying that the statute imposes on the mine-owners a duty not to employ men in their mine when it is not in the state required by the statute. The statute does not mean that the owners are under an absolute obligation to secure that their mine will never get into a condition of unsafety. It merely secures that they are not to risk the safety of their
G employees by working the mine when it has failed to comply with the requirements of the Act directed to securing their safety. The damages in this case were caused, not by breach of duty, but by the stoppage of the mine while the defendants were fulfilling their statutory duty to restore the mine to the condition required by statute. It is true they postponed this duty longer than they should have done, but, as already pointed out, the men did not lose anything by reason
H of this postponement, but on the contrary, gained by it. (c) I find upon the evidence that it was not reasonably practicable for the owners to have prevented the shafts from getting into an unsafe condition, and they are, therefore, protected by s. 102 (8) of the Coal Mines Act, 1911. The only practicable method of dealing with the consequences of unusual pressure on the shafts was, in my judgment, to
I repair from time to time defects as they arose, and so to keep the shafts reasonably safe until the time came when such repairs as could be done while the mine was in work were no longer adequate to that end and in the meantime to proceed with the strengthening of the foundations of the east shaft, then to close the mine, reconstruct the lower part of the east shaft and thoroughly repair the whole of the west shaft. This the defendants did, and though, in my opinion, they formed a wrong judgment as to the safety of the shafts and should have closed the mine earlier than in fact it was closed, the real cause of the plaintiffs' loss of wages was the unsafety of the shafts which it was not practicable to prevent, and not the

postponement of complete repair and reconstruction. For these reasons the plaintiffs' claim fails in all its branches and there must be judgment for the defendants. A

Solicitors: *Smith, Rundell & Dodds*, for *J. S. Edwards & Son*, Newport; *Bell, Brodrick & Gray*, for *Kensholes & Prosser*, Aberdare.

[Reported by R. A. YULE, Esq., Barrister-at-Law.] B

AKTIESELSKABET REIDAR v. ARCOS LTD. C

[COURT OF APPEAL (Bankes, Atkin and Sargant, L.JJ.), July 1, 22, 1926]

[Reported [1927] 1 K.B. 352; 96 L.J.K.B. 33; 136 L.T. 1;
42 T.L.R. 737; 17 Asp.M.L.C. 144; 32 Com. Cas. 34] D

Shipping—Charterparty—Failure of charterers to load full cargo—Right of ship-owners to damages—Measure of damages—Effect of provision for demurrage—Extension of lay days by demurrage days.

A charterparty provided that a ship should load a "full and complete cargo" of timber, and the contract provided for loading at a stipulated rate and for demurrage "should the steamer be detained beyond the time stipulated for loading." The charterers failed to load at the stipulated rate with the result that the ship could only sail for her port of destination in the United Kingdom with a "winter cargo" if her master and owner were not to be liable to penalties under s. 10 of the Merchant Shipping Act, 1906. If loading had been carried out at the stipulated rate she would have been able to arrive at the port of destination with a full "summer cargo" which was considerably larger. The plaintiffs claimed dead-freight for the difference between the "full and complete" cargo which might have been carried and that which, in fact, was carried. E

Held: the provision in the charterparty for demurrage did not extend the lay days, its object was to provide compensation for a detention of the vessel by the charterers in the course of fulfilling their obligation to load a full and complete cargo and not to give compensation for a breach of that obligation; and, therefore, at the determination of the lay days the charterers were in breach of the charterparty, and the shipowners were entitled as damages to the difference between the amount of the freight which they would have earned if the charterers had loaded at the agreed rate, i.e., a full cargo, and the amount which they in fact earned. F

Per ATKIN, L.J.: It appears to me to be incorrect to say that days on demurrage are extended lay days unless the contract is so drawn. On the contrary, demurrage days are days in which the charterer is in breach, and this view alone explains what I conceive to be the well-established principle that, unless by express stipulation, exceptions that would protect the charterer during lay days no longer protect him during demurrage days. G

Notes. Explained: *Chandris v. Isbrandtsen-Moller Co., Inc.*, [1950] 1 All E.R. 768. Referred to: *Re Ropner Shipping Co. and Cleaves Western Valleys Anthracite Collieries*, [1927] 1 K.B. 879; *Argonaut Navigation Co. v. Ministry of Food*, [1949] 1 All E.R. 160. H

As to the duty of charterers to provide a cargo and their liability to damages if they fail to do so, see 30 HALSBURY'S LAWS (2nd Edn.) 434-436, 461, and for cases I

A see 41 Digest 453 et seq. For Merchant Shipping (Safety and Load Line Conventions) Act, 1932 (see *infra*), see 23 HALSBURY'S STATUTES (2nd Edn.) 903.

Cases referred to:

- (1) *Lockhart v. Falk* (1875), L.R. 10 Exch. 132; 44 L.J.Ex. 105; 33 L.T. 96; 23 W.R. 753; 3 Asp.M.L.C. 8; 41 Digest 561, 3864.
- B** (2) *Francesco v. Massey* (1873), L.R. 8 Exch. 101; 42 L.J.Ex. 75; 21 W.R. 440; 41 Digest 346, 1959.
- (3) *Lilly & Co. v. D. W. Stevenson & Co.* (1895), 22 R. (Ct. of Sess.) 278; 32 Sc.L.R. 212; 41 Digest 561, 3868 *ii*.
- (4) *Ethel Radcliffe Steamship Co., Ltd. v. W. R. Barnett, Ltd.* (1926), 95 L.J.K.B. 561; 135 L.T. 176; 42 T.L.R. 385; 70 Sol. Jo. 485; 17 Asp.M.L.C. 55; 31 Com. Cas. 222, C.A.; 41 Digest 520, 3490.
- C** (5) *Procter Garrett Marston, Ltd. v. Oakwin Steamship Co., Ltd.*, [1926] 1 K.B. 244; 95 L.J.K.B. 375; 134 L.T. 388; 42 T.L.R. 232; 16 Asp.M.L.C. 600; 31 Com. Cas. 213, C.A.; 41 Digest 520, 3491.
- (6) *Inverkip Steamship Co., Ltd. v. Bunge & Co.*, [1917] 2 K.B. 193; 86 L.J.K.B. 1042; 117 L.T. 102; 14 Asp.M.L.C. 110; 22 Com. Cas. 200, C.A.; 41 Digest 580, 4037.
- D** (7) *Saxon Steamship Co., Ltd. v. Union Steamship Co., Ltd.* (1900), 69 L.J.Q.B. 907; 83 L.T. 106; 16 T.L.R. 527; 9 Asp.M.L.C. 114; 5 Com. Cas. 381, H.L.; 41 Digest 574, 3980.
- (8) *Reid v. Hoskins* (1856), 6 E. & B. 953; 26 L.J.Q.B. 5; 28 L.T.O.S. 145; 3 Jur.N.S. 238; 5 W.R. 45; 119 E.R. 1119, Ex.Ch.; 41 Digest 454, 2852.
- E** (9) *Avery v. Bowden* (1856), 6 E. & B. 953, 962; 26 L.J.Q.B. 3; 28 L.T.O.S. 145; 3 Jur.N.S. 238; 5 W.R. 45; 119 E.R. 1119, 1122, Ex.Ch.; 41 Digest 440, 2763.
- (10) *Exposito v. Bowden* (1857), 7 E. & B. 763; 8 State Tr. N.S. 807; 27 L.J.Q.B. 17; 29 L.T.O.S. 295; 3 Jur.N.S. 1209; 5 W.R. 732; 119 E.R. 1430, Ex.Ch.; 41 Digest 440, 2764.
- F** (11) *Patrick v. Milner* (1877), 2 C.P.D. 342; 46 L.J.Q.B. 537; 36 L.T. 738; 41 J.P. 568; 25 W.R. 790, D.C.; 40 Digest (Repl.) 253, 2128.
- (12) *Howe v. Smith* (1884), 27 Ch.D. 89; 53 L.J.Ch. 1055; 50 L.T. 573; 48 J.P. 773; 32 W.R. 802, C.A.; 40 Digest (Repl.) 241, 2027.

Appeal from a decision of GREER, J., in an action tried by him without a jury.

G The plaintiffs, Aktieselskabet Reidar, were the owners of the Norwegian steamship *Sagatind*, and the defendants, Arcos, Ltd., a Russian firm carrying on a business of timber importers in England, were the charterers of the vessel under a charterparty, dated May 26, 1923, which provided that the vessel was to proceed to a Norwegian port named therein and load a "full and complete cargo" of wood goods and thence proceed to a port, and one port only, in the United Kingdom, or in Holland or Belgium or North France, or a French bay port not south of Bordeaux, as ordered. Owing to unforeseen circumstances the port of loading had to be altered, and by a supplementary charterparty dated Sept. 19, 1923, the vessel was directed to proceed to Archangel and there load her cargo of wooden goods. The other conditions of the charterparty of May 26 were to attach to the substituted voyage, and by one of the clauses it was provided

I "the steamer to be reckoned a four-hatch steamship and the cargo to be loaded at the rate of eighty standards per weather working day for deals and battens and sixty standards for other goods, and should the steamer be detained beyond the time stipulated as above demurrage shall be paid at £25 per day and pro rata for any part thereof."

The *Sagatind* arrived at Archangel on Oct. 3, 1923, and if the loading had been carried out at the agreed rate she would have been able to carry a full summer cargo and to have arrived at Manchester (the notified port of destination) without incurring any penalty under s. 10 of the Merchant Shipping Act, 1906, which

imposed a penalty on the master and owner of a ship arriving at any port in the United Kingdom between Oct. 31 and April 16 in any year carrying timber as deck cargo in excess of that laid down by the section [see now Merchant Shipping (Safety and Load Line Conventions) Act, 1932, s. 61]. The loading, however, was not carried out at the agreed rate, and instead of having a full summer cargo of 850 standards by Oct. 17, the vessel had to sail on Oct. 23 with only 544 standards. In an action by the shipowners to recover from the charterers dead-freight for their failure to load a full and complete cargo, GREER, J., entered judgment for the shipowners, and the charterers appealed.

C. T. Le Quesne, K.C., and D. B. Somervell for the charterers.

A. T. Miller, K.C., and Sir Robert Aske for the shipowners.

Cur. adv. vult.

July 22. The following judgments were read.

BANKES, L.J.—This appeal raises a question of very considerable general importance, and one upon which there appears to have been some difference of judicial opinion. The action was brought by shipowners against charterers for damages for breach of a charterparty. The breach alleged was a failure to load a full and complete cargo. GREER, J., decided in the plaintiffs' favour and he founded his decision upon the view that what constituted a full and complete cargo must be ascertained by reference to those stipulations of the charterparty which provided for the rate at which the charterers had undertaken to load. For the reason to which I refer later the plaintiffs' claim (if any) must, I think, be based upon a breach of the stipulations as to the rate of loading, and the case thus presented raises the two important questions whether, in view of the terms of the charterparty, there was any breach on the part of the charterers, and, if there was, whether the breach is satisfied by a payment of demurrage at the stipulated rate.

The charterparty is dated May 26, 1923, and it provided that the steamer should proceed to Mesane after completing her then intended voyage and there load a full and complete cargo of timber for a port in the United Kingdom or North France, Holland or Belgium, at charterers' option, orders to be given on signing bills of lading or at Lodingen. Time was not to count before July 15, 1923. The clause dealing with the loading and discharging was, so far as is material, in the following terms:

"Steamship to be reckoned as a four-hatch steamship and the cargo to be loaded at the rate of eighty standards per weather working day for deals and battens and sixty standards for other goods. Should the steamer be detained beyond the time stipulated for loading demurrage to be paid at £25 per day and pro rata for any part thereof."

Owing to the delay in completing her then intended voyage, the vessel was not ready to proceed to Mesane at the time contemplated by the charterparty. After some discussion as to what should be done, the parties ultimately agreed, on Sept. 19, 1923, to substitute Archangel for Mesane at an altered rate of freight, "all other conditions of charterparty to apply." The vessel proceeded to Archangel and arrived there on Oct. 3, 1923. The position created by the delay in arriving at the port of loading was a peculiar one, if the vessel was ordered to a port in the United Kingdom, owing to the provisions of the Merchant Shipping Act, 1906. Unless this vessel could arrive on or before Oct. 31, 1923, the master or owner would be liable to a fine if he carried a larger deck cargo than is specified in s. 10 of that Act. If the vessel could have been fully loaded, and could have sailed on or before Oct. 20, 1923, so as to arrive at a port in the United Kingdom on or before October 31, she could have carried 850 standards. If the loading was delayed so as to prevent the vessel sailing on or before Oct. 20, she could only carry 544 standards without infringing the provisions of s. 10. If the charterers had commenced to load the vessel as soon as notice of readiness had been received,

A and had loaded her on an average at the agreed rate for eleven and three-quarter days, the full 850 standards could have been put on board and the vessel could have sailed in plenty of time to enable her to have arrived in a United Kingdom port before October 31. What in fact happened was that the cargo was not loaded at the agreed rate, and by Oct. 23 she had only 544 standards on board. By that time it was impossible for the vessel to arrive at a United Kingdom port before October 31, and the master, anticipating, or being told (it does not appear which), that he would be ordered to a United Kingdom port, refused to take any more cargo. The entry in the deck log is as follows:

"Tuesday 23rd. Loading from 8 a.m. until 4.30. Was then fully loaded. Height of deck cargo is level with the railings."

C This clearly indicates that the master had in mind the restrictive provisions of s. 10 of the Merchant Shipping Act, 1906. The orders given to the master on signing bill of lading were that he was to proceed to Lodingen for orders. When he arrived there he was ordered to Manchester. I see a difficulty upon the facts in saying that the vessel did not load a full and complete cargo, as it appears to me that the time for ascertaining whether she had or had not a full cargo is the time when she sailed. At that time, assuming her destination to be a port in the D United Kingdom, she had a full and complete cargo. Whether this is or is not a correct view of the facts is really immaterial, because, on the assumption that the obligation to load a full and complete cargo, and the obligation to load the cargo (that is, the goods of which the cargo consists) at a stipulated rate, are separate and distinct obligations, as I think they are, the plaintiffs are still entitled to say E that, but for the failure to load at the agreed rate, they would have received 850 standards on board instead of the 544 which they in fact received. In whichever way the case is put the same two questions arise to which I have already referred, both of which are of importance, and upon neither of which can I find any direct authority which is binding upon this court, though upon the first of the two questions judicial opinion has been by no means unanimous.

F The answer to the first question depends upon what is the true view of a contract expressed as this charterparty is, with a fixed number of lay days, and with a provision as to the demurrage rate, but with no provision for any fixed number of days on demurrage. CLEASBY, B.'s view of what is meant by demurrage as expressed by him in *Lockhart v. Falk* (1) is often referred to and may well be quoted again. He says (L.R. 10 Exch. at p. 135):

G "The word 'demurrage' no doubt properly signifies the agreed additional payment (generally per day) for an allowed detention beyond a period either specified in or to be collected from the instrument; but it has also a popular or more general meaning of compensation for undue detention, and from the whole of each charterparty containing the clause in question we must collect what is the proper meaning to be assigned to it."

H It will be noted that the learned judge draws the distinction between the "allowed detention" and "undue detention." It may well be that where a charterparty, as in *Francesco v. Massey* (2), provides for a given number of days (in that case ten days) on demurrage, so much of the much-discussed judgment of LORD TRAYNER in *Lilly & Co. v. D. W. Stevenson & Co.* (3) as holds that days stipulated for by the merchant or demurrage are just lay days, but lay days that have to be paid for, is I well founded. In the present case it is not necessary to express any opinion upon that particular point.

We are here dealing with what CLEASBY, B., refers to as undue detention. In dealing with this question it is necessary to bear in mind one of the outstanding features of the contract of the parties as contained in the charterparty. It is well established that, even where the number of lay days for loading and discharging, or for loading or discharging, is fixed, time is not of the essence of the contract. The shipowner is not entitled, merely because the lay days have expired and the contract is not completed, to treat the contract as at an end and to withdraw his

ship. It is for this reason, I think, that the stipulation for a demurrage rate is so often inserted in the contract in order that if the vessel has to remain in order to enable the charterer to complete his obligation, either of loading or of discharging, the parties may know what sum will have to be paid for the detention. The Court of Appeal in *Ethel Radcliffe Steamship Co., Ltd. v. W. R. Barnett, Ltd.* (4) and ROCHE, J., in *Procter Garratt Marston, Ltd. v. Oakwin Steamship Co., Ltd.* (5), both left the point over for future decision whether the obligation upon the shipowner to keep his ship at the port of loading or discharge or at the port of call, as the case may be, after the expiration of the time limited by the charterparty for the performance by the charterers at the port of some obligation undertaken by them to be performed there, rests upon an implied term of the contract, or upon the necessity that the master shall remain a reasonable time before he is in a position to say that the conduct of the charterers in not performing their obligation amounts to a repudiation of the contract. I see no sufficient reason for construing the provision for demurrage, contained in the charterparty in the present case, as a contractual extension of the lay days either for a reasonable time or for any other time, or as an implied term of the contract that the vessel shall remain for any time. I prefer to rest the necessity for remaining upon the ground that, time not being of the essence of the contract, the shipowner will not, except in some exceptional circumstances be in a position to assert that the contract has been repudiated unless the vessel does remain a sufficient time to enable that question to be tested. If this is the correct view, it follows that where a charterparty is in the terms of the present charterparty, and the charterer fails to load or to discharge, as the case may be, within the agreed lay days, or at the stipulated rate, he does commit a breach of contract.

So far as there is any authority on the point, I think that it is in favour of the view which I have expressed. I do not feel sure that LORD TRAYNER's language, which has been relied on as expressing the contrary view, has not been strained beyond what was really intended. It is, I think, consistent with that language that what the learned judge had in mind was the obligation of the vessel to remain even after the expiration of fixed lay days where there is a provision for demurrage. Be that as it may, LORD TRAYNER's view and Mr. Carver's approval of it have quite recently been expressly disapproved by SCRUTTON, L.J., in this court in *Inverkip Steamship Co., Ltd. v. Bunge & Co.* (6). The only case which I can find in which any approval of LORD TRAYNER's view has been expressed in this court is *Saxon Steamship Co., Ltd. v. Union Steamship Co., Ltd.* (7), where A. L. SMITH, L.J., was dealing with a case as between vendor and purchaser of coal in whose contract the colliery guarantee was incorporated. The guarantee provided for lay days and for demurrage. The point for decision was the date when the purchaser made default, and it was in that connection that the lord justice referred to LORD TRAYNER's decision with approval, and he may well have been confining his remarks to so much of that decision as referred to the fixed lay days on demurrage.

Thinking, as I do, that this particular point is free from authority, and that I am at liberty to express my own opinion, I agree with GREER, J., in coming to the conclusion that at the termination of the fixed lay days the charterers in the present case were in breach. The only question which remains for decision, therefore, is the question of damages. If the plaintiffs' claim was in substance, though not in form, a claim for detention of the vessel, the special damage here claimed for would not be recoverable (*Inverkip Steamship Co., Ltd. v. Bunge & Co.* (6)). Upon the special facts of this case the plaintiffs' claim appears to me to be, both in substance and in form, essentially distinct from any claim for the detention of the vessel. In substance what the plaintiffs are saying is that, if the charterers had loaded the goods at the agreed rate the plaintiffs would have earned freight on 850 standards, whereas owing to the failure to load at that rate the plaintiffs could only earn freight on 544 standards, and that their loss, directly flowing from the breach of contract, is the difference between the amount of freight which they would have earned and the amount which they in fact earned.

A This loss is, in my opinion, on the facts of this case, recoverable as damages for the breach of contract to load at the agreed rate. At one time I was inclined to think that, where parties had agreed a demurrage rate, the contract should be construed as one fixing the rate of damages for any breach of the obligation to load or discharge in a given time. On further consideration I do not think that such a view is sound. I can find no authority on the point, and it is noticeable that in the *Saxon Steamship Case* (7) it was not suggested that the claim for demurrage excluded the additional claim for special damage arising from the detention of this vessel. In my opinion, the appeal fails and must be dismissed with costs.

ATKIN, L.J.—This case raises a question of considerable importance in shipping circles, and it is surprising that there is so little direct authority to guide us. The question is whether, if the charterer had failed to complete the loading of the ship within the lay days, and the ship during the demurrage days becomes, without the default of the shipowner, unable to carry as much cargo as she would if loaded within the lay days, but receives from the charterer a full cargo for his diminished capacity, the loss falls upon the charterer in addition to the demurrage. In my opinion, our decision should be for the shipowner. The result of the authorities appears to be that in a contract fixing a number of lay days and providing for days at demurrage thereafter, the charterer enters into a binding obligation to load a complete cargo within the lay days subject to any default by the shipowner or to the operation of any exceptions, matters which do not arise in this case. If the lay days expire without a full cargo having been loaded the charterer has broken his contract. The provisions as to demurrage quantify the damages not for the complete breach, but only such damages as arise from the detention of the vessel. For correlative to the ship's right to receive the agreed damage is the charterer's right to detain the ship for the purpose of enabling him, if possible, to perform his broken contract and so mitigate any further damage. If, however, for reasons other than the shipowner's default, the charterer becomes unable to do that which he contracted to do, namely, put a full and complete cargo on board during the fixed lay days, the breach is never repaired, the damages are not completely mitigated, and the shipowner may recover the loss that he has incurred in addition to his liquidated damages or his unliquidated damages for detention. It appears to me to be incorrect to say that days on demurrage are extended lay days unless the contract is so drawn. On the contrary, demurrage days are days in which the charterer is in breach, and this view alone explains what I conceive to be the well-established principle that, unless by express stipulation, exceptions that would protect the charterer during lay days no longer protect him during demurrage days. If a stipulation for demurrage either directly extended the contract time for performance or waived a breach, there could be no difference between illegality supervening during the lay days, or after the lay days and during demurrage days. Yet in *Reid v. Hoskins* (8) and *Avery v. Bowden* (9) and *Exposito v. Bowden* (10), all in the Exchequer Chamber, it is plain that the decisions treated as material the allegation or proof that the illegality (outbreak of war and consequent trading with the enemy) occurred during the lay days, that is, during the time for performance and before breach. In those circumstances the charterer was excused. I know of no authority that subsequent illegality would relieve the charterer of the consequences of his accrued breach. If the occurrence were one which would occasion the frustration of the contract, then on principles established in England, though not in Scotland, the contract would end, with accrued liabilities left subsisting.

It is said, however, that in this case there is no evidence that the charterers had not furnished and were not willing to load a cargo sufficient to satisfy a summer loading. I will assume that such a cargo was available. Nevertheless, it appears to me that, the charterers having exercised their option to order the ship to the United Kingdom, the charter must be treated for all purposes as a United Kingdom

charter. In the circumstances of this case I am satisfied that they made it clear to the master when they ceased loading that the eventual destination was the United Kingdom. If this be so, the charterers had no right to put on board, and the master was entitled to reject, any further cargo that would expose him to penalties under the Merchant Shipping Act if carried within the winter months. The excess cargo over the winter load would not be a lawful cargo. The ship, therefore, sailed with what was a complete cargo at the date of sailing, but less than a complete cargo if the loading had been completed within the lay days. For any damages caused thereby I think that the charterers are liable. No question of the amount of damages arises here. I think, therefore, that the appeal fails and should be dismissed, with costs.

SARGANT, L.J.—In my opinion the judgment of GREER, J., should be affirmed. The original charterparty of May 26, 1923, undoubtedly contemplated that the ship should carry a full cargo of 850 standards. And when on the failure of that contract the charterparty now in question was made on Sept. 19, 1923, by endorsement on the original charterparty, and adopted with some variations the terms of the original contract, it seems to me that the parties must have been contemplating the same full cargo. There was ample time, as was proved by the event, for the ship to reach Archangel in good time to load a full cargo and sail with it for any of the specified British ports without the risk of any objection on arrival, and it is not immaterial in construing this part of the contract to observe that the charterers had the option of proceeding to any one of a number of foreign ports at which no objection could arise. This view gives a plain and straightforward meaning to the words used and does not, I think, impose any unreasonable obligation on the charterers. For it is, no doubt, implied that the ship shall reach Archangel in time to load a full cargo, either for a British port or for a foreign port at the option of the charterers; and, should the arrival of the ship at Archangel be delayed so as to render the alternative of proceeding to a British port with a full cargo unavoidable, the charterers, if electing to proceed to a British port and loading a winter cargo only, could set up the default of the ship in arrival against any claim for failure to load more than such a cargo as would satisfy the requirements of British ports. Further, if the meaning of the phrase "full and complete cargo" in cl. 1 is to be interpreted (as the charterers have urged) with reference to the cargo which could lawfully be carried to a British port, the result must be the same. For the time at which that cargo must be ascertained is, in my judgment, the time when the charterers received the ship for loading, that is Oct. 4, and not the time at which they ceased to load in fact. It cannot be that by their delay in loading they were entitled to diminish the extent of the cargo which they were under obligation to load, and thus take advantage of their own default.

It is next necessary to consider the effect of cl. 3 of the charterparty. Here I agree with the view of the learned judge that the second sentence of that clause does not enlarge the express obligations as to time of loading expressed in the first sentence of the clause, but merely assesses damages at £25 a day for detention of the ship due to a failure of the charterers to load at the prescribed rate, and incidentally indicates that their obligations in this respect are not of the essence of the contract, and that some unpunctuality in this respect will not entitle the owners to treat the contract as repudiated and to withdraw their ship. Such a construction gives full effect to the language of the clause and is consistent with the views expressed in the textbooks on the subject which summarise the general effect of the decisions: see SCRUTTON ON CHARTERPARTIES (12th Edn.), p. 348, and CARVER ON CARRIAGE BY SEA (7th Edn.), pp. 828–9, and note on p. 907. And this is in accordance with the view taken of somewhat analogous provisions in contracts for the sale and purchase of property: see *Patrick v. Milner* (11); *Howe v. Smith* (12).

On the footing, then, that cl. 3 of the charterparty fixes the damages for the detention of the ship at £25 a day, does the payment of a sum calculated on this basis form an agreed compensation for the loss which the owners have sustained

- A** in the circumstances of this case? I cannot think so. The loss inflicted on the owners and claimed by them is loss of another character, namely, loss of freight caused by the breach by the charterers of their contract to load a full and complete cargo as prescribed by cl. 1 of the charterparty. The obligation of cl. 1 is, in my judgment, rightly described by the learned judge as the primary obligation. The object of the second sentence of cl. 3 is to provide compensation for a detention
- B** of the vessel in the course of fulfilling this primary obligation, not to give compensation for the breach of the primary obligation itself. No doubt, the same delay in loading, which might give rise to a claim for detention, also resulted in a breach of the obligation to load a full cargo, but the breach of this latter obligation caused a definite separate loss independent of and largely exceeding any loss arising from mere detention, or, to put the matter in another way, the object of the second
- C** sentence in cl. 3 being to ascertain the damages arising from a delay in loading for the purpose and in the course of fulfilling the primary obligation of cl. 1, namely, the loading of a full cargo, it would unwarrantably widen the scope of this second sentence, if it should also ascertain the damages arising from a breach of the primary obligation itself. The same result would, I think, follow if, contrary to the view above expressed, the second sentence of cl. 3 were to be read as
- D** an agreement that the charterers might have some extra time for loading at an agreed rate per day. Even on this interpretation this could not, in my view, be read as extending further than an agreement to allow some extra time for the purpose of loading a full cargo. It could not properly be construed as an agreement that such an extra time might be occupied in loading as to diminish the quantity of cargo that had ultimately to be loaded.
- E** There was a further contention on the part of the appellants that should perhaps be noticed—namely, that they had only to provide cargo, not to load it, and that there was no evidence that they had not provided a full summer cargo. In my judgment, under this charterparty, the charterers had both to provide and load; and there is no evidence that there was any default on the part of the ship to provide the assistance mentioned in cl. 20. Nor is it shown that the master at any
- F** time declined to accept more than a winter cargo. From his letters of Oct. 10 and 19, I should gather that he was willing to accept a full summer cargo provided that, if he was ordered to sail after Oct. 20 to a British port, provision was made for the fines he might incur. The points mentioned in this paragraph are not the real points in issue between the parties, they are not raised by the charterers' defence in the action, and they do not seem to have been argued before the
- G** learned judge.

Appeal dismissed.

Solicitors: *Wynne-Baxter & Keeble; Botterell & Roche.*

[*Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.*]

BRACEY v. PALES

[KING'S BENCH DIVISION (Salter and MacKinnon, JJ.), November 18, 19, 1926]

[Reported [1927] 1 K.B. 818; 96 L.J.K.B. 305; 136 L.T. 282;
43 T.L.R. 69; 25 L.G.R. 156]

Rent Restriction—Persons protected—Occupier of dwelling-house rent free—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 12 (7).

The occupier of a dwelling-house rent free cannot claim the protection of the Rent Restriction Acts since, by reason of s. 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which provides that the Act does not apply to tenancies at a rent less than two-thirds of the rateable value of the dwelling-house, the occupier cannot be a "tenant" within the meaning of the Act.

Notes. The words in square brackets in s. 12 (7) of the Act of 1920, set out *infra*, were repealed as to England and Wales by the Rent Act, 1957, Sched. 8, Part I, but are still in force in Scotland. By s. 2 (5) of the Landlord and Tenant Act, 1954, and s. 25 (1) of the Rent Act, 1957, a "tenancy at a low rent" in those Acts means a "tenancy the rent payable in respect whereof is less than two-thirds of the rateable value of the property comprised in the tenancy."

Considered: *Ford v. Langford*, [1949] 1 All E.R. 483. Referred to: *Turner v. Watts* (1927), 44 T.L.R. 105.

As to tenancies at less than two-thirds of the rateable value, see 23 HALSBURY'S LAWS (3rd Edn.) 756-758; and for cases see 31 Digest (Repl.) 637-640. For Increase of Rent, etc. (Restrictions) Act, 1920, see 13 HALSBURY'S STATUTES 981.

Cases referred to:

- (1) *Hughes v. Chatham Overseers, Burton's Case* (1843), 5 Man. & G. 54, 77; Bar. & Arn. 61; Cox & Atk. 14; 1 Lut. Reg. Cas. 51; Pig. & R. 35; 7 Scott, N.R. 581; 13 L.J.C.P. 44; 2 L.T.O.S. 149, 189; 8 J.P. 89; 7 Jur. 1136; 134 E.R. 479, 488; 30 Digest (Repl.) 548, 1820.
- (2) *Marsh v. Estcourt* (1889), 24 Q.B.D. 147; 59 L.J.Q.B. 100; 54 J.P. 294; 38 W.R. 495; Fox & S. Reg. 157, D.C.; 30 Digest (Repl.) 549, 1827.
- (3) *Smith v. Seghill Overseers* (1875), L.R. 10 Q.B. 422; 44 L.J.M.C. 114; 32 L.T. 859; 40 J.P. 228; 23 W.R. 745, D.C.; 30 Digest (Repl.) 549, 1825.
- (4) *National Steam Car Co., Ltd. v. Barham* (1919), 122 L.T. 315, N.P.; 31 Digest (Repl.) 658, 7602.
- (5) *Ecclesiastical Comrs. v. Hilder* (1920), 36 T.L.R. 771; 84 J.P.Jo. 309, N.P.; 31 Digest (Repl.) 658, 7603.
- (6) *Marquis of Bute v. Prenderleith*, 1921 S.C. 281; 31 Digest (Repl.) 640, *2524.
- (7) *Pollock v. Assessor for Inverness-shire*, 1923 S.C. 693; 60 Sc.L.R. 310; 1923 S.L.T. 282.
- (8) *Hornsby v. Maynard*, [1925] 1 K.B. 514; 94 L.J.K.B. 380; 132 L.T. 575; 41 T.L.R. 102; 69 Sol. Jo. 254; 23 L.G.R. 319, D.C.; 31 Digest (Repl.) 677, 7708.
- (9) *Waller & Son, Ltd. v. Thomas*, [1921] 1 K.B. 541; 90 L.J.K.B. 656; 125 L.T. 21; 37 T.L.R. 325; 19 L.G.R. 109, D.C.; 31 Digest (Repl.) 657, 7591.

Appeal from Barnet County Court.

The plaintiff, Mrs. Bracey, brought an action claiming possession of a cottage known as "The Homestead," Boreham Wood, Herts, and mesne profits since Sept. 12, 1925. The defendant, Pales, contended that he was protected by the Rent Restriction Acts. The defendant, a painter and decorator, had been for some years in the employ of the plaintiff's husband, who was a member of a firm of builders. Adjoining the cottage was a yard belonging to the firm, and one of the firm's signboards was there displayed. The defendant first occupied the cottage

A in 1905, and for a short period before the war paid rent for it. He went abroad on military service in 1916, in 1919 he returned to his former employment, and, after occupying another of Mr. Bracey's cottages at Boreham Wood for a short time, he resumed occupation of "The Homestead," which had in the meantime been occupied by another person. There was a conflict of evidence whether after 1919 the defendant paid rent or not, but the county court judge found that none
B had been paid by him. After the death of Mr. Bracey in April, 1925, his widow, the plaintiff, carried on the business for a short time, but gave it up on Sept. 12. After that date rent was paid by the defendant for three weeks to an agent who had been in the habit of collecting Mr. Bracey's rents, but the amount paid was refunded on the instruction of the plaintiff's solicitors. In February, 1926, the plaintiff brought her action. The county court judge held that the defendant had
C been allowed to occupy the cottage rent free at Mr. Bracey's pleasure as a servant, and not as a tenant, and that, therefore, he was not protected by the Rent Restriction Acts. Accordingly he gave judgment for the plaintiff, and the defendant appealed. By the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (7):

D "Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy . . . [and this Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed]."

Malcolm Hilbery, for the defendant, referred to *Hughes v. Chatham Overseers*, *Burton's Case* (1), *Marsh v. Estcourt* (2), and *Smith v. Seghill* (3).

E *H. I. P. Hallett*, for the plaintiff, referred to *National Steam Car Co., Ltd. v. Barham* (4), *Ecclesiastical Comrs. v. Hilder* (5), *Marquis of Bute v. Prenderleith* (6), *Pollock v. Assessor for Inverness-shire* (7), *Hornsby v. Maynard* (8), and dicta of *LUSH, J.*, in *Waller & Son, Ltd. v. Thomas* (9) ([1921] 1 K.B. at p. 549).

F **SALTER, J.**—This was an action by the owner to obtain possession of a house in the occupation of the defendant, and the question was whether the defendant was entitled to resist the plaintiff's claim by reason of the provisions of the Rent Restriction Acts. The house was situated at Boreham Wood, Herts, about seven miles from Watford, and the plaintiff, Mrs. Bracey, is the widow, executrix and sole beneficiary under the will of her late husband, who was a member of a firm
G of builders at Watford, Boreham Wood, and elsewhere in the neighbourhood. That firm had built and were the owners of certain cottages at Boreham Wood, and the cottage to which the claim related was called "The Homestead." The defendant, Mr. Pales, is a painter and decorator, and he was for many years in the employ of the building firm. Before the war he occupied this cottage and there is apparently no dispute that he paid rent for it. In 1916 he went abroad on military service and was absent for three years. During his absence his wife died and his children ceased to live in the cottage which was then let to another person, a
H Mrs. Harding, and it is common ground that the tenancy of this house which existed between Mr. Bracey and the defendant before the war was determined. On his return from the war, the defendant again entered the service of Mr. Bracey, and for a short time occupied another house belonging to Mr. Bracey at Boreham Wood named "Oakleigh," but "The Homestead" soon became vacant and the defendant
I then occupied it again. With regard to payment of rent by the defendant either for "Oakleigh" or for "The Homestead" from the time of his return from the war till the date of these proceedings, there was an acute conflict of evidence. The defendant said from the time of his re-entering Mr. Bracey's service he paid rent first for "Oakleigh" and then for "The Homestead" every week; that the rent was paid for a short time to a rent collector named Fudge; and that afterwards the rent was obtained by a deduction from the defendant's weekly wage. The defendant said that he was paid his wages at first by the hour, but subsequently by the week, and that he received the weekly payments with a deduction of 9s. at

first and 13s. 7d. later as the rent of the cottage. That was denied by the plaintiff, and it was said that no deduction was ever made from the full amount due to the defendant under his contract of service. The defendant's employment terminated on Sept. 12, 1925. Mr. Fudge, who was employed to collect the rents of other houses belonging to Mr. Bracey, said in his evidence that, when the defendant's employment ceased, he thought it would be proper to demand rent from the defendant for the cottage. Accordingly, he received rent from the defendant for three consecutive weeks and gave the defendant a rent book; he was subsequently told that he had done wrong in collecting rent from the defendant, upon which he repaid the amount received. On these facts the county court judge has held that no tenancy ever existed between the late Mr. Bracey and the defendant, or after Mr. Bracey's death between the plaintiff and the defendant, since the defendant's return from the war. His finding is that the defendant was paid a fixed weekly wage without any deduction as rent, that he was allowed to remain rent free in the cottage at Mr. Bracey's pleasure as a servant, and that he was not a tenant. It is, perhaps, material to add here that adjoining this cottage was one of the builder's yards belonging to Mr. Bracey's business and that a signboard bearing Mr. Bracey's name was there displayed. When these proceedings were threatened, the defendant wrote a letter in which he stated that it was the late Mr. Bracey's wish that he (the defendant) should carry on this branch of the business.

The first question that arises in this appeal is in substance this: Was there evidence on which the county court judge could rightly find that since 1919 no relation of tenancy ever existed between Mr. Bracey or the plaintiff and the defendant? If it were necessary to determine whether at common law the defendant was ever a tenant of Mr. Bracey or the plaintiff I think a question of some difficulty might arise, and I should have preferred to take time to consider the authorities upon the subject. Cases have been cited where the question was whether servants occupying houses belonging to their employers were entitled to be regarded as occupiers for the purpose of the franchise—the real issue being whether such persons occupied merely as servants, or whether they were tenants. In two Scottish cases—*Marquis of Bute v. Prenderleith* (6) and *Pollock v. Assessor for Inverness-shire* (7)—it was said that for the purposes of the Rent Restriction Acts the class of case to which I have just referred did not apply and it was laid down that where, as part of his remuneration, a servant occupies a house belonging to his employers, he is not entitled to the protection of the Acts. It is not, however, necessary to decide this question, because, even if the defendant was a tenant of Mr. Bracey or the plaintiff at common law, he is not a tenant under these Acts so as to be entitled to avail himself of their protection. The point is that, if he was a tenant at all, he was a tenant occupying rent free, and the Rent Restriction Acts do not, in my opinion, protect a tenant who occupies rent free. I come to this conclusion upon a perusal of the whole structure of the Acts, and further upon consideration of the decision in *Hornsby v. Maynard* (8), where it was held that the rent contemplated by these Acts is pecuniary rent only, and lastly upon a reading of the wording of s. 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. Section 12 is the definition section, and by sub-s. (7) it provides:

"Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy . . . and this Act shall apply as if no such tenancy existed or ever had existed."

Applying that subsection to the facts of this case, I am of opinion that the house in question remains a house to which the Act applies, but that this case is to be regarded as though the tenancy of the defendant did not exist and never had existed. If there is no existing tenancy of the defendant for the purpose of this Act, then he is not a tenant so far as the Act is concerned, and the case is removed from the restriction upon orders of possession against tenants imposed by s. 5 (1) of the same Act [see now Rent & Mortgage Interest Restrictions (Amendment) Act,

A 1933, s. 3], which must be read in conjunction with s. 12 (7). The result is that the defendant is not in a position to invoke the protection of the Rent Restriction Acts, and the plaintiff is entitled to avail herself of her common law right to possession. The appeal, therefore, fails.

MACKINNON, J.—I agree.

B Solicitors: *Watkins, Pulleyn & Ellison*, for *F. Cookesley Slater*, Boreham Wood; *Sharpe, Pritchard & Co.*, for *Sedgwick, Turner, Sworder & Wilson*, Watford.

[Reported by T. R. FITZWALTER BUTLER, ESQ., Barrister-at-Law.]

DYSTER v. RANDALL & SONS AND OTHERS

D [CHANCERY DIVISION (Lawrence, J.), May 17, 18, June 8, 1926]

[Reported [1926] Ch. 932; 95 L.J.Ch. 504; 135 L.T. 596;
70 Sol. Jo. 797; [1926] B. & C.R. 113]

E *Sale of Land—Purchase by agent—Non-disclosure of principal—Principal bankrupt and unacceptable to vendors—No material personal qualifications by contracting party—No intervention by trustee in bankruptcy—Bona fide transaction for value—Specific performance—Breach by purchaser of term of contract—Failure to submit building plans—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 47.*

F In February, 1924, the plaintiff became bankrupt. In May, 1925, he procured C. to enter into an agreement with the defendants to purchase from them on his behalf two plots of freehold land. In accordance with the arrangement between the plaintiff and C., C. did not disclose to the defendants that he was acting as the agent of the plaintiff. Before the purchase had been completed the plaintiff took possession and proceeded to build two bungalows on the land. In July, 1925, the defendants discovered that these building operations were going on, and they wrote to C., pointing out that no plans had been submitted of the buildings as provided for by the agreement. C. then explained that he was acting as agent for the plaintiff, and at his request the agreement was cancelled. In an action by the plaintiff for specific performance of the contract,

G **Held:** (i) mere non-disclosure as to a person actually entitled to the benefit of a contract for the sale of real estate did not amount to misrepresentation as to the identity of that person, even though the contracting party knew that, if the disclosure were made, the other party would not enter into the contract, provided that, as in the present case, the contract was not one in which any personal qualifications possessed by the contracting party formed a material ingredient;

I (ii) the trustee in bankruptcy not having intervened to claim the benefit of the agreement, this after-acquired property continued in the plaintiff who could maintain an action in relation to it, and, moreover, the transaction, being bona fide and for value, was valid against the trustee under s. 47 of the Bankruptcy Act, 1914, and in the circumstances the vendors would be certain to be able to retain the purchase money against the trustee in bankruptcy;

(iii) the principle that a plaintiff who has committed a breach of an essential term of the contract could not obtain specific performance did not apply because the failure to submit plans, which, when produced, the defendants admitted to be unexceptionable, was a non-essential or trivial breach;

and, therefore, the plaintiff was entitled to a decree for specific performance of the agreement. A

Notes. Referred to: *Re Pascoe*, [1944] 1 All E.R. 70.

As to the effect of misrepresentation in an action for specific performance, see 31 HALSBURY'S LAWS (2nd Edn.) 373 et seq.; and as to the effect of s. 47 of the Bankruptcy Act, 1914, see 2 HALSBURY'S LAWS (3rd Edn.) 429 et seq., and 2 HALSBURY'S STATUTES (2nd Edn.) 321. For cases see 5 DIGEST 724 et seq., and 42 DIGEST 475 et seq. B

Cases referred to:

- (1) *Nash v. Dix* (1898), 78 L.T. 445; 42 Digest 479, 470.
- (2) *Said v. Butt*, [1920] 3 K.B. 497; 90 L.J.K.B. 239; 124 L.T. 413; 36 T.L.R. 762; Digest Supp. C
- (3) *Cohen v. Mitchell* (1890), 25 Q.B.D. 262; 59 L.J.Q.B. 409; 63 L.T. 206; 38 W.R. 551; 6 T.L.R. 326; 7 Morr. 207, C.A.; 5 Digest 729, 632*d*.
- (4) *Archer v. Stone* (1898), 78 L.T. 34; 42 Digest 479, 469.
- (5) *Franklin v. Lord Brounlow* (1808), 14 Ves. 550; 33 E.R. 632; 42 Digest 507, 728.
- (6) *O'Herlihy v. Hedges* (1803), 1 Sch. & Jef. 123; 43 Digest 863, 3097 *vii*. D

Witness Action for specific performance of an agreement to purchase two plots of freehold land.

The first defendants, W. E. R. Randall & Sons, were auctioneers and estate agents carrying on business at Chatham, Kent. The second defendants (who were added as parties to the action at the trial) were the owners in fee of two plots of land numbered 43c and 43d on the plan of a building estate at Chatham known as the Maidstone Road estate. The plaintiff was in the employ of the first-named defendants as draughtsman from 1920 to 1923. After that date he became one of the directors and the manager and secretary of a small company promoted by his employers and himself. In January, 1924, he was discharged from his office of manager and secretary of the company in circumstances which, to his knowledge, caused the defendants profoundly to distrust him and to render it certain that they would not enter into any further business transaction with him. In February, 1924, he became bankrupt and had not yet obtained his discharge. During the whole of the time that the plaintiff was in the employ of the first-named defendants they had been engaged on behalf of the second defendants in developing the Maidstone Road estate as a residential building estate according to a building scheme which had been prepared for that purpose. Before May, 1925, the whole of the Maidstone Road estate had been sold with the exception of the two plots numbered 43c and 43d on the estate plan. In May, 1925, the plaintiff desired to acquire these two remaining plots with the intention of erecting thereon a couple of bungalows and then disposing of them at a profit. Knowing that the defendants would not entertain any offer he might make for the plots if he were to approach them directly, he procured a friend of his, named Crossley, to buy the plots for him without disclosing the fact that he was acting as his agent. Accordingly, Crossley, on May 7, 1925, entered into an agreement in writing with the defendants to purchase the two plots for the sum of £100, Aug. 7, 1925, being fixed as the date for the completion of the purchase and no provision being inserted which enabled the purchaser to take possession before that date. The sale was expressed to be made subject to certain stipulations which since the year 1921 had been made generally applicable to the estate. Three of those stipulations were: E
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"1. The purchaser shall forthwith make and afterwards maintain the boundary fences next the road and on the sides of the property marked T. within the boundary. No fence of a greater height than 4 ft. shall be erected in front of the building line.

4. The purchaser shall until the roads, footpaths, sewers and works connected therewith abutting upon the property have been adopted by the local authority

- A contribute his fair proportion towards maintaining and repairing the same, and shall be responsible for any damage to the said roads, footpaths, etc., occasioned by him or by contractors or servants working under his authority.
8. Plans of all houses and buildings to be erected on the estate shall be approved by the vendor's architect, W. E. R. Randall, Junr., who shall be paid a nominal fee of one guinea for perusal."
- B On signing the agreement Crossley paid to the defendants a deposit of £10 with which he had been provided by the plaintiff. On May 9, 1925, the plaintiff, without the knowledge or consent of the defendants, took possession of the two plots. On May 14 he verbally agreed to sell plot 43c to a Mrs. Kelly, and on the same date he entered into a written contract with her to build a bungalow on this plot, to be completed and delivered to her on or before Aug. 4, 1925, for the sum of £600, to be paid as to £50 on entering into the contract, and the balance up to 90 per cent. of the contract price from time to time as the work proceeded—the ultimate balance of 10 per cent. being payable as to one-half on the completion of the bungalow and the remaining half one month after the completion. The contract contained a stipulation that in default of completion on or before Aug. 14, 1925, the plaintiff should forfeit as liquidated damages the sum of £1 per week for each week that the bungalow remained unfinished. Shortly after entering into this contract the plaintiff, without the knowledge or consent of the defendants, and without having submitted any plans to their architect, commenced the erection of Mrs. Kelly's bungalow on plot 43c. The building of the bungalow proceeded, and Mrs. Kelly, in pursuance of her contract, paid to the plaintiff from time to time in respect thereof sums amounting in all to £450. The plaintiff also constructed the foundations of another bungalow and executed certain other works on plot 43d, spending about £60 in so doing. On July 21, 1925 (at which date Mrs. Kelly's bungalow had been partially roofed in), the defendants for the first time discovered that building operations were proceeding upon the two plots, and on the same day wrote to Crossley calling his attention to the fact that no plans for any building on these plots had been submitted for the approval of the vendors' architect.
- F Crossley, on receipt of this letter, wrote to the plaintiff informing him of its contents, and stating that it had placed him in an awkward position from which he could only free himself by explaining the whole position to the defendants, or by the plaintiff paying the balance of the purchase money and submitting plans as required. An interview between Crossley and the plaintiff then took place, at which the latter endeavoured to allay Crossley's fears by pointing out that the date for completion of his purchase from the defendants had not yet arrived. Crossley, however, was not satisfied, and an appointment for another interview was arranged which the plaintiff did not keep. On July 27, 1925, the plaintiff wrote to Crossley expressing his regret at not having kept the further appointment and sending him the plans of Mrs. Kelly's bungalow for production to the defendants. He also requested Crossley to try to procure the defendants' sanction to complete the purchase by instalments, adding: "Please make the best arrangements you can." Crossley, who by this time was evidently much alarmed, went to see the defendants on July 30, 1925, and, after explaining that he was acting merely as agent for the plaintiff, asked to be relieved of the agreement. The defendants, after consulting their solicitors, acceded to Crossley's request and agreed to cancel the agreement. Thereupon they gave him a cheque for £10 in repayment of the deposit and caused a receipt for such sum and a note of cancellation to be endorsed on the agreement and to be signed by Crossley. On July 31, 1925, Crossley wrote to the plaintiff enclosing the defendants' cheque, and stating that the defendants (after having pointed out that no one had a right to build on the land before the completion of the purchase) had insisted upon the agreement being cancelled. That statement was admitted by Crossley in the witness-box to be untrue. On receipt of this letter the plaintiff stopped all building operations on the plots. He kept the defendants' cheque without, however, attempting to

cash it, and, although he did not expressly repudiate Crossley's action in cancelling the agreement, he tried several times to get to see the defendants, who, however, would not grant him an interview. Eventually the plaintiff consulted his solicitors, and after some correspondence the writ in this action was issued on Dec. 15, 1925. A

J. Lort-Williams, K.C., and Thomas Dawson, for the plaintiff, referred to *Nash v. Dix* (1), *Said v. Butt* (2), *Cohen v. Mitchell* (3), and s. 47 of the Bankruptcy Act, 1914. B

Owen Thompson, K.C., and J. E. Harman, for the defendants, referred to *Archer v. Stone* (4).

Cur. adv. vult.

June 8. **LAWRENCE, J.**, read the following judgment.—The first question to be determined is whether the agreement between Crossley and the defendants has been effectively cancelled. The solution of this question depends upon whether Crossley was authorised to cancel the agreement, or, if not, whether the cancellation by Crossley was subsequently ratified. The only authority which it is suggested that Crossley had to cancel the agreement is the request contained in the letter of July 27, 1925, that he should make the best arrangement he could. Apart altogether from the question whether the plaintiff, in view of his agreement with Mrs. Kelly, could have validly conferred such an authority upon Crossley, and, apart from the improbability in the circumstances of the plaintiff having intended to confer any such authority, I am of opinion that the letter, when fairly construed, does not confer any such authority, but that the arrangement which Crossley was requested to make if he could was merely an arrangement as to the payment of the purchase money. Further, I have come to the conclusion that, even if the plaintiff could have validly ratified Crossley's purported cancellation of the agreement without first obtaining Mrs. Kelly's consent, he did not in fact do so. It is true that he did not at once protest against Crossley's action in purporting to cancel the agreement, and that he did not return the cheque for the deposit, but he had no legal advice and he tried several times to see the defendants with a view to surmounting the difficulties which had arisen. Moreover, he had been misinformed by Crossley as to what took place when the latter went to see the defendants. Later on when he consulted his solicitors they at once, on his behalf, insisted on the agreement being carried out. In the circumstances, I have come to the conclusion that the plaintiff never intended to ratify, and did not in fact ratify, the purported cancellation of the agreement by Crossley. C D E F G

I now come to the main question in the case, viz., whether in the circumstances the plaintiff is entitled to specific performance of the agreement. It is clearly established that, as between the plaintiff and Crossley, the latter throughout acted as the agent of the former, and that there never was any intention that Crossley should buy the property for himself. The defendants contended that the plaintiff is not entitled to specific performance on three grounds, viz.: First, because the plaintiff deceived the defendants in regard to the person with whom they were contracting, and, therefore, there was no contract; secondly, because the plaintiff is an undischarged bankrupt; and, thirdly, because the plaintiff has committed a breach of the agreement by not submitting plans for the approval of the defendants' architect before commencing the erection of the bungalow. H

In considering the first ground it is essential to bear in mind that the agreement which the plaintiff seeks to enforce is not one in which any personal qualifications possessed by Crossley formed a material ingredient, but is a simple agreement for sale of land in consideration of a lump sum to be paid on completion. It is an agreement which the defendants would have entered into with any other person. It is well settled that the benefit of such an agreement is assignable and that the assignee can enforce specific performance of it. If Crossley had entered into the agreement on his own behalf (as the defendants believed he had) he could immediately have assigned it to the plaintiff and the defendants would have been bound I

A to convey the plots to the plaintiff. Moreover, as Crossley had not before signing the agreement disclosed the fact that he was acting as agent, he was liable under it as principal and the defendants could have compelled him to complete the purchase. Further, it is to be noted that, in this case, there was no direct misrepresentation such as there was in *Archer v. Stone* (4). Crossley was not asked by the defendants whether he was buying for the plaintiff and he made no statement to the defendants on the subject. The real question, therefore, is whether Crossley's silence in the circumstances amounted to a misrepresentation which renders the agreement unenforceable in this court. In my judgment, mere non-disclosure as to the person actually entitled to the benefit of a contract for the sale of real estate does not amount to misrepresentation, even though the contracting party knows that, if the disclosure were made, the other party would not enter into the contract, secus if the contract were one in which some personal consideration formed a material ingredient: see *Nash v. Dix* (1) and *Said v. Butt* (2) ([1920] 3 K.B. at p. 501). In *Nash v. Dix* (1), NORTH, J., held that the ostensible purchaser was acting on his own account and not as agent, but it appears to me that the learned judge would have arrived at the same conclusion if the alleged agency had been established. In *Said v. Butt* (2), McCARDIE, J., relied entirely on the personal consideration which entered into the contract and would obviously have decided otherwise if the personal element had been absent. I, therefore, hold that the first ground relied upon by the defendants does not afford a good defence to the plaintiff's claim for specific performance.

The next point to be considered is whether the fact that the plaintiff is an undischarged bankrupt debars him from obtaining specific performance. The plaintiff will not, of course, get a conveyance until he pays the balance of the purchase money. The trustee in the plaintiff's bankruptcy (although stated to be aware of the plaintiff's interest in the agreement) has not intervened in any way. It is well established that after-acquired property continues in the bankrupt until the trustee interferes to claim it, and that, subject to the right of the trustee to intervene, an undischarged bankrupt can maintain any action in relation to after-acquired property and can sue on any contract made with him after bankruptcy. Further, under s. 47 of the Bankruptcy Act, 1914, all transactions by a bankrupt with any person dealing with him bona fide and for value in respect of property whether real or personal acquired by the bankrupt after the adjudication, if completed before any intervention by the trustee, are valid against the trustee. This section applies whether the parties dealing with the bankrupt were so dealing with or without knowledge of the bankruptcy: see *Cohen v. Mitchell* (3).

In the present case it is clear that in entering into the agreement with Crossley the defendants were dealing bona fide and for value, and are, therefore, protected against any claim by the trustee so long as he does not intervene before completion. It was suggested that the right conferred by s. 54 upon the trustee to disclaim onerous property operated to prevent the plaintiff from obtaining specific performance. I find some difficulty in appreciating this suggestion as the trustee has not interfered to claim the benefit of the agreement, and I cannot conceive that he would intervene merely in order to disclaim. Assuming, however, that he were to do anything so foolish after the completion of the sale, the only result would be that the defendants would have the purchase money in their pocket and would probably obtain a vesting order of at all events so much of the land as the plaintiff had not contracted to sell to Mrs. Kelly, thus being placed in the happy position of having received the price of both plots and of obtaining one plot back again. Mrs. Kelly having bona fide bought plot 43c, and having expended £450 towards building a bungalow upon it would in the event of disclaimer no doubt be protected by the court both under s. 47 and under s. 54. Mrs. Kelly, as a sub-purchaser from the plaintiff, should, in my opinion, have been joined as co-plaintiff, but the defendants have raised no objection on the ground of want of parties. She has been called as a witness on behalf of the plaintiff, and has supported his claim, being, of course, vitally interested in the success of this action.

Counsel for the defendants, however, relied upon the statement in *Fry on Specific Performance* (6th Edn.), p. 447, that a bankrupt purchaser cannot enforce the contract because he is incapable of so paying the money to the vendor that the vendor shall be certain of being able to retain it against the trustee. The case cited in support of this statement is *Franklin v. Lord Brownlow* (5), which, however, is distinguishable from the present case in that there the purchaser was not a bankrupt acquiring property after his adjudication, but was a person who, after entering into a contract to purchase, committed an available act of bankruptcy of which the vendors had notice, with the consequence that, owing to the relation back of the trustee's title, the vendors if they had completed the sale and if bankruptcy had supervened, would have had to pay back the purchase money to the trustee. Moreover, at the date when that case was decided, there was no enactment such as is contained in s. 47 of the Bankruptcy Act, 1914. With some diffidence I venture to suggest to the authors of that valuable work that the more accurate way of stating the result of that case is that a purchaser who has committed an available act of bankruptcy of which the vendor has notice cannot enforce the contract because he is incapable of so paying the purchase money to the vendor that the latter shall be certain of being able to retain it against the trustee should bankruptcy supervene. In the present case it is clear that the plaintiff is capable of so paying the purchase money to the vendors that the latter will be certain of being able to retain it against the trustee.

It was further contended that the plaintiff could not enforce specific performance because the agreement involved his entering into covenants with the vendors which, owing to his bankruptcy, would be rendered worthless. In support of this contention *O'Herlihy v. Hedges* (6) was relied upon. In that case specific performance of a lease of a farm was refused on the ground (inter alia) that the solvency of the tenant formed a material ingredient in entering into the agreement. In my opinion, neither the decision in that case nor the principle upon which it was decided govern the present case. Where a lease is concerned (especially an agricultural lease) the solvency of the tenant must necessarily be of the first importance. Here, in so far as the stipulations are merely restrictive of the user of the land, they could be enforced by injunction notwithstanding the bankruptcy of the plaintiff, and in so far as the stipulations involve the expenditure of money (viz., the stipulations as to the fencing of the plots and contributing towards the expense of the maintenance and repair of the roads) it is important to note that the vendors have parted with the whole of the rest of the estate, and that after the completion of the plaintiffs' purchase they will no longer be interested in any part of it. The defendants, therefore, can suffer no pecuniary damage even if the plaintiff should hereafter be unable to perform these covenants. In so far as the other owners who have purchased with similar covenants are concerned, they are powerless to prevent the defendants from selling the two remaining plots to an impecunious person. If such owners could establish that the defendants were trustees of the plaintiff's covenants for their benefit they might no doubt compel the defendants to sue the plaintiff for any breach, but in such a case they would have to indemnify the defendants, and the defendants would suffer no loss if such an action should prove abortive. In the special circumstances the mere fact that the agreement involves the entering by the plaintiff into covenants in the terms of the stipulations annexed to the agreement does not, in my opinion, debar him from obtaining specific performance. On the whole, therefore, I have come to the conclusion that the bankruptcy of the plaintiff does not afford a good defence to the action.

As regards the third ground relied upon by the defendants, while it is clearly settled that a plaintiff who has committed a breach of an essential term of the agreement cannot obtain specific performance, yet this principle does not, in my opinion, extend to non-essential or trivial breaches. Here the only breach complained of consists of not submitting the plans of Mrs. Kelly's bungalow to the vendors' architect for approval before commencing the erection of such bungalow.

A Mr. Randall, in the witness-box, when shown the plans of the bungalow, admitted that they were unexceptionable and would no doubt have been passed by the vendors' architect. In these circumstances the breach, in my judgment, is a trivial one and not such as to disentitle the plaintiff to specific performance.

B In the result, for the reasons stated, I have come to the conclusion that the plaintiff is entitled to a decree for specific performance of the agreement of May 7, 1925.

There remains to be considered the plaintiff's claim for damages. Particulars of these damages were applied for by the defendants, and pursuant to such application the plaintiff delivered particulars claiming £100 damages in addition to specific performance being his estimate of "the cost of restoring the bungalow to the condition in which it stood at the date when the defendants refused to allow him to complete the same." According to the particulars this is the sole claim for damages made by the plaintiff in the event of his being successful in his claim for specific performance. Apart from the fact that the plaintiff has failed to convince me that it would cost more than about £60 to restore the bungalow to its condition in August, 1925, I have come to the conclusion that the plaintiff is not entitled to any damages in respect of the deterioration which it is alleged that D the bungalow has suffered owing to the plaintiff having abstained from completing it pending the determination of the question whether he was entitled to specific performance of the agreement. The simple ground on which I base my decision is that he had no right to take possession of the land before completion of the purchase, and, consequently, had no right to build on it. In my judgment, the plaintiff cannot claim damages for the deterioration of a building which he ought E not to have erected on the land.

The plaintiff also delivered particulars of his claim for damages in lieu of specific performance amounting to £554 10s., and at the trial evidence was adduced in support of this claim. As I have held that the plaintiff is entitled to specific performance it is not necessary to go into this claim, but it seems to me that it is based mainly, if not entirely, on the fact that he made a contract with Mrs. Kelly F to build and deliver a bungalow before Aug. 5, 1925, and on the fact that he commenced building upon the plots before he was entitled to possession, and would, therefore, be open to the same objection as his claim for the £100 additional damages. As regards the costs, having taken all the circumstances of the case into consideration I have decided in the exercise of my discretion to make no order as to the costs of the action and therefore the plaintiff and defendants will have to G bear his and their own costs. In the result, there will be a decree for specific performance without damages or costs.

Solicitors: *Lawson & Lawson*; *F. J. Berryman*, for *Wallace, Watson & Flint*, Chatham.

[*Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.*]

KINGSBURY v. DIRECTOR OF PUBLIC PROSECUTIONS

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Salter, JJ., November 10, 11, 1926)]

[Reported 96 L.J.K.B. 209; 136 L.T. 312; 96 J.P. 24; 43 T.L.R. 79; 70 Sol. Jo. 1182; 28 Cox, C.C. 303]

Drugs—Dangerous drugs—“Administration” by or under direct personal supervision of doctor—Dangerous Drugs Regulations, 1921 (S.R. & O. 1921 No. 865), reg. 4, proviso.

By the Dangerous Drugs Regulations, 1921, reg. 4: “Except when the drugs are lawfully dispensed in pursuance of a prescription given by a duly qualified medical practitioner . . . in accordance with the conditions hereinafter specified, no person shall supply . . . any of the drugs to or for any person in the United Kingdom who is not licensed or otherwise authorised to be in possession of the drug. . . . Provided that administration of the drugs by or under the direct personal supervision of a duly qualified medical practitioner . . . shall not be deemed to be supplying the drug within the meaning of this and the following regulations.”

The appellant, who was a registered medical practitioner, but had given up practice, undertook without fee to cure an old patient of having to take morphine daily and adopted the gradual reduction treatment. He saw the patient every other day and left with him the necessary supply of morphine for the proper doses for that day and the succeeding day with instructions as to the time and method of taking them, but he did not actually see the patient take the drug. He did not enter the name and address of the patient in a register kept for the purpose. He was summoned under s. 13 (1) of the Dangerous Drugs Act, 1920, as amended, for failing to comply with reg. 9 of the Dangerous Drugs Regulations, 1921, by supplying the drug without entering in a register the name and address of the person to whom it was supplied. The appellant claimed exemption from reg. 9 under the proviso to reg. 4.

Held: the word “administration” in the proviso to reg. 4 was not confined to a particular emergency as contrasted with a general course of treatment which involved something in the nature of a regular supply, and since, on the facts of the case, there was direct personal supervision within the meaning of the regulation, the appellant had not committed the offence charged.

Notes. The Dangerous Drugs Regulations, 1921, were revoked by the Dangerous Drugs (Consolidation) Regulations, 1928 (S.R. & O. 1928 No. 981). The 1928 Regulations were revoked by the Dangerous Drugs Regulations, 1937 (S.R. & O. 1937 No. 560), which were revoked by the Dangerous Drugs Regulations, 1953 (S.I. 1953 No. 499). For the corresponding provisions to reg. 4, proviso, and reg. 9 of the 1921 Regulations, see the proviso to reg. 8 (2) (a) and reg. 17 of the 1953 Regulations. The Dangerous Drugs Act, 1920, as amended, was repealed by the Dangerous Drugs Act, 1951, s. 25 (1) and schedule. Section 13 (1) of the 1920 Act has been replaced by s. 15 (1) of the 1951 Act. The 1951 Act came into operation on Jan. 1, 1952 (see S.I. 1951 No. 2124).

As to dangerous drugs, see 26 HALSBURY'S LAWS (3rd Edn.) 198 et seq.; and for cases see 34 DIGEST 567 et seq. For the Dangerous Drugs Act, 1951, s. 15 (1), see 30 HALSBURY'S STATUTES (2nd Edn.) 237.

Case Stated by the Lord Mayor of London, sitting as a court of summary jurisdiction.

On Mar. 1, 1926, an information was preferred by Inspector Pay, of the City Police, against the appellant, Dr. George Chadwick Kingsbury, charging that between Aug. 20, 1925, and Feb. 2, 1926, he unlawfully failed to comply with the provisions of reg. 9 of the Dangerous Drugs Regulations, 1921, made by the Secretary of State under s. 7 of the Dangerous Drugs Act, 1920, in that, having

A supplied quantities of a certain dangerous drug, to wit, morphine, to a person unknown, he did not enter or cause to be entered in a register kept for the purpose, in the form and containing the particulars shown in Sched. 1 to the regulations, all dealings in the drug effected by him; that was to say, that he did not enter the name and address of the person to whom the drug was supplied, and did not record in a day book the name and address of the patient to whom the drug was supplied

B by him, contrary to s. 13 (1) of the Dangerous Drugs Act, 1920, as amended by the Dangerous Drugs and Poisons (Amendment) Act, 1923.

The appellant pleaded "Not Guilty," but consented to be dealt with summarily. The following facts were then proved or admitted. The appellant was a doctor of medicine, and his name duly appeared in the Medical Register for 1925.

C In 1902 he was called to the Bar, and had practised regularly as a barrister since that date. Old patients of his, and barrister friends in the Temple, had occasionally desired his advice, but he had never accepted any fee from any patient since his call to the Bar. Subsequently to the passing of the Dangerous Drugs Act, 1920, the appellant undertook, at the earnest solicitation of two of his old patients, to try to cure them of their having to take certain daily quantities of morphine. In both cases the morphine had been administered by doctors, originally during

D prolonged illnesses, and was taken on the average in four doses per diem. To that end the appellant made purchases of morphine in quarter-grain tabloids to the average amount of 17 to 20 grains weekly. He paid for the morphine himself at a cost of about £25, and made no charge to the patients for it. He had taken no fee for his treatment of the patients. The first of the two patients was cured before the end of 1924. During the period covered by the summons, Aug. 20, 1925, to

E Feb. 2, 1926, the appellant was treating the remaining patient, a worker in the City, and was adopting the gradual reduction treatment. Before the hearing he had succeeded in reducing the drug taken to one-fiftieth of the daily dose taken at the beginning of the treatment. He had seen this patient every other day, even during his (the appellant's) holidays, and, on the days of his visits, had left with the patient the necessary supply of morphine for the proper doses for that day and

F the succeeding day, with instructions as to the time and method of taking it. On no occasion did the appellant ever depart from that method of treatment, and he had never entrusted the drug to any person other than the patient, save on one occasion (before the period covered by the summons) to the patient's wife. He did not actually see the patient take the drug, but stated that he would have

G known if the patient had been getting morphine from other doctors.

The Lord Mayor was of opinion that reg. 9 was a valid regulation, and that, in the circumstances, the proviso to reg. 4 was not applicable to the appellant. He, accordingly, found the appellant guilty and fined him £25 and £10 10s. costs. The appellant now appealed.

Birkett, K.C., and A. H. Davis for the appellant.

H *H. D. Roome* for the respondent.

LORD HEWART, C.J.—In the course of an extremely interesting argument in this case some matters have been stirred with which it is not necessary to deal. At the close of the argument the question which really emerged was simple, and one capable of brief statement. It is this: On the true construction of the proviso to reg. 4 of the Dangerous Drugs Act, 1921, was that which was here complained

I of "administration" of morphine "by or under the direct personal supervision of a duly qualified medical practitioner"? When the Special Case is examined, no doubt is left as to the contention made by the prosecution in the court below. I will read its ipsissima verba:

"That in reg. 4 the words 'administration of the drug by a duly qualified medical practitioner' meant that the doctor must administer every dose by his own hand; and that administration 'under the direct personal supervision of a duly qualified medical practitioner' meant that the doctor must be present, and

either see the patient administer each and every dose to himself, or see the nurse or other person administer such dose to the patient."

Whatever else may be said of that contention it is wholly free from ambiguity, and that contention was held to be right by the Lord Mayor.

Counsel for the respondent, with his usual frankness, now no longer contends that, subject to proper provisions and precautions, the actual personal presence of the doctor is necessary. But he has contended that, when the terms of the proviso are contrasted with the body of reg. 4, the word "administration" is confined to a particular emergency as contrasted with a general course of treatment which involves something in the nature of a regular supply. It is said that, if that were not so, great mischief might arise to the patient himself, because he might consume a quantity of the drug without a record being made, and might have the opportunity of obtaining further supplies. But the court has to construe what the regulations say, not what they might have said. The words "in the case of emergency" occur in reg. 5. It would have been easy to put those words in reg. 4. The question of amending the regulations is not for the court, but for the department concerned. It seems to me as impossible to limit the words of the proviso to cases of emergency as it is to limit personal supervision to cases where the doctor is personally present at the time when each particular dose is taken. Looking at the words of the regulation as part of a much larger whole, I do not think that it is restricted to the limited meaning contended for, and, as soon as that has gone, on the facts of this case I think that there was direct personal supervision. I express no opinion as to the amendment of the regulations, but the decision of the court below cannot be supported, and the appeal must be allowed, with costs.

AYORY, J.—I agree.

SALTER, J.—I agree.

Appeal allowed.

Solicitors: *Ashurst, Morris, Crisp & Co.; Director of Public Prosecutions.*

[Reported by J. F. WALKER, ESQ., Barrister-at-Law.]

A

GLICKSMAN v. LANCASHIRE AND GENERAL ASSURANCE CO., LTD.

[HOUSE OF LORDS (Viscount Dunedin, Lord Atkinson, Lord Shaw, Lord Wrenbury and Lord Carson), November 2, 4, 1926]

B

[Reported [1927] A.C. 139; 136 L.T. 268; 43 T.L.R. 46; 70 Sol. Jo. 1111; 32 Com. Cas. 62]

Insurance—Burglary insurance—Voidability of policy—Proposal form—Proposal by partners—Mis-statement by one partner—Concealment of material fact.

C

The appellant, who was carrying on business in partnership with R., made a proposal to the respondents for insurance against burglary. Question 8 on the proposal form was as follows: "Has any company declined to accept, or refused to renew, your burglary insurance . . . ?" To this the appellant and his partner made the following answer: "Yorkshire accepted, but proposers refused on account of fire proposal." The appellant had in fact personally been refused a burglary policy by another insurance company. A policy was issued by the respondents, and it contained a condition that any misrepresentation, suppression, concealment or untrue averment in the answers to the questions on the proposal form should render the policy absolutely void. On the dissolution of the partnership, the policy was continued for the benefit of the appellant alone, and he later made a claim under the policy alleging that a burglary had taken place. The respondents refused the claim and the dispute was referred to an arbitrator who found that there had been suppression of a material fact in the answer to question 8.

D

E

Held: it was a material fact for the respondents to know whether a proposal had been refused or not; there had been non-disclosure on the part of the appellant; and, therefore, the policy was void.

Decision of the Court of Appeal ([1925] 2 K.B. 593), affirmed.

F

Notes. Referred to: *Farra v. Hetherington* (1931), 47 T.L.R. 465; *Locker and Woolf, Ltd. v. Western Australian Insurance Co.* (1935), 153 L.T. 334.

As to non-disclosure and misrepresentation in relation to a policy of insurance, see 22 HALSBURY'S LAWS (3rd Edn.) 185 et seq.; and for cases see 29 DIGEST 49-52.

G

H

I

Appeal in forma pauperis by the appellant, Sapsy Glicksman, from an order of the Court of Appeal (BANKES, SCRUTTON and SARGANT, L.JJ.) dated June 15, 1925, reversing an order of ROCHE, J., on a Special Case stated by an arbitrator. The respondents had issued a joint policy of insurance against burglary to the appellant and one Rohman, who was the appellant's partner in the business of a ladies' tailor, at 4 Albert Square, Commercial Road, E. During the currency of the policy the partnership was dissolved. Mr. Rohman went to America and the policy was then continued for the sole benefit of the appellant. The alleged burglary then took place. The policy contained a condition that any misrepresentation, suppression, concealment or untrue averment in the answers to the questions in the proposal form should render the policy absolutely void. Question 8 in the proposal form was as follows: "Has any company declined to accept, or refused to renew, your burglary insurance, or increased your premium, or required special terms or additional precautions to be taken? If so, state name of company and date." To that the appellant and Rohman replied jointly: "Yorkshire accepted, but proposers refused on account of fire proposal." In fact, the appellant had, at a time when he was not in partnership with Mr. Rohman, been refused a burglary insurance by the Sun Insurance Co. Arising out of the burglary the appellant made a claim under the policy against the respondents, who refused to pay upon the ground, inter alia, that the claim was avoided by misrepresentation in the proposal form. The matter having been referred to arbitration, the arbitrator decided in favour of the respondents, subject to a Special Case Stated. The Court

of Appeal held, reversing the decision of ROCHE, J., that there was evidence of the concealment of a material fact, and that the onus was on the appellant to prove that he had told the respondents of that material fact. In these circumstances, the arbitrator was entitled to find that there had been suppression of a material fact and his award must be affirmed. A

Croom-Johnson and Claud Mullins for the appellant.

Rayner Goddard, K.C., and H. C. Dickens for the respondents. B

VISCOUNT DUNEDIN.—One Sapsy Glicksman, a small ladies' tailor, insured against burglary his stock-in-trade. A burglary happened and a large portion of his stock-in-trade was taken away, but, on his applying to the insurance company for the insurance money, he was met by the allegation that there had been no burglary and no stock-in-trade. They went to arbitration, and here is what the learned arbitrator said: C

"On the hearing of the reference during the opening of the case for the [appellant], counsel for the respondents stated to me that the only point he intended to raise was that there had been no burglary as alleged by the [appellant] and that the goods for which the claim was made were not upon the said premises at the date of such alleged burglary and had not been removed or stolen by burglars as alleged." D

That was a very serious accusation. It was an accusation which, if it was true, would have put the man in the dock. I remember myself giving somebody three years' penal servitude for exactly the same sort of thing. Here is what the arbitrator said about it: E

"I find that the goods in respect of which the claim was made were upon the said premises at such date and were stolen and removed by burglars as alleged by the [appellant], and that the [appellant] thereby suffered loss and damage to the amount of £1,656 6s. 3d." E

But, in the course of the examination of the appellant, in answer to some more or less casual questions, it seems that he said that he had been turned down by another office, and thereupon the respondents remembered that he had, like other people, signed a paper when he made application for insurance, and, accordingly, they asked leave and got leave to put in an amended point of defence. The amended point of defence was: F

"It was warranted by the policy that the statements made by the [appellant] in his proposal in writing dated Nov. 9, 1922, were true in all respects, and that if the policy should be obtained through any misrepresentation, suppression, concealment, or untrue averment" G

it should be absolutely void. Then it was said that he had, as a matter of fact, in answer to a question, "Has any company declined to accept or refused to renew your burglary insurance?" said, "Yorkshire accepted, but proposers refused on account of fire proposal"; whereas, in fact, in a written proposal dated June 19, 1919, the appellant had offered his burglary insurance to the Sun Insurance Office and the said Sun Insurance Office had declined it. It was not quite plain sailing even then, because, when the proposal came to be looked at, it was found that, at the time the proposal was made, he was in partnership. The word "you" in English is either singular or plural, and when one comes to the answers to the questions there is what I may call a somewhat inextricable confusion between the singular and the plural. Of course, literally speaking, if the word "you" is used in the plural, as naturally it should have been because two people were applying, then it was quite true that there had not been any refusal of an insurance; but it was not true if one takes it in the singular. The arbitrator came to the conclusion that it voided the policy and an appeal was taken on a stated Case to ROCHE, J. ROCHE, J., came to an opposite conclusion—I do not altogether wonder when one thinks of the scene: On the one hand Mr. Cohen, agent for the respon- H I

A dents, keen, as he was quite entitled and bound to be, to get business for the respondents, and, on the other hand, this wretched little ladies' tailor of whom the arbitrator tells us that he could neither read nor write and could only sign his name, and whose natural and best language was Yiddish and not English—surely an impar congressus. ROCHE, J., held that there was no proof of concealment; and he held, on the other question, that the answer was really made in the plural.

B For the reasons that I shall presently state, I am unable to agree with ROCHE, J., but at least I am left with this impression, that those—shall I call them attractive?—qualities which we are prone to ascribe to the Hebrews, among whom Shylock has always been the prototype, have been quite as satisfactorily developed on the part of this insurance company as ever they were by the little Polish Jew.

C Then I come to the law of it. The law has often been stated, but perhaps it is just as well to state it again. A contract of insurance is denominated a contract uberrimae fidei. It is possible for persons to stipulate that answers to certain questions shall be the basis of the insurance, and if that is done then there is no question as to materiality left, because the persons have contracted that there should be materiality in those questions; but, quite apart from that, and alongside of that, there is the duty of no concealment of any consideration which would

D affect the mind of the ordinary prudent man in accepting the risk. As I have said, on this proposal two questions arose. First, the question arose on what I call the plural and the singular. One of the learned judges in the Court of Appeal has said that he would like further to consider this. ROCHE, J., decided it in the sense that the question was really put in the plural and that, therefore, there was no untrue answer. There were certain cases quoted to us which go to the same

E view. Two of the learned judges in the Court of Appeal took the other view. I do not think it necessary that we should come to a conclusion on which of these views is right, and I, therefore, do not propose myself to express any opinion on them, because I think the ground of judgment is quite clear on the other point. It is narrow enough, because, when one comes to the law as to materiality and concealment, of course there are certain circumstances which are so obviously

F material that it will not be taken from any man to say that he did not know it. If one is insuring a ship on a time policy and that ship had been badly knocked about three weeks before, of course one could not be heard to say that one did not think that was a material circumstance. But here the whole point really comes to turn on this—and this is the ground of the judgment of the learned judges in the Court of Appeal—that, never minding the singular or the plural, the fact that a

G question of this sort was put showed that the respondents thought it was material whether a proposal had been refused or not, and that that was brought to the knowledge of the appellant. In the circumstances, I have considerable doubts, but then I am not entitled to take any view of my own on that, because that is a fact, and the arbitrator has found it as a fact and I cannot get beyond his finding. I think that the reasoning of the learned judges in the Court of Appeal is impeccable.

H This was brought to the knowledge of the appellant that it was a material fact and he certainly did not disclose it and, therefore, the policy is void. Therefore, with unfeigned regret, I move your Lordships that this appeal be dismissed with such costs as there are in a case in forma pauperis.

I **LORD ATKINSON.**—My Lords, I concur. I wish to say one word in reference to the observations of SCRUTTON, L.J. I think it is a lamentable thing that insurance companies will abstain from shaping the questions they put to intending insurers on such occasions in clear and unambiguous language. For instance, in this particular case, all that it was necessary to say was, "Did you two or either of you make an application to the Sun Insurance Co. for a policy against burglary?" This whole case and all the expense would have been prevented had that simple method been adopted.

LORD SHAW.—I agree with both the judgments just delivered.

LORD WRENBURY.—It is with the very greatest reluctance that I concur

in the motion which is proposed from the Woolsack. I think it a mean and contemptible policy on the part of an insurance company that it should take the premiums and then refuse to pay on a ground which no one says was material. Here, on purely technical grounds, they, having in point of fact not been deceived in any material particular, choose to avail themselves of what seems to me the contemptible defence that, although they have taken the premiums, they are protected from paying.

LORD CARSON.—Without committing myself to the strictures passed on the respondents, I concur in the conclusion arrived at that the appeal should be dismissed with costs as proposed.

Appeal dismissed.

Solicitors: *F. J. Rutledge; Coward, Chance & Co.*

[Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]

OUTERBRIDGE v. OUTERBRIDGE

[KING'S BENCH DIVISION (Lord Hewart, C.J., Ivory and Salter, JJ.), October 14, 15, 1926]

[Reported [1927] 1 K.B. 368; 96 L.J.K.B. 74; 136 L.T. 303; 90 J.P. 204; 43 T.L.R. 33; 70 Sol. Jo. 1113; 28 Cox, C.C. 281]

Husband and Wife—Summary proceedings—Maintenance—Arrears—Adultery of wife—Recovery of arrears up to date of proof of adultery—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict., c. 39), s. 6, s. 9.

By s. 6 of the Summary Jurisdiction (Married Women) Act, 1895: "No orders shall be made under this Act on the application of a married woman if it shall be proved that such married woman has committed an act of adultery." By s. 9: "The payment of any sum of money directed to be paid by any order under this Act may be enforced in the same manner as the payment of money is enforced under an order of affiliation." A maintenance order was made against the husband under the Act of 1895, and, payments not having been made, the wife took out a summons for payment of the arrears. The husband applied for the discharge of the order on the ground of the wife's adultery. The justices discharged the maintenance order, but made an order for payment of the arrears up to the date of proof of the wife's adultery, and under s. 9 of the Act of 1895 and s. 2 of the Affiliation Orders Act, 1914, ordered the attachment of the husband's income.

Held: since the order for payment of arrears was not under s. 6 of the Act of 1895, but was under s. 9 of that Act, and was, therefore, regulated by the Bastardy Acts, the wife could recover the arrears up to the date of the proof of her adultery.

Ruther v. Ruther (1), [1903] 2 K.B. 270, applied.

Notes. As to the summary procedure in matrimonial cases, see 12 HALSBURY'S LAWS (3rd Edn.) 487 et seq.; and for cases see 27 DIGEST (Repl.) 719 et seq. For the Summary Jurisdiction (Married Women) Act, 1895, s. 6 and s. 9, see 11 HALSBURY'S STATUTES (2nd Edn.) 852, 853.

Case referred to:

(1) *Ruther v. Ruther*, [1903] 2 K.B. 270; 72 L.J.K.B. 826; 67 J.P. 359; 52 W.R. 154; 47 Sol. Jo. 640, D.C.; 27 Digest (Repl.) 724, 6922.

Case Stated by Surrey justices.

An application was made by the respondent, Mrs. Outerbridge, against her hus-

- A** band, Richard H. Outerbridge, the appellant, for his committal for non-compliance with an order for maintenance made under s. 5 of the Summary Jurisdiction (Married Women) Act, 1895, on April 15, 1915, by which the appellant was ordered to pay the respondent £2 a week until the order should be varied or discharged. A summons for the arrears up to Feb. 14, 1924, which had been adjourned from that date, was heard on Jan. 21, 1926, when the following facts were found: (a) the order of April 15, 1915, was, in accordance with s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, discharged by the justices on Feb. 14, 1924, as from that date, on the grounds of the respondent's adultery with one Frost. (b) There was on Feb. 14, 1924, the sum of £390 unpaid under the order of April 15, 1915, and the same sum was still unpaid on Jan. 21, 1926. The justices ordered the appellant to pay the arrears to the respondent by instalments of £2 a week, and under s. 2 of the Affiliation Orders Act, 1914, and s. 9 of the Summary Jurisdiction (Married Women) Act, 1895, ordered the attachment of the appellant's income from the Public Trustee for the payment of the instalments. The grounds for making this order were: that the order of April 15, 1915, was only discharged as from Feb. 14, 1924, and that there was £390 still due to the respondent as arrears up to Feb. 14, 1924, under that order. It was contended for the appellant that this order was erroneous in law and in excess of jurisdiction because the order of April 15, 1915, having been discharged by the justices as from Feb. 14, 1924, was no longer in force and no further order for payment of money thereunder could be made; that no further order for payment could be made because by s. 6 of the Summary Jurisdiction (Married Women) Act, 1895, no order could be made thereunder on the application of a married woman after proof of her adultery; that the justices were *functi officio*, and had no power to make another order for payment of arrears against the appellant; that this order of Jan. 21, 1926, was erroneous in law and in excess of jurisdiction as divorce proceedings between the parties were pending at the date of the application for and the making of the order; that the order was erroneous in law and in excess of jurisdiction because it was made in respect of arrears alleged to be due subsequently to the commencement of the adulterous cohabitation with Frost; and that the order was erroneous in law and in excess of jurisdiction inasmuch as no documentary or other evidence was adduced of any settlements or investments made in favour of the appellant. It was contended for the respondent that the order was rightly made; that s. 6 of the Act of 1895 did not apply to an order for payment of arrears due under an order before discharge; and that divorce proceedings between the parties were no bar to the making of the order.

J. Wellesley Orr for the appellant.

J. D. Young for the respondent.

- LORD HEWART, C.J.**, stated the facts, and continued: The chief ground of appeal, as appears from the Case and from the arguments before us on behalf of the appellant, is that the justices were *functi officio*, and had no power to make an order against the appellant, *scilicet* because the maintenance order had been discharged. The effect of the argument is that, if a woman who has obtained an order for maintenance is going to commit adultery, she must be diligent to collect her arrears first. The basis of the contention is to be found in the Summary Jurisdiction (Married Women) Act, 1895. Section 4 and s. 5 having dealt with the granting of orders, s. 6 provides as follows:

"No orders shall be made under this Act on the application of a married woman if it shall be proved that such married woman has committed an act of adultery...."

The argument was that this order was an order "under this Act" and there was no power to make it. The answer was that the original order was undoubtedly made "under this Act," but that a distinction must be drawn between that order and the order for enforcement of arrears, which was made under the powers con-

ferred by the Affiliation Orders Act, 1914. In other words, for the enforcement of the payment of such sums nowadays it is not necessary to obtain an order under the Summary Jurisdiction (Married Women) Act, 1895; what is needed is an order similar to that sought by persons seeking to enforce affiliation orders. A

The question was dealt with in *Ruther v. Ruther* (1), where LORD ALVERSTONE, C.J., said ([1903] 2 K.B. at p. 274):

"The Act of 1895 provided a new and amended procedure for making orders for the maintenance of wives, and by s. 9 it is enacted that the payment of any sum of money directed to be paid by an order under the Act may be enforced in the same manner as the payment of money is enforced under an order of affiliation. The procedure for enforcing payment is, therefore, regulated by s. 4 of the Bastardy Laws Amendment Act, 1872, which empowers magistrates where an order for payment has not been obeyed and no sufficient distress can be had to commit the defendant to prison for any term not exceeding three months." B

WILLS, J., said (*ibid.*, at p. 275):

"Orders for payment made under the Act of 1895 are by s. 9 to be enforced in the same way as affiliation orders; and on looking at s. 4 of the Bastardy Laws Amendment Act, 1872, one sees what the procedure is. Therefore an order of committal for non-payment is not an order made under the Act of 1895." C

That decision seems to depend precisely on the contrast sought to be made in this case. The learned judge went on to say:

"As to the main question, it is clear that there is no power to order committal for non-payment of the weekly sum after adultery on the part of the wife has been proved. I do not mean to say that the respondent was not entitled to recover arrears in respect of the period between the date when the adultery was committed and the date when the order ought to have been discharged." D

CHANNELL, J., agreed. In those circumstances, the decisions being what they are, it seems clear that it was open to the justices to make the order which they made in this case as to the arrears which had accrued before the discharge of the order. I have come to the conclusion, not without hesitation, that the justices were right. E

AVORY, J.—I have entertained, and still entertain, considerable doubt whether an order made under the Act of 1895 which has been discharged can afterwards be enforced, and also I entertain some doubt whether this order is not an order under the Act of 1895. If it were, then s. 6 would prohibit the justices from making the order on proof that the wife had committed adultery. But it has apparently been decided that an order for payment of arrears is not to be treated as an order under the Act of 1895. It is a very fine distinction, but just intelligible. It has been held in *Ruther v. Ruther* (1) by implication, if not in express terms, that, on an application for arrears, the wife is entitled to receive them up to the date of proof of her adultery and not merely to the date at which adultery was committed. In these circumstances I do not dissent from the judgment of my Lord, with which I understand my brother SALTER agrees. F

SALTER, J.—I agree that the justices had jurisdiction to make an order for payment of arrears due under this order, which had been discharged but not annulled ab initio. The jurisdiction to make this order was derived partly from s. 9 of the Summary Jurisdiction (Married Women) Act, 1895, and partly from the Bastardy Acts. In a sense, no doubt, it was made under the Act of 1895, but I think not in the sense required. I think we could not hold otherwise without differing from *Ruther v. Ruther* (1). I agree that the justices could order payment of arrears down to the date of proof of the adultery. G

Solicitors: *C. T. Lewis; Cardew Smith & Ross.* H

Appeal dismissed.

[Reported by J. F. WALKER, Esq., Barrister-at-Law.] I

FAULKNER v. HYTHE CORPORATION

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Slater, JJ.),
October 29, 1926]

[Reported [1927] 1 K.B. 532; 96 L.J.K.B. 167; 136 L.T. 329;
91 J.P. 22; 43 T.L.R. 55; 71 Sol. Jo. 20; 25 L.G.R. 60]

*Street—Private street works—Objection—Application to justices to determine—
Jurisdiction of justices to hear objection after works executed—Private
Street Works Act, 1892 (55 & 56 Vict., c. 57), s. 7, s. 8 (1).*

By the Private Street Works Act, 1892, s. 7, during one month after the publication by an urban authority of a provisional apportionment, "any owner . . . may, by written notice served on the urban authority, object to the proposals" on a number of grounds. By s. 8 (1): "The urban authority at any time after the expiration of the said month may apply to a court of summary jurisdiction to appoint a time for determining the matter of all objections made as in this Act mentioned."

The appellant was the owner of property abutting on a street in the area of the respondent urban authority, who, having resolved that the street be sewered, levelled, paved, &c., and that the expenses be apportioned on the abutting premises, and having approved and published the provisional apportionment, served it on the appellant. Within a month from the publication, the appellant, under s. 7 of the Private Street Works Act, 1892, served on the respondents written notice of objection to their proposals on the ground that the street was a highway repairable by the inhabitants at large. About seven months later the respondents served on the appellant notice of final apportionment, and the appellant gave notice of objection to the final apportionment similar to the previous notice of objection. Nearly a year later, the works having been completed, the respondents for the first time applied to the justices under s. 8 of the Act to determine the matter of the objection made by the appellant to the provisional apportionment.

Held: the application under s. 8 (1) of the Act of 1892 referred to objections made under s. 7 to "proposals" of an urban authority to do the works, and, therefore, the application having been made after the works had been completed, the justices had no jurisdiction to hear it.

Notes. Referred to: *Stockwell v. Southgate Corpn.*, [1936] 2 All E.R. 1343.

As to private street works, see 19 HALSBURY'S LAWS (3rd Edn.) 437 et seq.; and for cases see 26 DIGEST 539 et seq. For the Private Street Works Act, 1892, s. 8, see 11 HALSBURY'S STATUTES (2nd Edn.) 187.

Cases referred to:

- (1) *Wirral R.D.C. v. Carter*, [1903] 1 K.B. 646; 72 L.J.K.B. 332; 89 L.T. 171; 67 J.P. 31; 51 W.R. 414; 19 T.L.R. 153; 47 Sol. Jo. 223; 1 L.G.R. 206; 26 Digest 543, 2409.
- (2) *Hayles v. Sandown U.D.C.*, [1903] 1 K.B. 169; 72 L.J.K.B. 48; 88 L.T. 61; 67 J.P. 177; 51 W.R. 348; 1 L.G.R. 187, D.C.; 26 Digest 546, 2443.
- (3) *Pearce v. Maidenhead Corpn.*, [1907] 2 K.B. 96; 76 L.J.K.B. 591; 96 L.T. 639; 71 J.P. 230; 5 L.G.R. 622, D.C.; 26 Digest 545, 2432.

Case Stated by justices for the borough of Hythe.

The respondents applied to the justices pursuant to the Private Street Works Act, 1892, s. 8, to determine the matter of an objection made by the appellant under s. 7 of the Act to proposals of the respondents relating to property in Albert Road, Hythe. The application was heard on July 13, 1926, and the court, having heard an objection to their jurisdiction made by counsel for the appellant, decided that they had the power to hear and determine the objection within the meaning of s. 8 of the Act of 1892. On the hearing, the following facts were agreed between

counsel for both parties. The respondents, as the urban authority within their district, resolved that Albert Road (a road on which the appellant's property abutted) was not sewered, levelled, paved, metalled, flagged, channelled, made good, and lighted to the satisfaction of the urban authority, and the respondents as such urban authority resolved to sewer, level, pave, metal, flag, channel, and make good and to provide proper means for lighting the street, and that the expense incurred by them should be apportioned on the premises fronting, adjoining, or abutting on the street or part of the street in pursuance of s. 6 of the Act of 1892. The respondents' surveyor prepared: (a) A specification of the private street works referred to in the resolution with plans and sections. (b) An estimate of the probable expenses of the works. (c) A provisional apportionment of the estimated expenses between the premises liable to be charged therewith under the Act. These were duly approved by the respondents in the manner provided by the Private Street Works Act, 1892. The resolutions approving the specification, plans and sections, estimate, and provisional apportionment were published in the manner specified in Part II of the Schedule to the Act of 1892, and copies thereof were served on the owners of the premises, including the appellant, shown as liable to be charged in the provisional apportionment, within seven days after the date of the first publication, namely, on Dec. 29, 1923, and the necessary publications were made. An amended apportionment was duly served on the appellant on Jan. 21, 1924. On Jan. 23, 1924, the appellant served a notice on the respondents in writing objecting to the proposals of the urban authority on ground (b) specified in s. 7 of the Act of 1892, namely, that Albert Road was a highway repairable by the inhabitants at large. No application to a court of summary jurisdiction to appoint a time for determining the matter of objections under s. 8 of the Act of 1892 was made by the respondents until after the work was completed and final apportionment made and notice thereof served. The notice of final apportionment was served on the appellant on Sept. 1, 1925, and a similar objection was made by the appellant under s. 12 of the Act of 1892 by notice in writing on the respondents on Sept. 3, 1925, such as had been raised to the proposals of the respondents under s. 7 of the Act of 1892. On July 2, 1926, the respondents as urban authority applied to the justices to hear, determine and appoint a time for determining the matter of the said objection made by the appellant under s. 7 of the Act of 1892, in pursuance of s. 8 of that Act. The date appointed was July 13, 1926.

The attention of the justices was called by the appellant to *Wirral R.D.C. v. Carter* (1) and the obiter dictum of LORD ALVERSTONE, C.J., and certain expressions used in the same case by WILLS, J., and to *Hayles v. Sandown U.D.C.* (2) and *Pearce v. Maidenhead Corpn.* (3). It was admitted that these cases were not cases which directly decided the case before the justices, but it was contended that the expressions by the learned judges should have weight. The justices were of opinion that the obiter dicta quoted were merely ancillary to the case before the court and were not in any way considered judgments or applicable to the present case; and that s. 12 of the Act of 1892 was not inconsistent with construing s. 8 in the words of that section in that, until the notice of objection of the appellant to the provisional apportionment had been dealt with under s. 8, it would be impossible to make a binding legal, final apportionment to which s. 12, s. 13, and s. 14 would apply.

C. R. Havers for the appellant.

A. F. Clements and *W. M. Andrew* for the respondents.

LORD HEWART, C.J.—This is a Case Stated by justices, and the point involved in it may be very concisely stated. It is whether, in s. 8 of the Private Street Works Act, 1892, the true construction of the words relating to the application by the urban authority at any time after the expiration of the month therein referred to, involves the meaning that the application is to be made while the works are still proposed works and before they have been begun. Reference has been made to certain observations in *Wirral R.D.C. v. Carter* (1), in *Hayles v.*

A *Sandown U.D.C.* (2) and *Pearce v. Maidenhead Corpn.* (3), which assume, rather than hold, that that is the true construction. In my opinion, that is the true construction, as is made plain by the whole scheme of this statute, and, moreover, by particular phrases to be found in its sections. The scheme is this: That, where the street is not yet sewered, levelled, paved, &c., the urban authority may pass a resolution and the surveyor shall thereupon prepare a specification, estimate, and

B provisional apportionment. That resolution has to be published in the manner provided by s. 6, and there is to be a month during which, as provided by s. 7, the owner of any premises shown in the provisional apportionment as liable to be charged may, by written notice, object to the proposals. The grounds of such objections are enumerated, and one finds in the body of the objections, for example, ground (d), that the proposed works are insufficient or unreasonable, or that the

C estimated expenses are excessive. The work is then a matter of proposal. Passing to s. 8, one finds that it is the duty of the urban authority to apply to a court of summary jurisdiction to appoint a time for determining the matter of all objections made as in the Act mentioned, that is to say, they must apply for objections to be heard to the proposed works. Then follows s. 9, as to incidental works, s. 10 as to apportionment, and then a very significant section, s. 11, where the whole

D process is to be repeated *de novo* if the urban authority from time to time desire to amend the specification, plans, &c., and that chapter of the story, so to say, is closed. We then pass to s. 12, beginning with the words: "When any private street works have been completed." I do not see that the words "before the commencement of the works" are not by implication included in s. 8. In my view, the scheme of these sections and the vocabulary employed show that the

E application is to be made before the commencement of the works, otherwise it would be grotesque to speak of objections to proposed works.

It is not necessary to repeat the facts of this case. The point of them is that it was not until the whole work had been carried out and the whole of the expense incurred and the final apportionment made, that this particular owner of premises had an opportunity, if indeed it was an opportunity, of taking the preliminary

F point that this street, which he was to bear a part of the cost of treating under this statute, was all the time a highway repairable by the inhabitants at large. That was not an objection which could be taken at the time of the hearing; it was an objection which arose on the proposed works. I think, therefore, that the point taken by the learned counsel for the appellant in the court below was right, and that the justices were without jurisdiction at that stage to deal with such an application.

G Therefore, this appeal succeeds and whatever order (and there seems to be some doubt as to the precise terms and effect of the order made) was in those circumstances made by these justices is null and void.

AVORY, J.—I am of the same opinion. The only ground on which the decision of the justices that they had jurisdiction can be supported is the ground taken by

H counsel for the respondents, that under s. 8 there is no limitation of the time within which the urban authority may apply to a court of summary jurisdiction; but when that section is looked at, I think it is clear that this is one of those instances where the word "may" has to be construed in a mandatory sense, and, further, it is clear, from this section, that that provision as to the urban authority applying to the court has relation only to the question of an objection which has

I been made under s. 7 to the proposed works, and it can have no application to an objection which is provided for by s. 12 after the works have been completed. The word "may" here is undoubtedly used in the permissive sense, because there may have been no objection raised, and, therefore, there may be no need for an application to the court. But it clearly contemplates that, if an objection has been made under s. 7, then the urban authority shall apply to the court of summary jurisdiction, and, in my opinion, if they fail to do so, then the justices have no jurisdiction at all to deal with any question of final apportionment.

SALTER, J.—I am of the same opinion. If s. 9 and s. 10 of the Act are read,

as it appears to me they should, strictly speaking, be read, before s. 7 and s. 8, it will be sufficiently clear that Parliament was intending that objections to the provisional apportionment should be dealt with and disposed of before the works are begun, and that view is considerably strengthened by a consideration of the terms of s. 11. A

Appeal allowed.

Solicitors: *E. C. Rawlings, Butt & Bowyer; John Hands & Son, for H. Stainer, Hythe.* B

[Reported by J. R. WALKER, Esq., Barrister-at-Law.]

GALE *v.* MOTOR UNION INSURANCE CO. LTD.
LOYST *v.* GENERAL ACCIDENT FIRE AND LIFE
ASSURANCE CORPORATION LTD. C

[KING'S BENCH DIVISION (Roche, J.), November 2, 1926]

[Reported [1928] 1 K.B. 359; 96 L.J.K.B. 199; 138 L.T. 712;
43 T.L.R. 15; 70 Sol. Jo. 1140] D

Insurance—Motor insurance—Risk insured by two insurers under separate policies—Rateable contribution. E

G. and L. were insured in respect of motor car risks under separate policies issued by different companies. Each policy contained conditions to the effect that (i) if the risk insured was covered by any other insurance, the insurers were not to be liable, and (ii) if the risk insured was covered by any other insurance, the insurers were only to be liable to contribute rateably. L., while driving G.'s car with his consent, became liable in damages to a third party in circumstances in which he was covered by both policies. Each insurance company denied liability on the ground that the risk was covered by the policy issued by the other company. F

Held: the first of the conditions in each policy was qualified by the second, and each of the insurance companies was liable in rateable proportions, the proper basis of contribution being that they should contribute one-half each. G

Notes. Considered: *Weddell v. Road Transport and General Insurance Co., Ltd.*, [1931] All E.R. Rep. 609. Referred to: *Austin v. Zurich General Accident and Liability Insurance Co.*, [1944] 2 All E.R. 243.

As to contribution and average, see 22 HALSBURY'S LAWS (3rd Edn.) 265 et seq.; and for cases see 29 DIGEST 403 et seq. H

Special Case stated by an arbitrator.

The claimant Gale, as trustee for the claimant Loyst, and the claimant Loyst, on his own behalf, sought an indemnity from the Motor Union Insurance Co. and the General Accident Fire and Life Assurance Corpn. respectively, in respect of monetary compensation which the claimant Loyst had been compelled to pay in consequence of a collision. The claimant Gale was insured under a policy of the Motor Union Co. dated Sept. 30, 1924, from Aug. 14, 1924, to Aug. 13, 1925, in respect of his ABC two-seater motor car. The policy contained, inter alia, the following clauses: I

"Section A. The company shall indemnify the insured or (subject to the provisions of cl. 6) any relation or friend driving with the insured's consent against the payment of all sums which they shall become legally liable to pay for compensation in respect of accidents caused by any motor vehicle belonging

- A to the insured and described in the above schedule (a) to any third person (including passengers in the car) but excluding any person in the service or household of the insured or of the person driving the car; (b) to any property or animal belonging to a third person. . . . Provided always that the due observance and fulfilment of the conditions and qualifications endorsed on this policy shall be a condition precedent to any liability of the company under this policy."
- B

The following material conditions were endorsed on the policy :

- "Condition 6. The extension of the indemnity to friends or relatives of the insured is conditional upon such friend or relative being a licensed and competent driver and not being insured under any other policy. . . ."
- C "Condition 10. If at the time of the happening of any accident, injury, damage, or loss covered by this policy, there shall be subsisting any other insurance or indemnity of any nature whatsoever covering the same, whether effected by the insured or by any other person, persons, or firm, then the company shall not be liable to pay or contribute to any such damages or loss more than a rateable proportion of any sum or sums payable in respect thereof for compensation."
- D

The claimant Loyst was insured with the General Accident Corp'n. in respect of his Morris Cowley motor car from Oct. 31, 1924, to Oct. 30, 1925, under a policy dated Nov. 3, 1924. The policy contained (inter alia) the following provisions :

- "(1) The corporation will, subject to the terms, conditions and limitations contained herein and of any endorsement hereon, indemnify the insured his executors and (or) administrators in respect of any car described in the schedule against . . . cl. 2 (1). All sums which the insured shall become legally liable to pay in respect of any claim by any person (including passengers in the car) for loss of life or accidental bodily injury or damage to property (including animals) caused by through or in connection with such car and in addition the law costs payable in connection with such claim when incurred with the consent of the corporation. (2) The insured will also be indemnified hereunder whilst personally driving a car not belonging to him provided the insured's own car is not in use at the same time, and provided that there is no other insurance in respect of such car whereby the insured may be indemnified."
- E
- F

The following was among the conditions endorsed on the policy :

- "Condition 5. If at the time of the occurrence of any accident loss or damage there shall be any other indemnity or insurance subsisting whether effected by the insured or by any other person the corporation shall not be liable to pay or contribute more than a rateable proportion of any sums payable in respect of such accident loss or damage . . . the due observance and fulfilment of the provisions and conditions of this policy . . . shall be a condition precedent to any liability of the corporation to make any payment under this policy."
- G
- H

On April 5, 1925, the claimant Loyst, with the claimant Gale's consent, was driving the ABC two-seater motor car belonging to the latter, when he collided with a motor cyclist. The motor cyclist recovered from the claimant Loyst £93 17s. 4d. damages and £60 2s. 11d. costs in the Brentford County Court in respect of this collision. The claimant Loyst paid both these sums personally since liability in respect thereof was disclaimed by both companies, each maintaining that the other company was liable. Eventually each claimant claimed against the two insurance companies respectively, the claimant Gale as trustee for the claimant Loyst, and the claimant Loyst on his own behalf, and the matter went to arbitration. For the claimants, it was contended that one or other of the policies covered the claimant Loyst, who should be indemnified by the one so far as he was not by the other; that, having regard to condition 10 of the Motor Union

I

Co.'s policy and condition 5 of that of the General Accident Corpn., the two insurers were liable to contribute rateably to the full indemnity, and in proportion to the insured values of the two cars, that is to say, £120 in the case of the ABC car, and £150 in that of the Morris Cowley, it being eventually agreed that the proportion (if so payable) should be one-half each. For the Motor Union Co., it was contended that any provision extending the right of indemnity to any other person than the person to whom the policy was issued must be interpreted strictly, and that the claimant Loyst being insured under another policy was not covered by their policy. It was also contended that there could be no liability of both companies. On behalf of the General Accident Corpn., it was contended that the liability of one insurer excluded that of the other, and that the rateable contributions condition in the policies did not apply. It was also contended that cl. 2 (2) of the policy only provided for another car than that insured if there was no other insurance on that car.

The arbitrator held that the liability of one insurer excluded liability of the other, and that the conditions in both policies as to rateable proportions did not apply; that the claimant Loyst satisfied the requirements of condition 6 of the Motor Union Co.'s policy, and that, therefore, the claimant Gale, as trustee for the claimant Loyst, was entitled to be indemnified by the Motor Union Co. in respect of all pecuniary loss suffered by the claimant Loyst in consequence of the collision of April 4, 1925; and that the claimant Loyst's claim against the General Accident Corpn. failed. The question for the opinion of the court was whether the award was correct in law.

Blanco White and *E. Hancock* for the claimants.

Montgomery, K.C., and *Wallington* for the defendant, the Motor Union Insurance Co.

Le Quesne, K.C., and *Hilbery* for the defendant, the General Accident Corporation.

ROCHE, J., stated the facts, and continued: The terms of these policies are not so clearly expressed as they might be, and have naturally given rise to disputes. The substance of the disputes is whether both the defendant companies are liable or neither is liable, or one of them is liable alone. Each defendant company denies liability, and the arbitrator decided that the Motor Union Co. was solely liable.

It was contended before me on behalf of the claimants that both of the defendant companies were liable rateably, and, in my opinion, that is the right view to take. In looking at the two material clauses of the Motor Union Co.'s policy, one must, in my opinion, read them together as relating to, explaining and qualifying one another. Condition 5 of the General Accident Corpn.'s policy, though not precisely in the same terms, is substantially to the same effect as condition 10 of the Motor Union Co.'s policy. It is conceded by counsel for the Motor Union Co. that, in construing condition 6, the words "not being insured under any other policy" must be taken to mean "not being insured against the risk in question under any other policy"; and the real effect of his argument is, not that the Motor Union Co. is not liable at all, but that the liability is a liability to be shared rateably with the General Accident Corpn. He further contended that, on the proper construction of cl. 2 (2) of the General Accident Corpn.'s policy, it meant the same as condition 6 of the Motor Union Co.'s policy; that it limited the indemnity granted to the claimant Loyst while he was personally driving some other car to cases where he had not an indemnity from anybody else, meaning thereby a full indemnity. It was said on behalf of the General Accident Corpn. that the words "whereby the insured may be indemnified" substantially add nothing, except that they make more forcible the conclusion which ought to be drawn from the rest of cl. 2 (2), namely, that it is a provision that the claimant Loyst will be indemnified only if he is driving an uninsured car. In my judgment, there is nothing in the sub-clause which justifies that conclusion. The words "whereby the insured may be indemnified" do not allude to a possible or contingent or partial indemnity.

- A** The whole clause means, in my judgment, "provided there is no other insurance in respect of such other car under which the assured might secure an indemnity, meaning a full and complete indemnity in the existing circumstances." In other words, if the assured is completely protected elsewhere by insurance, then he is not to be entitled to recover under these policies or either of them. But in cases where these policies provide for a proportionate or partial indemnity, neither gives
- B** a full indemnity or complete protection. Accordingly, on the true construction of these various clauses, the assured is not deprived of the indemnity altogether, which would be the result if condition 6 of the Motor Union Co.'s policy and cl. 2 (2) of the General Accident Corp'n.'s policy stood alone. The provision as to a rateable contribution qualifies and explains the preceding clause negating liability. In my opinion, the proper award in this case is that the claimants
- C** should be paid rateably in respect of this accident by the Motor Union Co. and the General Accident Corp'n. It is agreed that rateably in the circumstances means that each company pays half. I, therefore, direct that each of the defendants shall pay to the claimants the amount awarded by the arbitrator in equal moieties.

Appeal allowed.

- D** Solicitors: T. & N. Blanco White; A. D. Vandamm & Co.; Joynson-Hicks & Co.
[Reported by J. S. SCRIMGEOUR, Esq., Barrister-at-Law.]

E

EVANS v. FLETCHER

F

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Shearman, JJ.).
May 3, 4, 1926]

[Reported 135 L.T. 153; 90 J.P. 157; 42 T.L.R. 507; 24 L.G.R. 424;
28 Cox, C.C. 231]

- G** *Licensing—Licensee found drunk on his licensed premises during non-permitted hours—Premises open to the public at the time—Licensing Act, 1872 (35 & 36 Vict., c. 94), s. 12—Licensing Act, 1902 (2 Edw. 7, c. 28), s. 8.*

The respondent, who was the licensee of a public-house, was found drunk on the licensed premises during non-permitted hours, the front door being wide open at the time, and he was charged with being found drunk on licensed premises under s. 12 of the Licensing Act, 1872, which provides . . . : "Every person found drunk in any highway or other public place, whether a building or not, or on any licensed premises, shall be liable to a penalty. . . ." By s. 8 of the Licensing Act, 1902: "For the purposes of s. 12 of the Licensing Act, 1872 . . . the expression 'public place' shall include any place to which the public have access, whether on payment or otherwise."

H

- I** **Held:** since at the time in question the premises were open and there was nothing to prevent the sale of food and non-intoxicating liquor to the public, the respondent was guilty of the offence charged.

Lewis v. Dodd (3), [1919] 1 K.B. 1, applied.

Notes. The Licensing Act, 1872, s. 12, has been applied to the place where intoxicating liquor is sold under an occasional licence, by the Licensing Act, 1953, s. 148 (5), replacing the Licensing (Consolidation) Act, 1910, s. 64 (8).

As to drunkenness in public places, see 22 HALSBURY'S LAWS (3rd Edn.) 691; and for cases see 30 DIGEST (Repl.) 111 et seq. For the Licensing Act, 1872, s. 12,

and the Licensing Act, 1902, s. 8, see 13 HALSBURY'S STATUTES (2nd Edn.) 158, 193. **A**

Cases referred to:

- (1) *Lester v. Torrens* (1877), 2 Q.B.D. 403; 46 L.J.M.C. 280; 41 J.P. 821; 25 W.R. 691, D.C.; 80 Digest (Repl.) 111, 808.
- (2) *Young v. Gentle*, [1915] 2 K.B. 661; 84 L.J.K.B. 1570; 113 L.T. 322; 79 J.P. 347; 31 T.L.R. 409; 25 Cox, C.C. 23, D.C.; 80 Digest (Repl.) 112, 816. **B**
- (3) *Lewis v. Dodd*, [1919] 1 K.B. 1; 88 L.J.K.B. 117; 119 L.T. 740; 83 J.P. 25; 35 T.L.R. 9; 17 L.G.R. 299; 26 Cox, C.C. 331, D.C.; 30 Digest (Repl.) 111, 810.
- (4) *R. v. Pelly*, [1897] 2 Q.B. 33; 66 L.J.Q.B. 519; 76 L.T. 467; 61 J.P. 373; 45 W.R. 504; 13 T.L.R. 319; 41 Sol. Jo. 455; 18 Cox, C.C. 556, D.C.; 30 Digest (Repl.) 111, 809. **C**

Case Stated by justices for the county of Brecknock sitting at Cefn Coed.

An information was preferred by the appellant, David Thomas Evans, superintendent of police, under the Licensing Act, 1872, s. 12, against the respondent, John Fletcher, licensee of the Brecon Arms, Penderyn, charging that on Dec. 12, 1925, he, at the parish of Penderyn in the said county, was found drunk on certain premises licensed for the sale of intoxicating liquors by retail, to wit, the Brecon Arms, Penderyn. On the hearing of the information on Jan. 7, 1926, the following facts were proved: At 10.30 p.m. on Saturday, Dec. 12, 1925, Police-Constable William Arthur Jones was standing on the road opposite the Brecon Arms and heard quarrelling and swearing from the house. He entered by the front door, which was wide open, and heard someone say: "What about another drink?" He went into the kitchen and saw the respondent sitting down and very drunk. On the other side of the table a man named Bailey was standing up, leaning on his walking-stick, and very drunk. The respondent said: "Good-bye, Tom, I will not see you again, I will be out of it." In trying to get up to shake hands with Bailey he staggered and leaned on the table to support himself. The constable said to Bailey: "What are you doing here, Bailey, at this time?" Bailey replied: "What's the odds to you? I am in a private room." The constable said: "Both of you are drunk, and I shall report you both." Bailey went out. The respondent did not say a word. There was no sign of beer being consumed on the premises at the time. **D**

It was contended on behalf of the appellant that, inasmuch as under the Licensing Act, 1921, there were no hours during which licensed premises must be closed, but there were only hours during which the sale of intoxicating liquor was permitted, and which, in the Penderyn division, had been fixed from 12 to 4 and from 6 to 10, such premises were, therefore, always open, and that a licensee being found drunk on his licensed premises at any time when the public had access thereto should be convicted. It was contended on behalf of the respondent that after ten o'clock, when the time for permitting the sale of intoxicating liquor ended, this being equivalent to the period defined as closing hours in the Licensing (Consolidation) Act, 1910, the premises were then the private residence of the licensee, and that he could not be convicted of being drunk on those premises. **E**

At the close of the case for the appellant, the solicitor for the respondent submitted that he had no case to answer in law; and the justices found that the respondent was drunk on his premises, but that it was after the hours when the sale of intoxicating liquor was permitted. No evidence was submitted on behalf of the respondent. The justices were of the opinion that, in view of the decisions of the High Court in *Lester v. Torrens* (1), *Young v. Gentle* (2) and *Lewis v. Dodd* (3), they ought not to convict the respondent, and they, therefore, dismissed the summons. **F**

E. H. Tindal Atkinson for the appellant.
The respondent did not appear. **G**

LORD HEWART, C.J.—The question in this case is: What was the nature of **H**

A these premises at the material time? They were premises for which there existed a licence to sell intoxicating liquor during the permitted hours. The permitted hours had elapsed, and, therefore, it was not lawful to sell intoxicating liquor. But there was nothing to prevent the sale of food and non-intoxicating liquor, and, though it may well be that the licensee could have closed the premises if he had chosen, they were in fact open. The door, it is found, was wide open, and we
B ought not to draw the inference that it was accidentally open. The premises were open, not for the sale of intoxicating liquor, but for the sale of food and non-intoxicating liquor, and the public were invited to enter the house

C Counsel for the appellant has directed the attention of the court to the authorities. They are not perfectly easy to reconcile, and, if the question what are licensed premises were still open, much might be said. But the authorities, though decided before the Licensing Act, 1921, seem to me to cover this case. The first case to which I need refer is *Lester v. Torrens* (1), decided in 1877. There an information had been laid against the appellant, a licensee, for being drunk on his own licensed premises; the magistrates convicted the appellant and fined him, and this court quashed the conviction. MELLOR, J., said (2 Q.B.D. at p. 404):

D "It would be a strange construction to hold that during the whole night the premises are licensed premises for the purposes of the twelfth section. In order to put the proper limitation on this part of the section we must look at the context. The words connected with 'licensed premises' are, 'found drunk in any highway or other public place, whether a building or not.' The word 'found' in connection with 'public place' seems to me to point to the true
E meaning. When the premises are open during the hours of business, and so a person may, as one of the public, enter and find the offender drunk, the section applies, and I am inclined to think that it would apply whether the person so found was tenant of the house or not. But I cannot think that when the house is closed, and everybody excluded but the inmates, because a constable happens to be fetched in for some purpose and finds the landlord drunk, that that is
F a finding drunk on licensed premises within the meaning of the section. Publicans would, if this were so, be distinguished in their private capacity from any other class of persons. I think the legislature would have used other words than these, if they had meant to produce such a result. The premises no longer being a public house for the purposes of public resort, I think the section did not apply."

G In like manner LUSH, J. (*ibid.* at p. 405), said:

"I think, looking at the collocation of words, that 'licensed premises,' for the purposes of the section, must mean premises open to the public during licensed hours, or during the time when the premises are a quasi public place."

H Those words seem to be a curious anticipation of the present difficulty. Twenty years later, in 1897, the court had before it *R. v. Pelly* (4). In that case it was held that licensed premises do not cease to be licensed premises by reason of the fact that, after the permitted hours, they are closed to the general public. Then in 1915 *Lester v. Torrens* (1) was considered and applied in *Young v. Gentile* (2). In the last-mentioned case, LORD READING, C.J., said ([1915] 2 K.B. at p. 670):

I "It seems to me that the decision in *Lester v. Torrens* (1) is to be supported upon the ground that persons of the class I have mentioned are on the licensed premises in their capacity of residents in a private house, not that the premises cease to be licensed premises. As the decision in that case binds us, and I can see no justification for distinguishing between the bar and the bedroom, it follows that this conviction is wrong and must be quashed."

Finally, in 1919, came the decision in *Lewis v. Dodd* (3), which seems to me to conclude the present question. As my brother AVORY said in that case ([1919] 1 K.B. at p. 5):

"the question is whether at the time the person is found drunk the premises on which he was found in that condition are, or are not, a private house. This view is confirmed by a reference to the Licensing Act, 1902, which by s. 1 provides that

'if a person is found drunk in any highway or other public place, whether a building or not, or on any licensed premises, and appears to be incapable of taking care of himself, he may be apprehended and dealt with according to law.'"

And again he said (*ibid.*):

"it is clear that the premises at the material time were a public place, a place to which the public had access, for the justices have found that the front door was open and that the hotel was open for the public to come in and purchase anything in the shape of food or drink other than intoxicating drink. It is clear that the respondent could have been apprehended for being found drunk in a public place."

In my opinion, the judgments in that case conclude the present question, and the justices made an error in point of law, and this appeal should be allowed.

AYORY, J.—I am of the same opinion. The justices have expressly found that the respondent was drunk on these licensed premises, but that it was after the permitted hours. In my view, they took too narrow a view; on the other hand, the contention of the appellant, "that, inasmuch as under the Licensing Act, 1921, there are no hours during which licensed premises must be closed, but there are only hours during which the sale of intoxicating liquor is permitted, and which in the Penderyn division have been fixed from 12 to 4 and from 6 to 10, such premises are, therefore, always open, and that a licensee being found drunk upon his licensed premises at any time when the public have access thereto should be convicted," is much too wide. My opinion, as a result of the cases, is the following: If licensed premises are open for business of any kind, whether for the sale of alcoholic liquor or otherwise, or if, in fact, they are open so that the public have access to them, and the licensee is found drunk on them, then the privilege which is said to attach to a person getting drunk in his own house cannot be claimed by the licensee. The view expressed in *Lester v. Torrens* (1) was an attempt to reconcile the law with the repeal of the statute of James I, to which I had occasion to refer in *Young v. Gentle* (2). This case is decided by the words of **SALTER, J.**, in *Lewis v. Dodd* (3) ([1919] 1 K.B. at p. 6):

"At the time in question this hotel was, in fact, open to the public, although not for the sale of intoxicating drink. I think the case, therefore, comes within the section."

SHEARMAN, J.—I agree. This case is covered by *Lewis v. Dodd* (3), which is now the leading authority. It is clear that the premises were open, though not for the sale of liquor, and the landlord cannot claim to have been in his own house.

Appeal allowed.

Solicitors: *Field, Roscoe & Co.*, for *Albert Jolly*, Brecon.

[Reported by **J. F. WALKER, Esq.**, Barrister-at-Law.]

A

POLAND v. JOHN PARR AND SONS

[COURT OF APPEAL (Bankes, Scrutton and Atkins, L.JJ), June 11, 1926]

[Reported [1927] 1 K.B. 2; 96 L.J.K.B. 152; 136 L.T. 271]

B *Master and Servant—Liability of master for act of servant—Act done by servant in emergency in honest belief that master's property in danger—Implied authority—Servant's duty with respect to master's property.*

H., a carter in the defendants' employment, having finished his morning's work, was walking home behind a wagon loaded with bags of sugar driven by a partner in the defendant firm. The plaintiff, a boy twelve years old, was walking beside the wagon with his hand on a bag of sugar. H., honestly and reasonably thinking that the plaintiff was pilfering, or about to pilfer, sugar from the bag, hit him on the back of the neck. The plaintiff fell and one of the wheels of the wagon passed over and injured his foot. In an action by the plaintiff for damages for personal injuries,

C **Held:** H. had implied authority to act in his masters' interest and make reasonable efforts to protect their property; although the force he used may have been excessive, it was not so excessive as to take his act outside the scope of the authority; and, therefore, the defendants were liable.

Notes. Considered: *Warren v. Henlys, Ltd.*, [1948] 2 All E.R. 985.

As to the liability of a master for the acts of his servant, see 25 HALSBURY'S LAWS (3rd Edn.) 535 et seq.; and for cases see 34 DIGEST 123 et seq.

E Cases referred to:

(1) *Rees v. Thomas*, [1899] 1 Q.B. 1015; 68 L.J.Q.B. 539; 80 L.T. 578; 47 W.R. 504; 15 T.L.R. 301; 43 Sol. Jo. 397; 1 W.C.C. 9, C.A.; 34 Digest 293, 2440.

F (2) *Culpeck v. Orient Steam Navigation Co., Ltd.* (1922), 15 B.W.C.C. 187, C.A.; 34 Digest 293, 2445.

(3) *Dyer v. Munday*, [1895] 1 Q.B. 742; 64 L.J.Q.B. 448; 72 L.T. 448; 59 J.P. 276; 43 W.R. 440; 11 T.L.R. 282; 14 R. 306, C.A.; 34 Digest 130, 996.

(4) *Houghton v. Pilkington*, [1912] 3 K.B. 308; 82 L.J.K.B. 79; 107 L.T. 235; 28 T.L.R. 492; 56 Sol. Jo. 633, D.C.; 34 Digest 143, 1130.

(5) *M'Namara v. Brown*, [1918] 2 I.R. 215; 34 Digest 128, 981 *xiv*.

G (6) *Poulton v. London and South Western Rail. Co.* (1867), L.R. 2 Q.B. 534; 8 B. & S. 616; 36 L.J.Q.B. 294; 17 L.T. 11; 31 J.P. 677; 16 W.R. 309; 13 Digest (Repl.) 317, 1260.

(7) *Bank of New South Wales v. Owston* (1879), 4 App. Cas. 270; 48 L.J.P.C. 25; 40 L.T. 500; 43 J.P. 476; 14 Cox, C.C. 267, P.C.; 1 Digest 330, 464.

H (8) *Bayley v. Manchester, Sheffield and Lincolnshire Rail. Co.* (1873), L.R. 8 C.P. 148; 42 L.J.C.P. 78; 28 L.T. 366, Ex. Ch.; 8 Digest (Repl.) 124, 801.

(9) *Seymour v. Greenwood* (1861), 7 H. & N. 355; 158 E.R. 511; sub nom. *Greenwood v. Seymour*, 30 L.J.Ex. 327; 4 L.T. 835; 25 J.P. 693; 8 Jur.N.S. 214; 9 W.R. 785, Ex. Ch.; 8 Digest (Repl.) 124, 800.

Appeal from a judgment of the Court of Passage of the City of Liverpool, in an action tried by the judge (SIR W. F. K. TAYLOR) without a jury.

I The plaintiff, a boy aged twelve years, suing by his father as next friend, claimed damages for personal injuries caused by the alleged negligence of a carter employed by the defendants. The defendants were a firm of cartage contractors carrying on business in the city of Liverpool. On the day of the accident, June 30, 1925, the defendant, Henry Parr, was taking a wagon laden with five tons of sugar in fifty bags (each bag containing two hundredweight) from a warehouse in Love Lane, along the streets of Liverpool to Everton. He started from the warehouse with two horses, but he had arranged for Arthur Hall, a carter in the defendants' employment, to bring a third horse to meet him at a certain point on his way, to

help to draw the load up a steep hill called Sleepers Hill. Mr. Hall duly met him, and the third horse was attached to the wagon with the other two horses and the wagon-load of sugar proceeded on its way, drawn by the three horses, and was thenceforth in the sole control of the defendant Henry Parr. The defendant Henry Parr was leading the middle horse by the head, and he was driving the leading horse by means of a driving rein. Mr. Hall, having handed over the third horse to the defendant Henry Parr, proceeded to go home to his dinner, but continued to walk along the same road close behind his masters' wagon. He continued to do so for some time. Shortly after twelve noon, the wagon-load, with Mr. Hall, still walking along close behind it, was proceeding along Walton Lane at a walking pace, with the near wheels close to the edging stones of a tramway, which formed a kind of kerb running along the lane and which was slightly raised above its level. There was no footpath at the near side of the wagon. At that time the plaintiff and two other boys had just come out of school near by, and were walking home along Walton Lane in the same direction as and alongside the defendants' wagon. Mr. Hall noticed the plaintiff walking along the tramway on the near side of the wagon with his hand on one of the bags of sugar. He thought that the plaintiff was pilfering, or was about to pilfer, sugar, and he had reasonable ground for so thinking, as boys often took the opportunity of pilfering when wagons laden with sugar passed along the streets of Liverpool. The learned judge found as a fact that the plaintiff was not pilfering, and had no intention of pilfering the sugar; but Mr. Hall, honestly believing that the plaintiff was tampering with the sugar, and with the sole object of protecting his masters' goods, came up behind the plaintiff and struck him with his open hand on the back of his neck. The plaintiff then fell forward, and the back wheel on the near side of the wagon went over his right foot, and subsequently the plaintiff's leg had to be amputated in consequence.

In giving judgment, the learned judge said that Mr. Hall was in the defendants' employment as a carter, and that the plaintiff's claim failed because Hall's employment, being that of a carter, he was not, at the time of the occurrence, acting in the course of that which he was employed to do, nor was he doing any act which could be said to be incidental to that employment. The blot, the failure in this case, was that Mr. Hall was not then in fact acting in the course of his employment, nor was he doing an act incidental to it. It was not enough that he did the act in the interests of his masters. The real foundation of liability was absent, and, therefore, he gave judgment for the defendants. On being asked to assess the damages in the event of an appeal against the judgment being successful, he assessed them at £500. The plaintiff appealed.

F. Boyd Merriman, K.C., and Goldie, for the plaintiff, referred to *Rees v. Thomas* (1), *Culpeck v. Orient Steam Navigation Co., Ltd.* (2), and *Dyer v. Munday* (3).

T. Eastham, K.C., and Sellers, for the defendants, referred to *Houghton v. Pilkington* (4), *M'Namara v. Brown* (5), and *Poulton v. London and South Western Rail. Co.* (6).

BANKES, L.J., stated the facts, and continued: This is one of those cases where the rule of the law is easily expressed, but the difficulty is with regard to its application in certain cases. The rule of law is concisely stated in *SALMOND ON TORTS* (6th Edn.), 1924, p. 100:

"A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is to be deemed to be so done if it is either (a) a wrongful act authorised by the master, or (b) a wrongful and unauthorised mode of doing some act authorised by the master."

The defendants contend that what Mr. Hall did he did without their authority, either directly expressed or indirectly to be inferred from the circumstances of the case. I cannot agree with that contention. As a general rule, a servant has an implied authority in an emergency to endeavour to protect his master's property if

A he sees it in danger or has reasonable grounds for thinking that he sees it in danger; and an implied authority is as good as an express authority. In *Bank of New South Wales v. Owston* (7), SIR MONTAGUE SMITH based the opinion of the Privy Council on the ground that, from the facts proved, the jury might infer the necessary authority in the servant to do the act complained of. He said (4 App. Cas. at p. 290):

B "An authority to be exercised only in cases of emergency, and derived from the exigency of the occasion, is evidently a limited one, and before it can arise a state of facts must exist which shows that such exigency is present, or from which it might reasonably be supposed to be present. If a general authority is proved, it is enough to show, commonly, that the agent was acting in what he did on behalf of his principal. But in the case of such a limited authority as

C that referred to, the question whether the emergency existed, or might reasonably have been supposed to exist, arises for decision; and that question raises issues beyond the mere facts that the agent acted on behalf of and in the supposed interest of the principal; were it otherwise the special authority would be equivalent to a general one."

D It is, therefore, a question of fact whether the circumstances exist on which an emergency arises. There can be no doubt that the facts of this case amply warranted the finding of the learned judge, that Mr. Hall honestly believed that the plaintiff was tampering with the sugar, and that he struck the plaintiff with the sole object of protecting his masters' interests. Obviously, in these circumstances, an emergency had arisen, and Mr. Hall had implied authority to endeavour to prevent the plaintiff from doing what he honestly and reasonably

E believed he was doing, or about to do, namely, stealing his employers' property.

Counsel for the defendants argued on the authority of *M'Namara v. Brown* (5) that a master cannot impliedly authorise an act which he could not lawfully do himself; but, with all respect to the judges who decided that case, that decision is inconsistent with the decisions of our courts, and particularly to the judgment of

F LORD ESHER, M.R., in *Dyer v. Munday* (3). It was suggested in *Dyer v. Munday* (3) that the act complained of, although if reasonably done it might have been within the scope of the servant's employment, so as to make the master responsible for it, yet being a criminal act, must necessarily be outside the range of acts for which a master is responsible. LORD ESHER said ([1895] 1 Q.B. at p. 746):

G "Then it is suggested that if the excess complained of amounts to the commission of a criminal offence, that would take the case out of the rule which makes the master liable for the acts of his servant. But if we look at *Bayley v. Manchester, Sheffield, and Lincolnshire Rail. Co.* (8) and *Seymour v. Greenwood* (9), it appears that the acts complained of in both those cases were criminal acts. In neither case was the ground taken that because part

H of the excess was criminal the master was exempt from liability, and in view of that fact the opposition put before us will not hold good."

That disposes of the argument for the defendants as it was put to us in this case. In deciding whether an act of a servant is one for which his master is responsible the act complained of must be regarded from two points of view. First, was the act complained of merely a wrong method of doing an authorised act, in which case the master is responsible; and secondly, where the authority is not otherwise established but has to be inferred from the circumstances, was the act complained of an act which was done for the servant's own purposes and not an act done in his master's interests? In this case the act of Mr. Hall was an act done in his masters' interests, and, although it was perhaps excessive, yet it did not pass beyond the description of an unauthorised mode of doing an impliedly authorised act. For an act of this description the master is responsible. The judgment of the learned judge was, therefore, wrong. The appeal must be allowed, and judgment

I

must be entered for the plaintiff for the sum of £500 damages assessed by the learned judge. A

SCRUTTON, L.J., stated the facts, and continued: In order to make a master liable for the act of a person alleged to be his servant, the act must be one of a class of acts which the person was authorised or employed to do. If the act complained of is one of that class, the master is liable, although the act is done negligently, or, in some cases, even if it is done with excessive violence. But the excess may be so great as to take the act in question out of the class of acts which the person is employed or authorised to do. Whether it is so or not is a question of degree. It has been argued that a master cannot be liable if the act of his servant is illegal or excessive. In my opinion, *Dyer v. Munday* (3) negatives the proposition that a master cannot be liable if the act of his servant is illegal. In that case, **LORD ESHER, M.R.**, put the question whether the act complained of was or was not for the master's benefit. That may be one test, but where excessive violence is charged, another question must be considered—namely, whether the excess is such as to take the act complained of out of the class of authorised acts. It was also argued that a master could not authorise an act which he could not lawfully do himself. But in many cases masters have been held responsible for acts of their servants which, if done by themselves, would have been illegal. In cases of emergency, any servant is bound to take reasonable steps to protect his master's property. In *Rees v. Thomas* (1), **A. L. SMITH, L.J.**, said ([1899] 1 Q.B. at p. 1017): B

“The deceased was acting in the interest of his master in an emergency which suddenly arose, and in which anyone would, I should think, have tried to do the same thing. I think, therefore, that the accident arose out of his employment.” C

The lord justice lays stress on the act having been done “in the interest of his master.” That shows that an act is not placed beyond the scope of the servant's duty by the mere fact that it is not one of the class of acts which he is specially employed to do, or that the time when the act was done is not an hour at which the servant is ordinarily at work. If a chauffeur passing his master's house saw that it was on fire, it would be his duty, or at any rate he would be authorised, to take reasonable steps to protect it from further damage. D

In this case, **Mr. Hall**, a carter in the employment of the defendants, saw his employers' wagon, with regard to which he had no special duty at the time, apparently being robbed by boys. He honestly and reasonably believed that his employers' property was being, or about to be, stolen. He took action either to prevent the theft or a repetition of it. It may be that his action was mistaken, and it may be that the force which he used was excessive. He might have pushed the plaintiff away, instead of striking him. But that was merely acting in excess of what was necessary in doing an authorised act. The excess was not enough to take the act out of the class of authorised acts, and, therefore, the appeal must be allowed. E

ATKIN, L.J.—I am of the same opinion. I think that the judgment of the learned judge is wrong where he said: F

“The blot, the failure in this case is that he [Hall] was not then in fact acting in the course of his employment . . . nor was he in fact doing an act incidental to it.” G

The learned judge took the view that the servant was not doing an authorised act, because he was not doing an act of the class which was expressly authorised, and, therefore, his act could not be authorised. *Bank of New South Wales v. Owston* (7) shows that such a view is erroneous. The learned judge has not given sufficient weight to the consideration that a servant may be impliedly authorised in an emergency to do an act different in kind from the class of acts which he is expressly authorised or employed to do. Any servant is, as a general rule, authorised H

A to do acts which are for the protection of his master's property. I say "authorised," for although there are acts which the servant is bound to do, and for which, therefore, his master is responsible, it does not follow that the servant must be bound to do an act in order to make his master responsible for it. For example, a servant may be authorised to stop a runaway horse, but it would be hard to say that every servant was bound to do this, or that a servant commits a breach of his duty if he refrains from doing so, or if he refrains from extinguishing a fire. Some men may have the necessary courage to encounter such dangers, others may shrink from facing them. It cannot be said that all are bound to face such dangers. Thus there is a class of acts which, in an emergency, a servant, though not bound, is authorised to do. And then the question is not whether the act of the servant was for the master's benefit, but whether it is an act of this class. I agree that, where

B the servant does more than the emergency requires, the excess may be so great as to take the act out of the class. For example, if Mr. Hall had fired a shot at the boy, the act might have been in the interests of his masters, but that is not the test. The question is whether the act is one of the class of acts which the servant is authorised to do in an emergency.

C In the present case, Mr. Hall was doing an act of this class—namely, protecting

D his masters' property, which was or which he reasonably and honestly thought was being pillaged. His mode of doing the act is not, in my opinion, such as to take the act out of the class. He was, therefore, doing an authorised act for which the defendants are responsible. The appeal must be allowed and judgment must be entered for the plaintiff.

Appeal allowed.

E Solicitors: *Helder, Roberts & Co.*, for *J. A. Behn*, Liverpool; *Hyman Isaacs*, *Lewis & Co.*, for *H. J. Davis*, Liverpool.

[*Reported by T. W. MORGAN, Esq., Barrister-at-Law.*]

F

G ATTORNEY-GENERAL v. HORNSEY BOROUGH COUNCIL

[CHANCERY DIVISION (Romer, J.), November 4, 5, 22, 1926]

[*Reported* [1927] 1 Ch. 331; 96 L.J.Ch. 164; 136 L.T. 502; 91 J.P. 61; 43 T.L.R. 92; 70 Sol. Jo. 1197; 25 L.G.R. 260]

H *Street—Bridge carrying highway over river—Liability to repair—Public Health Act, 1875 (38 & 39 Vict., c. 55), s. 4, s. 149, s. 152.*

By the Public Health Act, 1875, s. 4, it is provided that, if not inconsistent with the context, "'street' includes . . . any public bridge (not being a county bridge). . . ." In 1882, in the course of developing a housing estate, seven iron girder bridges were built over a river, each carrying a street. By reason of the streets eventually having been sewered, levelled, paved, flagged, channelled, made good, and provided with proper means of lighting, they were declared by the urban authority of the district to be highways under the provisions of s. 152 of the Act of 1875 and became repairable by the inhabitants at large. Section 149 of the Act of 1875 thereupon became applicable and the urban authority became liable to cause the streets to be repaired from time to time as occasion might require. The bridges fell into disrepair and the Attorney-General, in a relator action, sought a declaration that the urban authority were liable to repair them and keep them in repair.

Held: there being nothing in the context inconsistent with the inclusion of

the bridges in the streets, effect was to be given to the natural meaning of s. 4, and, accordingly, the declaration asked for would be made.

Great Eastern Rail. Co. v. Hackney Board of Works (1) (1883), 8 App. Cas. 687, distinguished.

Notes. The Public Health Act, 1875, s. 4, was repealed by the Public Health Act, 1936, s. 346 and Sched. 3, Part I, except in so far as it is material to the construction of the unrepealed provisions of the Act of 1875, or of any Act directed to be construed with it.

As to the meaning of "street," see 19 HALSBURY'S LAWS (3rd Edn.) 399-401; and for cases see 26 DIGEST 268 et seq. For the Public Health Act, 1875, s. 4, s. 149, s. 152, see 19 HALSBURY'S STATUTES (2nd Edn.) 60, 69, 72.

Cases referred to:

- (1) *Great Eastern Rail. Co. v. Hackney Board of Works* (1883), 8 App. Cas. 687; 52 L.J.M.C. 105; 49 L.T. 509; 48 J.P. 52; 31 W.R. 769, H.L.; 26 Digest 494, 2032.
- (2) *R. v. Whitney (Inhabitants)* (1835), 3 Ad. & El. 69; 1 Har. & W. 147; 4 Nev. & M.K.B. 594; 3 Nev. & M.M.C. 417; 4 L.J.M.C. 86; 111 E.R. 339; 26 Digest 379, 1053.
- (3) *R. v. Southampton County (Inhabitants), Black Bridge, Sandown Bridge, and Tinker's Bridge Cases* (1852), 18 Q.B. 841; 21 L.J.M.C. 201; 19 L.T.O.S. 245; 16 J.P. 438; 17 Jur. 254; 118 E.R. 318; 26 Digest 589, 2787.
- (4) *R. v. Chart and Longbridge (Inhabitants)* (1870), L.R. 1 C.C.R. 237; 39 L.J.M.C. 107; 22 L.T. 416; 34 J.P. 454; 18 W.R. 761; 11 Cox, C.C. 502, C.C.R.; 26 Digest 571, 2631.
- (5) *R. v. Lordesmere (Inhabitants)* (1886), 54 L.T. 766; 51 J.P. 86; 2 T.L.R. 623; 16 Cox, C.C. 65, C.C.R.; 26 Digest 364, 892.
- (6) *Eyre v. New Forest Highway Board* (1892), 56 J.P. 517; on appeal, 8 T.L.R. 648, C.A.; 26 Digest 260, 5.
- (7) *Tunbridge Wells Corp'n. v. Baird*, [1896] A.C. 434; 65 L.J.Q.B. 451; 74 L.T. 385; 60 J.P. 788; 12 T.L.R. 372, H.L.; 26 Digest 330, 618.

Witness Action.

The following statement of facts is taken from the judgment of ROMER, J.: In 1882, the relators were the owners of the Harringay Park Estate, which they proposed to develop by making roads and erecting houses thereon. The estate was intersected by the New River. The relators, accordingly, entered into an arrangement with the New River Co. for the construction by that company of seven iron girder bridges over the river, and for the grant to the relators and those claiming under them of rights of way for all purposes over and across the river by means of the seven bridges so to be constructed. In due course the seven bridges were erected by the New River Co., and the relators carried one of their new roads over each bridge. In this way, there were constituted within the defendants' district seven streets not being highways repairable by the inhabitants at large within the meaning of s. 152 of the Public Health Act, 1875. But these streets, having been sewered, levelled, paved, flagged, channelled, and made good, and provided with proper means of lighting, to the satisfaction of the defendants as such urban authority, were from time to time duly declared by the defendants to be highways under the provisions of that section, and thereupon became highways repairable by the inhabitants at large. From that time the provisions of s. 149 of the Act of 1875 became applicable, and, by virtue of that section, the streets and the pavements, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof, vested in and came under the control of the defendants, and the defendants became liable to cause such streets to be repaired from time to time as occasion might require. By s. 4 of the Act, the word "street," if not inconsistent with the context, included any public bridge not being a county bridge. In these circumstances, and all seven bridges being in a

A state of disrepair, the plaintiff asserted that the defendants were liable to repair them. The defendants, however, repudiated any such liability.

Maugham, K.C., and *C. P. Sanger* for the plaintiff.

Macmorran, K.C., and *Ronald Walker* for the defendants.

The following cases were referred to: *R. v. Whitney (Inhabitants)* (2), *R. v. Southampton County (Inhabitants)* (3), *R. v. Chart and Longbridge (Inhabitants)* (4), *R. v. Lordesmere (Inhabitants)* (5), *Great Eastern Rail. Co. v. Hackney Board of Works* (1), *Eyre v. New Forest Highway Board* (6), *Tunbridge Wells Corp'n. v. Baird* (7).

Cur. adv. vult.

C November 22. **ROMER, J.**, read the following judgment.—In this case His Majesty's Attorney-General, on the relation of the British Land Co., Ltd., asks for a declaration that the defendants, as the urban authority of Hornsey, are liable to repair and keep in repair seven bridges within the defendants' district. [His Lordship stated the facts, and continued:] The bridges in question are admittedly public bridges not being county bridges. The defendants are admittedly liable to repair the seven streets; and the Act says that the streets include the bridges, there being no context that I can see inconsistent with their inclusion. At first sight, therefore, the plaintiff's claim would appear to be justified by the language of the statute. It would also at first sight appear to be justified by common sense. For if the bridges, owing to want of repair, became incapable of supporting the road surface above them, that surface will collapse, and will cease to exist as a highway, and the defendants, having no right to compel any other body or person to repair the bridges will, unless they repair the bridges themselves, be unable to perform the duty which they concede is imposed on them of keeping that surface in repair. The defendants, however, contend that the matter is by no means so simple as all this, and that, in face of various authorities on which they rely, I am constrained to come to a different conclusion. And, even apart from authority, they say that the Act cannot bear the construction that the plaintiff seeks to put on it, inasmuch as the legislature cannot have intended to place on urban authorities so heavy a liability as that construction involves. But the authority was not, at any rate before 1925 it was not, under any compulsion to declare a street crossing a bridge to be a highway under s. 152 of the Public Health Act, 1875, and if they did not wish to become liable to repair the bridge, they could refrain from exercising the powers of that section.

G Having regard to s. 82 of the Public Health Act, 1925, the authority may now, no doubt, in certain circumstances be compelled to declare a street a highway repairable by the inhabitants at large. But that is only when the street is sewered, levelled, paved, flagged, metalled, channelled and made good to the satisfaction of the authorities. If, therefore, "street" includes the bridge, the authority need not make the declaration and incur the liability to repair until, amongst other things, the bridge is made good to their satisfaction. I can see no reason for coming to the conclusion that, in 1875, the legislature could not have intended urban authorities to incur the liability of repairing a bridge.

I I must now turn to the authorities on which the defendants rely. They say, in the first place, that in numerous cases the courts have considered and explained the true effect and extent of the vesting provision of s. 149 of the Public Health Act, 1875, and that the idea that the fabric of a bridge can become vested in an urban authority under the section is altogether inconsistent with the decisions in those cases. Counsel for the defendants, however, did not refer me to more than one of these authorities. He very properly contented himself with citing a passage from the speech of LORD HERSHELL in *Tunbridge Wells Corp'n. v. Baird* (7) as summing-up the law on the subject. LORD HERSHELL there said ([1896] A.C. at p. 442):

"It seems to me that the vesting of the street vests in the urban authority

such property and such property only as is necessary for the control, protection and maintenance of the street as a highway for public use.” A

LORD HALSBURY expressed himself in much the same way (*ibid.* at p. 437):

“It is intelligible enough that Parliament should have vested the street qua street, and, indeed, so much of the actual soil of the street as might be necessary for the purpose of preserving and maintaining and using it as a street.” B

Applying this criterion, it would seem that where a roadway runs across a bridge spanning a river and the urban authority, as here, have no means of compelling any other party to keep the bridge in repair, the bridge must vest in the authority to such an extent as is necessary to enable them to keep the bridge in repair, and so maintain the street as a highway for public use. In this connection, reference may usefully be made to *R. v. Lordesmere (Inhabitants)* (5). In that case, the defendants had been indicted for the non-repair of a wall alleged to form part of a highway. The wall was, in fact, a retaining wall supporting the highway, which at that point ran along the side of a steep hill, and which would have slipped away without the retaining wall or some such support. It was contended for the defendants that, even if they were liable to repair the highway, they were not liable to repair the wall. The jury at quarter sessions were directed to consider: C
(i) Whether the wall formed part of the highway; (ii) whether the wall was out of repair; and (iii) whether such wall was repairable by the defendants. The jury found the defendants guilty, and, on a Case Stated for the consideration of the Court of Crown Cases Reserved, it was held that the question of whether the wall was part of the highway was not a question of law but purely a question of fact, which was very properly left to the jury, and that the jury could properly answer the question in the affirmative. As I understand this case, it is an authority for the proposition that where there is, as there is here, a liability to keep in repair a highway, the question of what constitutes the highway for that purpose is a question of fact. If that be so, then, apart altogether from the definition in s. 4 of the Act of 1875, I should arrive at the conclusion that, in the circumstances of the present case, the bridges form part of the highways that the defendants are admittedly liable to keep in repair. This conclusion seems to be in accordance with the statement in 16 HALSBURY'S LAWS (1st Edn.), para. 342, that a bridge in a highway, if it be not a county bridge, is repairable as part of the highway by the persons, if any, liable to repair the highway. But, however that may be, I have in the present case the express provision that the word “street” includes any public bridge not being a county bridge. Now if the contention of the defendants be correct, the reference to bridges in this section is not easy to understand unless the object be to make it clear that a street is a street, even where it passes over a bridge. But if that were the object, it is very difficult to see why an exception should have been made in the case of county bridges, which are bridges that the county is liable to repair. D E F G

Before the passing of Lord Ellenborough's Act—the Bridges Act, 1803—the county were liable to repair every bridge—by which I mean a bridge carrying a highway super flumen seu cursum aquæ—unless such liability attached to some other person or corporation *ratione tenuræ* or otherwise. And this liability extended to the highway for a distance of 300 ft. from each end of the bridge. It was provided, however, by Lord Ellenborough's Act that a bridge thereafter erected could only become a county bridge when erected under the direction and to the satisfaction of the county surveyor. If any bridge were made otherwise than under the direction and to the satisfaction of the surveyor the liability to repair it would seem to have been in the persons liable to repair the highway that crossed it. For, even before Lord Ellenborough's Act, there were instances of structures that carried highways over a stream which were held not to be county bridges, and these structures appear to have been treated as part of the highway and repairable as such. In *R. v. Whitney (Inhabitants)* (2), LORD DENMAN, C.J., said (3 Ad. & El. at p. 71) that the mere fact of an arch passing over a stream did not necessarily H I

A make it a bridge. In that case, the parishioners of Whitney were indicted for non-repair of a public horse-and-carriage way 374 yards in length. The defendants contended that deduction must at all events be made in respect of a bridge and 300 ft. at each end of it which lay within the termini specified in the indictment. The so-called bridge was a stone arch 9 ft. wide, and without parapets, carrying the highway across a mill stream. At the trial PARK, J., expressed the view that
B it was a culvert, and merely left the jury the question whether or not the road was out of repair. The Crown obtained a verdict, and a motion for a new trial was refused by the Court of King's Bench. It was suggested that PARK, J., had laid it down that the structure was not a bridge in that it wanted parapets. As to this LITTLEDALE, J., said (*ibid.*):

C "The learned judge did not lay down any proposition of law as to the want of parapets . . . ; what he said was merely that . . . there was fair ground for saying that the place in question was part of the highway."

In *R. v. Southampton County (Inhabitants)* (3), it was held that a bridge carrying a public footpath over a stream and consisting of three planks 9 ft. long and a handrail was not such a bridge as the county was bound to repair. In the course
D of the argument, and when it was stated that the bridge had been repaired by certain commissioners, LORD CAMPBELL, C.J., said (18 Q.B. at p. 853):

"The fact of its having been repaired by the commissioners would rather raise a presumption that it is part of the highway."

I have referred to these two authorities in some detail, because it seems to me that
E they are authorities for the statement in 16 HALSBURY'S LAWS (1st Edn.), para. 342, to which I have already referred. No one can doubt that in both cases the structure was a bridge, though not a county bridge, and in both cases it was regarded as being a part of the highway, and repairable as such.

Reverting once more to the question of county bridges, it is to be noted that, by virtue of s. 21 of the Highway Act, 1835, as construed by the courts, in the case of
F all county bridges built after the passing of the Act, the liability to repair the highways leading to, passing over, and next adjoining the bridge does not rest on the county, but is thrown on those who would have been liable to repair the highways assuming that they did not cross the bridge. If, then, the object of s. 4 of the Public Health Act, 1875, was to make it clear that a street for the purposes of the Act was none the less a street because it passes over a bridge, one seems driven to
G the conclusion that a street passing over a county bridge is not a street for the purposes of the Act. In the case, therefore, of county bridges erected after 1835, the position would be extraordinary. For the urban authority would be under no obligation and would have no power to keep in repair the highway crossing over it. If, however, the true view of the definition clause be that the structure of a bridge is to be deemed a part of the street, the exclusion of county bridges is intelligible
H enough. For the county is responsible for the repair of the structure of those bridges, and there was no reason, therefore, for vesting the structure in the urban authority, or imposing on them the liability to repair such structure.

It remains, however, to consider *Great Eastern Rail. Co. v. Hackney Board of Works* (1) inasmuch as counsel for the defendants contends that I am precluded by that authority from coming to the conclusion that the defendants are liable to
I repair the seven bridges. In that case the railway line ran in a deep cutting much below the level of the highway, which was carried over the railway by a bridge built by the railway company under statutory powers and in pursuance of s. 46 to s. 51 of the Railways Clauses Consolidation Act, 1845. The District Board of Works, having paved the highway, which was admitted to be a new street within s. 105 of the Metropolis Management Act, 1855, maintained that the railway company were liable to contribute to the expenses of that operation, as being owners of land bounding or abutting on both sides of the roadway of the bridge. One of the points taken by the railway company in opposition to such claim was that the

fabric of the bridge was vested in the Board of Works by virtue of s. 96 of the Metropolis Management Act, 1855. That section provides that all streets being highways shall vest in and be under the management and control of the vestry or district board, the word "street" being declared by the interpretation section of the Act to apply to and include any bridge not being a county bridge. Lord Watson, in repelling this argument on the part of the railway company, said this (8 App. Cas. at p. 691):

"It was assumed, no doubt rightly, by the counsel on both sides of the Bar, that the rights and liabilities of the appellants, with reference to this bridge, were regulated by the Railways Clauses Act, 1845."

He then proceeded to examine the relevant sections of that Act, pointing out, among other things, that the Act appeared to distinguish the road itself from the bridge carrying it over the line, and continued as follows (*ibid.*):

"The real import of these enactments is, that the substitute road shall be supported by means of a bridge provided by the railway company, the land upon which the old highway rested having been taken and used for railway purposes. In my opinion the right of the public, or of the highway authority, is not thereby enlarged. Their right is, in the first place, in and to the road, and may extend to the materials of which it is composed; and in the second place, to have subjacent support to the road from a properly constructed bridge. They are also entitled, in terms of the statute, to have the road maintained, and to have the bridge kept properly fenced by the railway company; but these provisions do not appear to me to imply that they are to have any greater interest in the bridge and its fences, as distinguished from the road proper, than they had in the strata upon which the original road rested. These remained the property of the landowner, although burdened with a public right of way in perpetuity. The Metropolis Management Acts do not, in my opinion, confer upon district boards any larger right in the streets and highways placed under their charge than had previously belonged to the public. The statutory functions of the district board are limited exclusively to the surface of the road or street proper. In the case of new streets, what s. 105 of the Act of 1855 authorises the board to do is to 'pave the same, either throughout the whole breadth of the carriage-way and footpaths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair.' Keeping in view, then, that the sole object of vesting streets, and the materials of which they are composed, in district boards is to enable them effectually to perform their statutory duties in relation to the streets, I cannot suppose that the legislature, in enacting that the word 'street' shall 'apply to and include' any bridge, intended to vest in the board anything more than the street which is carried or supported by the bridge."

I cannot read these last words of Lord Watson as intended to be of general application to all bridges. Had that been his intention, I cannot think that he would have examined in such detail, as he did, the provisions of the Railways Clauses Consolidation Act, 1845. As I understand his judgment, his view was this: that it could not have been the intention of the legislature, in passing the Metropolis Management Act, to interfere by its general provisions with the special provisions as to bridges contained in the Railways Clauses Consolidation Act, 1845, and that, by virtue of the Metropolis Management Act, district boards obtained no larger right in streets and highways placed under their charge than had previously belonged to the public. I do not read his judgment as affirming the proposition that, even though a district board is unable effectually to perform its statutory duties in relation to a street without having vested in it a bridge carrying that street, the structure of the bridge nevertheless does not vest in them; or the proposition that, even though the public had previously been under a liability to repair the structure of a bridge, such a liability did not pass to the district boards.

A Such propositions, indeed, seem to be inconsistent with the language that he used.
 If I put on the section of the Public Health Act to which I have referred the construction contended for by counsel for the defendants, the defendants will not be able to discharge properly their duties in respect of the highways that cross over the bridges, and their liability for repair in respect of such highways would, as it seems to me, differ in a material respect from the liability of the public that existed before the passing of the Act in respect of highways carried over bridges that are not county bridges. In these circumstances, there is, in my opinion, no reason why I should not give effect to what appears to me to be the natural meaning of the words of the statute. I must, accordingly, make the declaration that is asked for.

C Solicitors: *Russell, Son & Bass; Sharpe, Pritchard & Co.*, for *E. B. Croasdell*, Town Clerk, Hornsey.

[Reported by J. S. SCRIMGEOUR, Esq., Barrister-at-Law.]

D

R. v. DUNKLEY

E [COURT OF CRIMINAL APPEAL (Lord Hewart, C.J., Greer and Acton, JJ.), February 8, 9, 1926]

[Reported [1927] 1 K.B. 323; 96 L.J.K.B. 15; 134 L.T. 632; 90 J.P. 75; 28 Cox, C.C. 143; 19 Cr. App. Rep. 78]

F *Criminal Law—Evidence—Character of accused—Cross examination as to previous offences—Imputation on character of witness for prosecution—Suggestion that witness lying through malice against accused—Liability of accused to be cross-examined as to previous convictions—Criminal Evidence Act, 1898 (61 & 62 Vict., c. 36), s. 1 (f) (ii).*

G The appellant was charged with, inter alia, stealing and receiving certain property. A witness for the prosecution gave evidence that the appellant had attempted to dispose of some of the stolen property at her premises, and that, at a later date, he had sent for her and asked her to say he was not the man who had called at her premises on that occasion. In cross-examination it was suggested to her that her story was a pure invention, fabricated because she thought she had a grievance against the appellant. The appellant in evidence said that the witness's story was untrue and was due to malice. The appellant was allowed to be cross-examined as to character, and was convicted of receiving. On appeal,

H **Held:** the statement made by the appellant and the suggestions made on his behalf in cross-examination of the witness that her evidence was not merely a pure invention, but was due to malice towards him, were imputations on the character of a witness for the prosecution within s. 1 (f) (ii) of the Criminal Evidence Act, 1898, so as to render the appellant liable to cross-examination as to his previous convictions.

I Per **Curiam:** Even where such a line of cross-examination is admissible in law, counsel for the prosecution should refrain from adopting it unless the circumstances are such as to make it appear to be a positive duty on his part so to cross-examine.

Notes. Referred to: *Stirland v. D.P.P.*, [1944] 2 All E.R. 13.

As to credibility of witnesses in criminal cases, see 10 HALSBURY'S LAWS (3rd Edn.) 448 et seq.; and for cases see 14 DIGEST (Repl.) 408 et seq. For the Criminal Evidence Act, 1898, s. 1, see 9 HALSBURY'S STATUTES (2nd Edn.) 613.

Cases referred to:

- (1) *R. v. Rouse*, [1904] 1 K.B. 184; 73 L.J.K.B. 60; 89 L.T. 677; 68 J.P. 14; 52 W.R. 236; 20 T.L.R. 68; 48 Sol. Jo. 85; 20 Cox, C.C. 592, C.C.R.; 14 Digest (Repl.) 515, 4990.
- (2) *R. v. Bridgwater*, [1905] 1 K.B. 131; 74 L.J.K.B. 35; 91 L.T. 838; 69 J.P. 26; 53 W.R. 415; 21 T.L.R. 69; 49 Sol. Jo. 69; 20 Cox, C.C. 737, C.C.R.; 14 Digest (Repl.) 517, 5006.
- (3) *R. v. Preston*, [1909] 1 K.B. 568; 78 L.J.K.B. 335; 100 L.T. 303; 73 J.P. 173; 25 T.L.R. 280; 53 Sol. Jo. 322; 21 Cox, C.C. 773; 2 Cr. App. Rep. 24, C.C.A.; 14 Digest 517, 5007.
- (4) *R. v. Wright* (1910), 5 Cr. App. Rep. 131, C.C.A.; 14 Digest (Repl.) 517, 5008.
- (5) *R. v. Roberts (otherwise Spalding)* (1920), 37 T.L.R. 69; 15 Cr. App. Rep. 65, C.C.A.; 14 Digest (Repl.) 516, 5000.
- (6) *R. v. Jones* (1923), 87 J.P. 147; 39 T.L.R. 457; 67 Sol. Jo. 751; 17 Cr. App. Rep. 117, C.C.A.; 14 Digest (Repl.) 517, 5009.
- (7) *R. v. Rowton* (1865), Le. & Ca. 520; 5 New Rep. 428; 34 L.J.M.C. 57; 11 L.T. 745; 29 J.P. 149; 11 Jur.N.S. 325; 13 W.R. 436; 10 Cox, C.C. 25, C.C.R.; 14 Digest 409, 3995.
- (8) *R. v. Hudson*, [1912] 2 K.B. 464; 81 L.J.K.B. 861; 107 L.T. 31; 76 J.P. 421; 28 T.L.R. 459; 56 Sol. Jo. 574; 23 Cox, C.C. 61; 7 Cr. App. Rep. 256, C.C.A.; 14 Digest (Repl.) 512, 4961.
- (9) *R. v. Marshall* (1899), 63 J.P. 36; 14 Digest (Repl.) 516, 4993.

Appeal against conviction and sentence.

The appellant, David Dunkley, was convicted at the County of London Sessions of receiving stolen goods and was sentenced to fifteen months' imprisonment with hard labour. The facts are set out in the judgment of the court.

R. E. Seaton, for the appellant, referred to *R. v. Rouse* (1), *R. v. Bridgwater* (2), *R. v. Preston* (3), *R. v. Wright* (4), *R. v. Roberts* (5), and *R. v. Jones* (6).

Bannerman, for the Crown, referred to *R. v. Wright* (4) and *R. v. Roberts* (5).

LORD HEWART, C.J., delivered the judgment of the court. The appellant was indicted at the County of London Sessions for breaking and entering a warehouse and stealing and receiving certain property in that warehouse. He was convicted of receiving and was sentenced to fifteen months' imprisonment with hard labour. He now appeals against both the conviction and the sentence. The facts as shown by the evidence were, shortly, that in the early morning of Oct. 20, 1925, a warehouse in Liverpool Road was broken into. The safe was taken from the office into the basement and was broken open, and a valley charger and an accumulator belonging to the occupier of the warehouse, a Mr. Fennimore, were stolen, and also there was stolen a bicycle belonging to a Mr. Polinsky. Ten days later, namely, on Oct. 30, a police-sergeant saw the appellant in Islington with Mr. Polinsky's bicycle. The appellant said that it belonged to him, that he had had it fourteen months, and that he had bought it at the cattle market for £4 10s. He was charged with the unlawful possession of the bicycle, and he said: "I did not steal the bicycle, but a chap I know stole it. I have had it about three weeks. He owed me some money and he gave me the bicycle." On the following day, the appellant was charged at the police court with unlawful possession. He was remanded for a week in custody. On Nov. 7 he was released on bail. Seven days later a charge of warehouse breaking was substituted for that of unlawful possession, and he was kept in custody.

At the trial, evidence was given of the breaking of the warehouse and of the larceny from the warehouse and of the finding of the appellant in possession of the bicycle, and of his contradictory statements about that possession. A Mrs. Smith, who had given evidence at the police court, was called as a witness for the prosecu-

A tion, and said that she was the wife of Albert Smith, and that they carried on the business of general dealers in Holloway. She said that she had known the appellant for ten years, and that he brought Mr. Fennimore's charger and accumulator to their house and asked if her husband would dispose of them for him. She said that she told him that she would ask her husband when he came from hospital. That conversation she said took place in November, though she could not give the exact date. She added that, on Nov. 13, when the appellant was on bail, he sent for her and, to quote her words, "wanted me to say he was not the young fellow who called with the stuff." That invitation she said she declined, saying that she had already made her statement, and, indeed, it was on the following day that she gave her evidence at the police court. Thereupon, Mrs. Smith was cross-examined by the learned counsel who then appeared for the appellant, and it was suggested to Mrs. Smith that her story was a pure invention and, more than that, that it was a pure invention fabricated for a particular reason, the reason being that she had, or thought she had, a grievance against the appellant about her own brother. The suggestion was that her brother, who is serving a sentence of three years' penal servitude for coining and five years' preventive detention to follow, and had been convicted with the appellant had, as she believed, been given away by the appellant, and that, therefore, she had invented this story against the appellant. She denied that she had any grudge against the appellant, and she said: "He suffered his punishment the same as my brother did." Later, the appellant himself went into the witness-box, and he said that Mrs. Smith's evidence was not true, that he had never taken the things to her house, that her story was due to malice because she thought he had given her brother away when he was convicted of house-breaking seven years ago. With regard to the bicycle, the appellant said that Mrs. Smith's husband had given it to him about Oct. 24, because he owed him some money, and he said he did not tell the detective of that fact because he wanted to keep Mr. Smith out of the court. He also denied the statement of Mrs. Smith, that he paid her a visit while he was out on bail.

F In view of those questions which had been put to Mrs. Smith, and those statements which had been made by the appellant about her in his evidence, he was allowed to be cross-examined as to character. Apparently, the ground on which it was said that the cross-examination was permissible was that he had chosen to put his character in issue. Perhaps it would have been more accurate to say that the ground on which the cross-examination was permitted was that the nature, or at any rate the conduct of the defence had been such as to involve imputations on the character of a witness for the prosecution. Being cross-examined, the appellant admitted that he had been bound over in 1915 and 1917 for larceny, that he had suffered eighteen months' imprisonment with hard labour, and then, in January, 1920, had been convicted again, and had been sentenced to three months in 1922 for loitering. He called two witnesses and sought to set up an alibi. In the result, the count for receiving was left to the jury, and the jury convicted the appellant.

H In those circumstances, the appellant comes to this court to say, so far as the conviction is concerned, that the cross-examination of him about his antecedents ought not to have been permitted, inasmuch as nothing had been done to bring his case within the statute which, in certain circumstances, permits such cross-examination. The question is whether that contention is right. It may be convenient to read once more the important words of the Criminal Evidence Act, 1898. By s. 1 of that Act, it is provided that

"Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person";

and there follows a long proviso, para. (f) of which is as follows:

"A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless . . . (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of his defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution."

It is apparent that, within the space of a very few lines, this part of this section uses the word "character" no fewer than four times. It is also apparent that the imputations which are spoken of in the closing words of the passage I have read are described not as imputations on the prosecutor or the witnesses for the prosecution, but imputations on the character of the prosecutor or the witnesses for the prosecution. In those circumstances, it is not difficult to suppose that a formidable argument might have been raised on the phrasing of this statute, that the character which is spoken of is the character which is so well known in the vocabulary of the criminal law, namely, the general reputation of the person referred to; in other words, that "character" in that context and in every part of it, in the last part no less than in the first, in the third part no less than in the second, bears the meaning which the term "character" was held to bear, for example, in *R. v. Rowton* (7), where the question was considered by the Court of Crown Cases Reserved, consisting of COCKBURN, C.J., ERLE, C.J., POLLOCK, B., WILLIAMS, J., MARTIN, B., WILLES, J., CHANNELL, B., BLACKBURN, BYLES, KEATING, MELLOR, J.J., PIGOTT, B., and SHEE, J. Nevertheless, when one looks at the long line of cases beginning very shortly after the passing of the Criminal Evidence Act, 1898, it does not appear that that argument has ever been so much as formulated. It was formulated yesterday. One can only say that it is now much too late in the day even to consider that argument, because that argument could not now prevail without the revision, and indeed to a great extent the overthrow, of a considerable number of decisions. Our attention has been directed to *R. v. Rouse* (1), *R. v. Bridgwater* (2), *R. v. Preston* (3), *R. v. Hudson* (8), *R. v. Wright* (4), *R. v. Roberts* (5), *R. v. Jones* (6), and an early case, which is not a decision of the Court of Criminal Appeal, but a decision of a single judge in the days when there was no Court of Criminal Appeal, and when there might have been but was not a Case Stated for the Court of Crown Cases Reserved: *R. v. Marshall* (9). When one looks at that mass of authority, whatever may be the merits of the more fundamental argument to which reference has been made, it is apparent that here there was a statement made by the appellant and suggestions were made on his behalf in cross-examination to the effect that Mrs. Smith's evidence was not merely a pure invention, but was due to malice towards him arising out of a grievance imputed to Mrs. Smith about a previous and wholly unrelated episode in which the appellant and her brother were concerned. It is also apparent that those imputations went sufficiently far to permit the kind of cross-examination of which the appellant complains. It is not possible to lay down, even if it were desirable, as the authorities stand, a series of formulas or regulations on this matter. At some date, perhaps, on a slightly different case, an opportunity may arise for further and better investigation of a really interesting and important point, and a point, it may be, on which further investigation and a statement of a clear and universal ratio decidendi may be desirable. For the purposes of this appeal, it is enough to say that, according to a considerable line of authority, that which is here complained of was within the limits of the law.

Apart from that legal question, it is abundantly clear that there are no merits in this appeal. The evidence was overwhelming, and, indeed, one cannot help thinking that counsel for the prosecution would be well advised, even where the occasion

A for such cross-examination appears to arise, to refrain from embarking on it unless the circumstances are such as to make it appear to the mind of the learned counsel to be a positive duty that he should enter on that somewhat invidious task.

Appeal dismissed.

Solicitors: *J. Albert Davis; Director of Public Prosecutions.*

B

[Reported by T. R. F. BUTLER, Esq., *Barrister-at-Law.*]

C

R. v. LEICESTER JUSTICES. Ex parte ALLBRIGHTON

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Salter, JJ.), November 11, 15, December 20, 1926]

D

[Reported [1927] 1 K.B. 557; 96 L.J.K.B. 310; 136 L.T. 635;
91 J.P. 31; 43 T.L.R. 183; 25 L.G.R. 149]

Licensing—Justices—Bias—Application for renewal of licence—Objection originated by licensing justices—Reference to compensation authority—Right of objecting justices to sit on compensation authority—Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 19.

E

At a general annual licensing meeting the justices, as the licensing committee, objected to the renewal of the applicant's old on-licence on the ground of redundancy. At the adjourned meeting they referred the question of renewal to the compensation authority under s. 19 of the Licensing (Consolidation) Act, 1910, and they made a report to that authority suggesting that the renewal of the licence should be refused. At the principal meeting of the compensation authority the justices who had sat as the licensing committee attended, with other justices adjudicated on the question of renewal, and refused it subject to the payment of compensation. The applicant obtained a rule nisi for certiorari to quash the order of the compensation authority on the ground that the fact of the justices who sat on the licensing committee having originated the objection to the renewal of the licence disqualified them from sitting as members of the compensation authority.

F

Held: the justices who originated the objection were not, for that reason alone, disqualified from afterwards sitting as members of the compensation authority on the reference to that authority of the question of renewal and from adjudicating thereon, and, therefore, the rule must be discharged.

G

H

R. v. Howard (1), [1902] 2 K.B. 363, applied; *Frome United Breweries Co. v. Bath Justices* (2), post, p. 576, distinguished.

Notes. The Licensing (Consolidation) Act, 1910, was repealed by the Licensing Act, 1953, s. 168 (1) and Sched. X. Section 19 of the 1910 Act has been replaced by s. 15 of the 1953 Act.

I

As to meetings and proceedings of licensing justices, see 22 HALSBURY'S LAWS (3rd Edn.) 529 et seq.; and for cases see 30 DIGEST (Repl.) 12 et seq. For the Licensing Act, 1953, s. 15, see 33 HALSBURY'S STATUTES (2nd Edn.) 163.

Cases referred to:

(1) *R. v. Howard, etc. Farnham Licensing Justices*, [1902] 2 K.B. 363; 71 L.J.K.B. 754; 51 W.R. 21; 18 T.L.R. 690; sub nom. *R. v. Farnham Licensing Justices, Ex parte Smith*, 86 L.T. 839; 66 J.P. 579, C.A.; 30 Digest (Repl.) 50, 377.

(2) *R. v. Bath Compensating Authority*, [1925] 1 K.B. 685; 94 L.J.K.B. 613; 133 L.T. 116; 89 J.P. 82; 41 T.L.R. 346; 69 Sol. Jo. 396; 23 L.G.R. 405,

- C.A.; reversed sub nom. *Frome United Breweries Co. v. Bath Justices*, post, p. 576; [1926] A.C. 586; 95 L.J.K.B. 730; 135 L.T. 482; 90 J.P. 121; 42 T.L.R. 571; 24 L.G.R. 261, H.L.; 30 Digest (Repl.) 54, 408.
- (3) *Boulter v. Kent Justices*, [1897] A.C. 556; 66 L.J.Q.B. 787; 77 L.T. 288; 61 J.P. 532; 46 W.R. 114; 13 T.L.R. 538, H.L.; 30 Digest (Repl.) 75, 579.
- (4) *Leeson v. General Council of Medical Education and Registration* (1889), 43 Ch.D. 366; 59 L.J.Ch. 233; 61 L.T. 849; 38 W.R. 303, C.A.; 34 Digest 544, 30.
- (5) *Allinson v. General Council of Medical Education and Registration*, [1894] 1 Q.B. 750; 63 L.J.Q.B. 534; 70 L.T. 471; 58 J.P. 542; 42 W.R. 289; 10 T.L.R. 304; 9 R. 217, C.A.; 34 Digest 544, 24.

Rule nisi for a writ of certiorari.

The applicant was the licensee of the "Hen and Chickens" inn in the city of Leicester. At the general annual licensing meeting held on Feb. 10, 1926, four of the justices, as the licensing committee for the city, orally objected to the renewal of four old on-licences, including that of the "Hen and Chickens" inn, on the grounds, in the case of each house: (i) that, having regard to the character and necessities of the neighbourhood and the number of licensed houses in the immediate vicinity, the licence which was then held in respect of the said premises was unnecessary; (ii) that in the interests of the public the renewal of the licence was not desirable. These applications were accordingly adjourned, and the applicants were duly notified of the objection. At the adjourned meeting on Mar. 10, 1926, the licensing committee, after hearing evidence on oath, and being of opinion that the question of the renewal of the licences required consideration on the above-mentioned grounds, being grounds other than those on which the renewal of an old on-licence could be refused by them, decided to refer the matter to the compensation authority under s. 19 of the Licensing (Consolidation) Act, 1910, and duly made their report to that authority, suggesting that the renewals of the licences should be refused. At the principal meeting of the compensation authority held on May 19, 1926, fourteen justices, including the four justices who had sat as the licensing committee, attended, and ten of them, including the said four justices, finally adjudicated on the applications referred to them. After having heard evidence on oath, and counsel having addressed them on behalf of the applicant, the compensation authority refused the renewal of the licence of the "Hen and Chickens" inn subject to the payment of compensation. The applicant obtained this rule and it was contended on his behalf that the mere fact of the four justices who sat on the licensing committee having originated the objection to the renewal of the licence disqualified them from sitting as members of the compensation authority, and that the principle that the same person could not act as prosecutor and judge applied. It was not suggested that the justices objected to took any other part in opposing the renewal of the licence, except by sitting and voting as members of the licensing committee and of the compensation authority.

Montgomery, K.C., and *Douglas L. Jenkins* showed cause.

Sir Henry Maddocks, K.C., and *C. E. Loseby* in support of the rule.

Cur. adv. vult.

Dec. 20. The following judgments were read.

LORD HEWART, C.J., stated the facts, and continued: In my opinion, the case is concluded by the decision in *R. v. Howard* (1), where it was treated as settled law that justices were entitled to take objection to the renewal of licences, and afterwards to take part in hearing the applications and deciding on the question of renewal. *COZENS-HARDY, L.J.*, said ([1902] 2 K.B. at pp. 382 and 383):

"The view has been repeatedly expressed and acted upon since 1874 that the justices may themselves start an objection. This conclusion seems to me necessary to enable the magistrates to perform their duty. The House of

A Lords held in *Boulter v. Kent Justices* (3) that there is no lis between an objector and a licence holder, and no right to recover the costs occasioned by an unsuccessful objection. In short, I regard the objection as merely a mode of informing the licence-holder that his case will be considered and that he must be prepared to deal with certain specified points. . . . [The justices] were not adjudicating upon any rights. They were not prosecutors. In truth, B there was no prosecution. They were only determining whether in the public interest a lucrative privilege should or should not be conferred."

C The recent decision of the House of Lords in *Frome United Breweries Co. v. Bath Justices* (2) was based on the fact that three of the justices who sat and voted as members of the compensation authority had been parties to a resolution of the licensing justices authorising a solicitor to appear before the compensation authority and oppose the renewal of a licence on their behalf, and that such solicitor had appeared and opposed the renewal. There is nothing in the decision which is inconsistent with the view that a justice who originates an objection is not, for that reason alone, disqualified from afterwards sitting as a member of the licensing authority which deals with the application for renewal, and, if the question of D renewal is referred for decision to the compensation authority, from sitting as a member of that authority. In doing so, he is merely carrying out his duties in accordance with the scheme prescribed by the legislature. In my opinion, therefore, the rule should be discharged, with costs.

E AVORY, J., stated the facts, and continued: It is not suggested that the licensing justices who had referred the matter to the compensation authority were represented by counsel or solicitor at the hearing, or that they did anything more than sit and vote on the question of the renewal; but the contention on behalf of the applicant is that the fact of the objection to the renewal having been initiated by the justices themselves of itself disqualified them from taking part in the decision of the compensation authority.

F The right of the justices themselves to start an objection, particularly of the nature of the objections in this case, has been recognised ever since the decision in *R. v. Howard* (1), and, as was said in that case, in starting an objection justices do not take sides or assume the position of parties, but are merely taking the steps which the legislature has prescribed for the better discharge of their licensing duties, which are administrative in character, but have to be performed in a quasi-judicial manner. If the applicant were right in his contention, it would follow G that the licensing committee would be disqualified from referring the matter to the compensation authority or from sitting as members of the compensation authority. It is suggested that this contention of the applicant is supported by the recent decision of the House of Lords in *Frome United Breweries Co. v. Bath Justices* (2), but the ground of the decision in that case was that the licensing justices had themselves actively opposed the renewal of the licence before the compensation H authority, and instructed a solicitor to do so on their behalf, and in the opinions delivered by the Lord Chancellor and LORD SUMNER the right of the licensing justices, who have referred the matter, to sit as members of the compensation authority and to take part in the argument and, if necessary, to be represented, is expressly recognised; and, although *R. v. Howard* (1) was cited in the argument, there is no trace of any dissent from that decision, which has been followed in I practice ever since 1902.

If it is conceded that the licensing justices have the right to initiate the objection and to refer the matter to the compensation authority, and if it is further conceded that the same justices have the right to sit and vote on the matter at the meeting of the compensation authority, it appears to be a contradiction in terms to say that they are disqualified because they initiated the objection. It is suggested in the applicant's affidavit that the clerk to the licensing justices gave some promise that, if alterations were made in the premises, the licensing justices would not oppose the renewal at the meeting of the compensation authority. In view of

the affidavit of the clerk to the justices, I do not think any such promise was made, but, if it had been made with the authority of the justices, it would negative any idea of bias on their part against the applicant. I think there is no ground for the contention that, in the circumstances of this case, these justices were disqualified by reason of interest, and the rule should be discharged with costs. A

SALTER, J.—I agree. As this appeal raises a point of much practical importance, I will give my reasons. So far as bias and likelihood of bias are concerned, I can see little difference between those who give notice of intention to oppose the renewal of a particular licence and those who give notice that they object to the renewal of that licence. There may be some difference in degree, but I can see none in kind. Neither an objector nor an opponent is a "party" to any "litigation," but each is a person who has publicly expressed an opinion that the particular licence should not be renewed and a desire that it shall not be renewed. If he is then called on to decide, on evidence, whether that licence shall be renewed or not, it seems to me that he must approach his task with a mind definitely predisposed to non-renewal. B C

In the *Bath Justices Case* (2), the licensing justices had a right as citizens (a right recognised but not conferred by the statute) to appear before the compensation authority, and be heard as supporters or opponents of the renewal of the licence under consideration. They also had a statutory right to sit as members of the compensation authority. But inasmuch as there was likelihood of bias, the House of Lords held that both these rights should not be exercised in the same matter. In the present case also, the licensing justices as a body have a right, like any other body of citizens, to object to the renewal of the licence now in question, and they have a statutory right to sit on the compensation authority. Since there is in this case, as I think, a clear likelihood of bias, it follows that they are not qualified to sit on the compensation authority, if the principle of the *Bath Justices Case* (2) is applicable to this case. I think it is not applicable. In my opinion, this case cannot be distinguished from the *Bath Justices Case* (2) on the ground that the likelihood of bias is stronger in one case than the other. The distinction is that, in that case, Parliament had not sanctioned what was done; in this case it has. This case is governed by the reasoning in *R. v. Howard* (1). That case was relied on and cited at length by BANKES, L.J., in the Court of Appeal in the *Bath Justices Case* (2), and there is nothing in the judgments in the House of Lords to suggest that it was not rightly decided. It is true that there is a difference—I think a great difference—between the objection in *R. v. Howard* (1) and the objection in this. The course taken by the justices in that case was carefully calculated to avoid any suggestion of discrimination or of a view unfavourable to any particular licence. That is very different from selecting a particular licence for objection. That case was partly decided, and, I think, might have been wholly decided, on the ground that there was no evidence whatever of any likelihood of bias. The justices had been careful to avoid it. But it was also decided on the ground applicable here—namely, that some risk of bias is inseparable from the machinery which Parliament has set up. COLLINS, M.R., in *R. v. Howard* (1), after dealing with the practice of the licensing justices to initiate objections to renewals, says ([1902] 2 K.B. at p. 377): D E F G H

"I think, therefore, that the practice is not only inveterate but is founded on a true view of the function of justices in relation to the matter. If that be so, the standard to be applied in considering the question of bias must be one which admits the right of the justices to be at one and the same time objectors and judges, in the sense in which they are judges in such matters, and therefore the standard laid down in such cases as *Leeson v. General Council of Medical Education and Registration* (4) and *Allinson v. General Council of Medical Education and Registration* (5) is not applicable to them. They fall outside their principle for two reasons—first, that they are empowered by law to fill the two capacities; and secondly, that, rightly understood, the two capacities I

- A are not incompatible in the sense in which in those two cases they were assumed to be incompatible, because, as has already been pointed out, in making the objection they do not in any sense become parties to the litigation or anything analogous thereto. They are simply taking the only or the best available course to enable matters vital to the exercise of their discretion to be formally and fairly considered openly before them."
- B The second ground is not so fully applicable to this case as it was to the facts of that case, but the first ground is, I think, decisive of the present case. The right of licensing justices "to be at one and the same time objectors and judges, in the sense in which they are judges in such matters," is recognised by Parliament: *R. v. Howard* (1). It was there held that the licensing justices who have initiated objections to the renewal of licences are qualified to determine finally, on evidence, whether those licences shall be renewed or not. If they were so qualified before the Licensing (Consolidation) Act, 1910, they cannot have lost the qualification because the renewal of old on-licences is now determined in two stages by a preliminary tribunal and a final tribunal, of both of which they are members. I think this rule should be discharged, not because there was no likelihood of bias, but because this decision was reached in a manner contemplated and sanctioned by Parliament, and cannot, therefore, be set aside.
- D

Rule discharged.

Solicitors: *Field, Roscoe & Co.*, for *W. J. Day*, Leicester; *B. Wilkinson*, for *Parsons, Son & Skillington*, Leicester.

[*Reported by J. F. WALKER, ESQ., Barrister-at-Law.*]

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HARGREAVES v. HARGREAVES

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hill, J.), January 20, 1926]

[Reported [1926] P. 42; 95 L.J.P. 31; 134 L.T. 543; 42 T.L.R. 252]

- G *Variation of Settlement—Power of appointment—Exercise in favour of wife in contemplation of marriage—Ante-nuptial settlement—Settlement not made in contemplation of marriage—No mention of wife therein—Matrimonial Causes Act, 1859 (22 & 23 Vict., c. 61), s. 5.*

- H By a deed dated April 28, 1914, the husband, then a bachelor, made a settlement of certain property under which the trustees were to pay the income to him and his assigns during his life, subject to his appointing the income in favour of "any wife of his," and after his death in trust for his children or remoter issue. The settlement was not expressed to be made in contemplation of marriage, and the woman whom the husband married on June 9, 1914, was not a party to it. By a deed dated May 25, 1914, the husband, in exercise of his power under the settlement, appointed to the wife, in contemplation of their intended marriage, a sum of £500 a year, for her separate use "during the continuance of the said coverture." The marriage was dissolved in 1924.
- I On a petition for the variation of the settlement of April 28, 1914,

Held: the court had no power under s. 5 of the Matrimonial Causes Act, 1859, to vary the settlement since it was not expressed to be made in contemplation of marriage and the wife was not a party to it, nor was she mentioned in it, but the deed of appointment of May 25, 1914, could be varied by omitting therefrom the words "during the continuance of the said coverture" and "for her separate use."

Notes. Section 5 of the Matrimonial Causes Act, 1859 (substantially re-enacted in s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925), has been replaced by s. 25 of the Matrimonial Causes Act, 1950, for which see 29 HALSBURY'S STATUTES (2nd Edn.) 388.

Considered: *Melvill v. Melvill and Woodward*, [1930] All E.R.Rep. 79. Applied: *Burnett v. Burnett*, [1935] All E.R.Rep. 490; *Joss v. Joss*, [1943] 1 All E.R. 102; *Lort-Williams v. Lort-Williams*, [1951] 2 All E.R. 241.

As to variation of settlements, see 12 HALSBURY'S LAWS (3rd Edn.) 451 et seq.; and for cases see 27 DIGEST (Repl.) 641 et seq.

Cases referred to:

- (1) *Blood v. Blood*, [1902] P. 190; 71 L.J.P. 97; 86 L.T. 641; 50 W.R. 547; 18 T.L.R. 588; 46 Sol. Jo. 499, C.A.; 27 Digest (Repl.) 649, 6111.
- (2) *Morgan v. Morgan and Kirby*, [1923] P. 1; 92 L.J.P. 8; 128 L.T. 252; 39 T.L.R. 47; 27 Digest (Repl.) 644, 6085.
- (3) *Loraine v. Loraine and Murphy*, [1912] P. 222; 82 L.J.P. 29; 107 L.T. 363; 28 T.L.R. 534; 56 Sol. Jo. 687, C.A.; 27 Digest (Repl.) 638, 6003.

Motion by wife to confirm registrar's report.

The wife obtained a decree nisi for the dissolution of her marriage on May 6, 1924, and a decree absolute was pronounced on Nov. 17, 1924. The husband came of age on April 5, 1914, and on April 28, 1914, while still a bachelor, he executed a settlement of the property in question, the parties to the settlement being himself, his mother, and the trustees. This settlement recited that the settlor was entitled under the will of his grandfather to one equal third part or share of the residuary estate, with, in certain events, an increased share, and to certain reversions, subject to an annuity to his (the husband's) mother; and, after dealing with other matters, the husband assigned and conveyed his said interests to the trustees to pay the income to him and his assigns during his life, subject to a power of appointing the income, or any less interest in the trust premises, in favour of "any wife of his," with such conditions and restrictions as he should think fit, and after his death in trust for his children or remoter issue. The woman who subsequently became the settlor's wife was not a party to this settlement. On May 25, 1914, the husband exercised his power under the settlement and executed a deed of appointment, by which he appointed to the wife, in contemplation of their then intended marriage, a sum of £500 a year for her separate use without power of anticipation during the continuance of the intended coverture, and after his death for the remainder of her life and during any future coverture of hers. The marriage took place on June 9, 1914. On the pronouncement of the decree absolute on Nov. 17, 1924, the coverture determined, and the appointment in favour of the wife ceased automatically. On Nov. 19, 1924, the husband, under the power reserved to him as settlor in the settlement of April 28, 1914, appointed £500 a year to a second wife whom he married shortly after. On Nov. 6, 1924, the first wife had filed a petition for permanent maintenance, and after the decree absolute, namely, on Nov. 28, 1924, she had also filed a petition for variation of the settlement of April 28, 1914. On Nov. 18, 1925, a registrar reported upon both petitions that the husband's gross income was £2,000 a year; the settlement of April 28, 1914, and the deed of appointment of May 25, 1914, were then recited; and the report went on to state that it had been argued before the registrar that the settlement of April 28, 1914, should be varied by directing the trustees to pay one-third of the reversionary interests settled by the husband, when the same should fall into possession, to the first wife for her life. The registrar stated that counsel for the husband had contended that the first wife was not a party to the settlement, which was not expressed to be made in contemplation of marriage and was not, therefore, such an "ante-nuptial settlement made on the parties" as the court has power to deal with by the Matrimonial Causes Act, 1859, s. 5 (re-enacted by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192). It was added that counsel for the husband had, on the other hand, raised no objection to

A the variation, as prayed, of the deed of appointment of May 25, 1914, that instrument being expressed to have been made in contemplation of the marriage. Finally, the registrar submitted that, on the petition for permanent maintenance, the husband should be ordered to pay £166 a year to the first wife for joint lives or until further order and £100 a year free of tax for the child of the marriage, and, on the petition for variation of settlements, that the deed of appointment should
B be varied by omitting therefrom the words "and during the continuance of the said coverture," and the words "for her separate use" and that the trustees should be directed to pay £500 a year to the first wife for life. On Dec. 31, 1925, the first wife gave notice of motion to confirm the registrar's report with the following addition thereto:

C "That the trustees of the indenture of settlement dated April 28, 1914, be directed to pay to the [first wife] during her life, and on the death of the [first wife], if she shall pre-decease the [husband], to or for the benefit of the child of the marriage, such a sum as together with the said sums of £166 payable under the said report during the joint lives of the [first wife and the husband], and £500 payable under the deed of appointment dated May 25, 1914, as varied
D by the said report, during the life of the [first wife], will be equivalent to one-third of the income arising from the property thereby settled."

The motion came on for hearing on Jan. 20, 1926.

Noel Middleton, for the first wife, cited *Blood v. Blood* (1), *Morgan v. Morgan and Kirby* (2), and *Lorraine v. Lorraine and Murphy* (3).

Cotes-Preedy, K.C., for the husband.

E *Bush James* for the trustees.

HILL, J.—There having been a registrar's report, this is a motion by the wife, the petitioner, to confirm the report, but with an additional provision that the settlement on the husband of April 28, 1914, be also varied. The husband came of age on April 5, 1914, and on April 28, 1914, there was an indenture of settlement
F between him, his mother, and certain trustees. The settlement is not expressed to be in contemplation of marriage, nor is his future wife mentioned in it at all, but there are provisions which contemplate that the young man might thereafter marry, and give him certain powers of appointment in the event of his marrying. On May 25, 1914, he exercised his power of appointment in favour of his first wife to the extent of £500 a year, and on June 9, 1914, he married her. The question
G is whether there is any settlement within the meaning of s. 5 of the Matrimonial Causes Act, 1859, or s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, other than the deed of appointment, and whether there is any property settled other than the £500 in the deed of appointment. In my view there is not. Counsel for the first wife argues that, while the court cannot deal with a settlement by a will, any settlement inter vivos, made upon either of two people who at any
H subsequent date marry, is a settlement which the court can deal with under the section because it is ante-nuptial, and that any property dealt with by such a settlement is to be regarded as property settled. In my view, that cannot be so. The section is dealing with ante-nuptial and post-nuptial settlements and it refers to marriage because what it is dealing with is what is commonly known as a settlement made in contemplation of, or because of, marriage, and the interests of
I married people or their children. Nobody has referred me to any case in which it is said to have any wider meaning, and the judgment in *Lorraine v. Lorraine and Murphy* (3) shows that it has no wider meaning. It follows, to my mind, that the property settled over which the court has jurisdiction is, not the whole fund out of which the £500 is carved, but the £500, and nothing else. I think, therefore, that counsel's contention on behalf of the first wife is wrong, and the report of the registrar must be confirmed.

Solicitors: *Thompson, Quarrell & Attneave; Royds, Rawstorne & Co.*

[Reported by HERBERT ROLFE, Esq., Barrister-at-Law.]

BOSWORTHWICK v. BOSWORTHWICK

[COURT OF APPEAL (Lord Hanworth, M.R., Scrutton, L.J., and Romer, J.),
July 13, 14, 1926]

[Reported [1927] P. 64; 95 L.J.P. 171; 136 L.T. 211; 42 T.L.R. 719;
70 Sol. Jo. 857]

Variation of Settlement—Post-nuptial settlement—Bond by one spouse to pay annuity to other—Matrimonial Causes Act, 1859 (22 & 23 Vict., c. 61), s. 5.

Section 5 of the Matrimonial Causes Act, 1859, must be construed widely and liberally, and, therefore, a bond executed by a spouse during the marriage by which that spouse undertakes to pay an annuity to the other party to the marriage is a "post-nuptial settlement" within the section, and can be varied by the court after the dissolution of the marriage.

Notes. Section 5 of the Matrimonial Causes Act, 1859 (substantially re-enacted in s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925), has been replaced by s. 25 of the Matrimonial Causes Act, 1950, for which see 29 HALSBURY'S STATUTES (2nd Edn.) 388. For a case in which a deed exercising a power of appointment was varied, see *Hargreaves v. Hargreaves*, ante, p. 195.

Approved: *Melvill v. Melvill and Woodward*, [1930] All E.R.Rep. 79. Considered: *Brown v. Brown*, [1936] 2 All E.R. 1616; *Gunner v. Gunner and Stirling*, [1948] 2 All E.R. 771; *Halpern v. Halpern*, [1951] 1 All E.R. 315. Referred to: *Jacobs v. Jacobs*, [1942] 2 All E.R. 471; *Smith v. Smith*, [1945] 1 All E.R. 584; *Tomkins v. Tomkins*, [1948] P. 170.

As to variation of settlements, see 12 HALSBURY'S LAWS (3rd Edn.) 451 et seq.; and for cases see 27 DIGEST (Repl.) 641 et seq.

Cases referred to:

(1) *Chalmers v. Chalmers* (1892), 68 L.T. 28; 1 R. 504; 27 Digest (Repl.) 645, 6089.

(2) *Hubbard (Otherwise Rogers) v. Hubbard*, [1901] P. 157; 70 L.J.P. 34; 84 L.T. 441, C.A.; 27 Digest (Repl.) 645, 6089.

(3) *Kane v. Kane* (1880), 16 Ch.D. 207; 50 L.J.Ch. 72; 43 L.T. 667; 29 W.R. 212; 40 Digest (Repl.) 561, 678.

(4) *Callwell v. Callwell and Kennedy* (1860), 3 Sw. & Tr. 259; 164 E.R. 1274; 27 Digest (Repl.) 551, 5009.

(5) *Gill v. Gill and Hogg* (1863), 3 Sw. & Tr. 359; 33 L.J.P.M. & A. 43; 10 L.T. 137; 12 W.R. 808; 164 E.R. 1314; 27 Digest (Repl.) 663, 6272.

(6) *Worsley v. Worsley and Wignall* (1869), L.R. 1 P. & D. 648; 38 L.J.P. & M. 43; 20 L.T. 546; 17 W.R. 743; 27 Digest (Repl.) 245, 1980.

(7) *Sykes v. Sykes and Smith* (1870), L.R. 2 P. & D. 163; 39 L.J.P. & M. 52; 23 L.T. 239; 18 W.R. 984; 27 Digest (Repl.) 657, 6192.

(8) *Jump v. Jump* (1883), 8 P.D. 159; 52 L.J.P. 71; 31 W.R. 956; 27 Digest (Repl.) 245, 1982.

(9) *Clifford v. Clifford* (1884), 9 P. & D. 76; 53 L.J.P. 68; 50 L.T. 650; 32 W.R. 747, C.A.; 27 Digest (Repl.) 246, 1983.

(10) *Thomson v. Thomson and Rodschinka*, [1896] P. 263; 65 L.J.P. 80; 74 L.T. 801; 45 W.R. 134; 12 T.L.R. 464; 40 Sol. Jo. 583, C.A.; 27 Digest (Repl.) 643, 6058.

(11) *Stone v. Stone and Brownrigg* (1862), 3 Sw. & Tr. 113; 32 L.J.P.M. & A. 7; 7 L.T. 757; 164 E.R. 1215; 27 Digest (Repl.) 687, 6568.

(12) *Dormer (Otherwise Ward) v. Ward*, [1901] P. 20; 69 L.J.P. 144; 83 L.T. 556; 49 W.R. 149; 17 T.L.R. 12, C.A.; 27 Digest (Repl.) 648, 6110.

Appeal from an order of LORD MERRIVALE, P., made on a petition for variation of a settlement, the petitioner being the wife-petitioner in a divorce suit in which she obtained a decree for divorce from the husband.

- A The "settlement" which it was sought to vary was a bond dated Dec. 23, 1902, executed by the wife under which she became bound to pay the husband £300 per annum as from Dec. 25, 1902, and during his life, subject to a penalty of £3,000 on default. The husband had not settled any property on the wife, and there was no other consideration for the annuity payable under the bond other than the relationship of husband and wife which existed between the parties.
- B The registrar's report submitted that the court had no jurisdiction to vary either bond.

LORD MERRIVALE, P., in his judgment, referred to *Chalmers v. Chalmers* (1), *Hubbard (Otherwise Rogers) v. Hubbard* (2), *Kane v. Kane* (3), *Callwell v. Callwell and Kennedy* (4), *Gill v. Gill and Hogg* (5), *Worsley v. Worsley and Wignall* (6), *Sykes v. Sykes and Smith* (7), *Jump v. Jump* (8), *Clifford v. Clifford* (9), and *Thomson v. Thomson and Rodschinka* (10). He held that the bond was a post-nuptial settlement which the court had power to vary, and that it should be varied by being discharged. The husband appealed.

E. P. Hewitt, K.C., and *F. L. C. Hodson* for the husband.

J. A. Hawke, K.C., and *J. L. Pratt*, for the wife, were not called upon to argue.

- D LORD HANWORTH, M.R.—This appeal raises a point which is illustrated in cases to which our attention has been called. The question is whether we have power to deal with a bond which has been executed by a wife in favour of her husband, by which she undertook to pay him £300 a year. That was in December, 1902, and the President tells us in his judgment that there was no consideration for that undertaking except the relationship of husband and wife. There was a decree nisi and an application for variation of what is said to be a settlement.
- E The President has gone through the history of the legislation on the subject, and he has considered all the authorities, and he has come to the conclusion that he has jurisdiction to treat this bond as a post-nuptial settlement and to vary it by cancelling the husband's interest. The jurisdiction depends upon s. 5 of the Matrimonial Causes Act, 1859, which was varied by s. 3 of the Matrimonial Causes Act, 1878, those sections being reproduced in s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925. It is said on the facts of this case that the court has no jurisdiction, because this is not a post-nuptial settlement; that whatever meaning one gives to the word "settlement" a bond of this sort is not a settlement, because it is not charged on any property; and that the words of the legislature in many statutes show that the meaning of settlement is the dealing
- G with property or something charged on some property. I think the sections to which I have referred must be looked at, and I think one gets no light from considering Acts which deal with other matters, such as the Bankruptcy Acts, where "settlement" has been defined specifically as a disposing of property. The President has gone through all the authorities which deal with the interpretation of those sections, and I think there is one case which binds this court and by
- H reason of it the appeal must be dismissed.

Before that, however, in *Stone v. Stone and Brownrigg* (11), LORD PENZANCE said :

"I am not prepared to say that the separation deed was not a post-nuptial settlement within the meaning of that section; undoubtedly property was settled and I think the section should be liberally construed."

- I I agree with that, and I think that s. 5 of the Act of 1859 was passed for the express purpose of helping the court to do justice between the parties when provision has been made for a marriage and the marriage has been dissolved. In *Worsley v. Worsley and Wignall* (6) the same learned judge said (L.R. 1 P. & D. at p. 651):

"The legislature has made use of very general terms. The court may inquire into the existence of ante-nuptial and post-nuptial settlements made on the parties whose marriage is the subject of a decree, and may make orders with reference to the application of the whole or a portion of the property settled. . . .

The court . . . would not be justified in narrowing the reasonable scope of the words used in the section."

It is not necessary to go through many other cases, but I think it will be found that when a payment has to be made by one spouse to the other, the court, after a decree, will intervene to deal with it as may be just between the parties, and in the present case I think that this bond was clearly a provision by the wife for the husband, as husband.

The case which is binding on us is *Dormer v. Ward* (12) in this court. In that case there was a settlement in which was a covenant to pay £200 a year, and it was said that that covenant was not a settlement, and that there was a wide distinction between property and a power to pay, and that only a dealing with property was a proper subject of a settlement. VAUGHAN WILLIAMS, J., deals with the matter, and it is quite plain that the court is dealing with liabilities created by settlement. He says:

"This is, of course, pro tanto, to vary the settlement, because, unless there was a valid marriage, [the wife], in my judgment, is not entitled to the benefit of the covenant. She could not recover on the covenant, unless valid, but I think that, for reasons which I have already given, the court in the case of a decree of nullity can and ought to vary the settlement, treating for the purpose of the order that which was no marriage as if it had been a valid marriage, and make the order for application for the benefit of a woman not a wife of this yearly sum of £200."

It is abundantly clear that the court dealt with this covenant separately, and held that it had power to deal with it as a settlement. The case had been before GORELL BARNES, J., and he had decided that the settled property only was a settlement in the ordinary way, and he had rejected jurisdiction so far as the covenant went. He took the view that the covenant was a debt, but not a charge on specific property, and that he ought not to make an order to vary. But if we held that we had no jurisdiction, I think we should go against the decision in *Dormer v. Ward* (12) in this court, which we cannot do. I am, therefore, inclined to follow *Dormer v. Ward* (12) on the grounds stated by LORD PENZANCE, namely, that the section is to be construed liberally and widely.

SCRUTTON, L.J., stated the facts and continued: I decline to guess what we might have done had there been no authorities to guide us, for I am quite sure that the ordinary Chancery barrister would have contemplated an agreement to pay £300 a year being held to be a settlement with horror. But I, too, think that the section which is material must be construed widely, and I think that *Dormer v. Ward* (12) binds us to decide that a covenant to pay an annuity by a husband for a wife, or vice versa, to maintain the other party to the marriage, is a settlement, which can be varied by the court upon dissolution of marriage. I think that authority binds us, but, at the same time, I think that the court would have been in some difficulty if confronted with a series of promissory notes, payable at successive future dates.

ROMER, J.—I agree. I think we get no assistance from looking at the meaning of "settlement" as used in other Acts of Parliament or as employed by conveyancers. We have to look at the meaning of the word as used in the Act of 1859. Our attention has been called to authorities binding on this court, and I think they establish that where one spouse makes provision for the other, as spouse, by periodical payments, the court has always treated that as a settlement. That may be a liberal construction, but I think it is not too liberal, having regard to the evident intention of the legislature and the principles of justice which are involved.

Appeal dismissed.

Solicitors: C. R. A. Edmonds; Law & Worssam.

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

A

WRIGHT v. MORGAN

[PRIVY COUNCIL (Viscount Dunedin, Lord Atkinson, Lord Phillimore, Lord Carson and Lord Merrivale), June 10, 11, 14, July 12, 1926]

B

[Reported [1926] A.C. 788; 95 L.J.P.C. 171; 135 L.T. 713]

Trustee—Purchase of trust property—Option to purchase conferred by will on beneficiary—Chose in action—Assignment of option to trustee—Conflict of duty and interest.

C

By his will a testator left the residue of his estate, which included two landed estates and the stock upon them, to trustees, who were his widow and his two sons H. and D., upon trust to convert and sell the same, and to divide the proceeds into eight shares and convey the same to his wife and to his children in the proportions specified in the will with power to delay the sale of any parts of the property for seven years. The will contained a clause that the property should not be sold until it had been offered at a valuation to his son H. and refused by him. The trustees entered into possession and managed the estate and did not put it up for sale. In 1905 D. acquired the share of H. in the trust estate, "together with the right to purchase the testator's freehold estate at a valuation conferred upon the said H. by the said will." In 1907 the trustees decided to sell the estate, and it was offered to D. as in right of the option to buy conferred by the will on H., and assigned to him (D.) in 1905. In an action by other beneficiaries under the will to set aside the sale to D. and have accounts taken of the profits,

D

E

Held: the position of D. as a trustee and also as the assignee of the option to purchase would involve a conflict of duty and interest since the best time for the trustees to sell would be when prices were high and the best terms on which the trustees could sell would be for a cash payment whereas the best time for D. to buy would be when prices were low and the best terms on which he could buy were something easier than the making of a cash payment, and, therefore, the assignment of the option to purchase—though that option was assignable—was bad and could not be allowed to stand.

F

Notes. Distinguished: *Re Mulholland's Will Trusts*, *Bryan v. Westminster Bank, Ltd.*, [1949] 1 All E.R. 460. Referred to: *Skelton v. Younghouse*, [1942] 1 All E.R. 650.

G

As to the purchase by trust property by trustees, see 33 HALSBURY'S LAWS (2nd Edn.) 282-287; and for cases see 43 DIGEST 778-785.

Cases referred to:

H

- (1) *York Buildings Co. v. Mackenzie* (1795), 8 Bro. Parl. Cas. 42; 3 E.R. 432, H.L.; 43 Digest 784, 2239.
- (2) *Aberdeen Rail. Co. v. Blaikie Bros.* (1854), 2 Eq. Rep. 1281; 23 L.T.O.S. 315; 1 Macq. 461, H.L.; 1 Digest 468, 1526.
- (3) *Parker v. McKenna* (1874), 10 Ch. App. 96; 44 L.J.Ch. 425; 31 L.T. 739; 23 W.R. 271, C.A.; 43 Digest 781, 2220.

Appeal from an order of the Court of Appeal of New Zealand, varying a decision of REED, J.

I

The facts appear from their Lordships' judgment.

M. J. Gresson (of the New Zealand Bar) and *A. Andrewes-Uthwatt* for the appellant, Douglas Wright, referred to in the headnote as "D."

M. Myers, K.C. (of the New Zealand Bar), and *J. Stamp* for the respondents, the plaintiff beneficiaries.

July 12. **VISCOUNT DUNEDIN.**—Though the full story out of which the present appeal arises is a complicated one, it is possible to set forth the facts on which the appeal really depends at no undue length. E. G. Wright died on

Aug. 12, 1902. He was the owner of, inter alia, two landed estates known as Surrey Hills and Windermere, in the county of Ashburton, New Zealand. He left a will dated Feb. 28, 1889, whereby he appointed as trustees and executors his wife, who survived him, and his eldest son Harry Herbert Wright. After certain specific bequests, which need not be particularised, he left the residue of his estate, which included the above-mentioned landed estates and the stock upon them, to his trustees in trust. The purposes of the trust were to convert and sell the whole residue and divide it into eight shares, which eight shares were to be conveyed as follows: Two shares to Harry Herbert; one share to his wife; one share to Edward Fondi, a son; one to Douglas, a son, and three shares to three daughters, but the daughters' shares were not to be paid, but were to be put in settlement for each daughter for life, and for her children in remainder. The trustees were empowered, if they thought fit, to delay the sale of any parts of the property for seven years. The will contained the following clause, on which much of the dispute in the present action turns:

"Provided always that my said trustees shall not sell my freehold estate in the county of Ashburton or any part thereof until the same shall have been offered by my said wife if she shall then be living and if dead by my said son Edward Fondi Wright in writing under her or his hand to my said son Harry Herbert Wright at a valuation to be made by two valuers named by my said wife or the said Edward Fondi Wright as the case may be or if such valuers shall disagree then to be made by a third valuer to be named by the other two before they shall enter upon the valuation as their umpire nor until my said son Harry Herbert Wright shall have refused or omitted to notify in writing under his hand to my said wife or my said son Edward Fondi Wright as the case may be his acceptance of the offer within three months after the making thereof, but no purchaser under this my will shall be obliged to take notice of this direction. . . ."

By a codicil dated May 25, 1894, he appointed his son Douglas as an additional trustee, and directed that the name of Douglas should be substituted in the above-mentioned proviso for the name of Edward Fondi. He also empowered his trustees to carry on the farming carried on by him on his estates.

The trustees entered into possession and managed the estate, the practical management of the real estate being done by Douglas, who was a practical farmer. The estates were not put up for sale. On Feb. 10, 1905, Douglas acquired the share of Harry Herbert. The agreement to purchase contained a conveyance, not only of the share as such, i.e., one-fourth of the residue, but also contained the following words:

"Together with the right to purchase the testator's freehold estate in the county of Ashburton at a valuation conferred upon the said Harry Herbert Wright by the said will and all other benefits and advantages given to him by the said will as a legatee of whatsoever kind or description at the price of £13,325."

On the same day he also acquired the interest of Edward Fondi, and in May, 1907, he acquired the interest of his mother. Thus at May, 1907, he was in right of five-eighths of the residue, the other three-eighths being the shares to be held in settlement for the daughters. In 1905 Harry Herbert had resigned his trusteeship, and Nosworthy, who had married one of the three daughters, had been appointed trustee. In December, 1906, and the beginning of January, 1907, the trustees determined to sell Surrey Hills. Mrs. Wright then offered the estate to Douglas as in right of the option to buy conferred by the will on Harry Herbert. Douglas accepted and valuers were appointed. There is controversy as to the formality of the offer and acceptance, but this, in the view taken by their Lordships, becomes immaterial and need not be inquired into. The valuers valued the stock. Their valuation dated January, 1907, was as follows:

A	Land	...	...	...	...	...	...	...	...	£56,301	11	0
	Stock	...	...	...	...	...	...	...	...	10,498	9	0
										£66,800 0 0		

The transaction was dealt with as follows :

B	There were outstanding mortgages to A.M.P., Ltd.,											
	amounting	...	...	...	...	...	...	...	...	£33,000	0	0
	Douglas was entitled to five-eighths of the capital										18,937	10 0
	Cash paid by Douglas										362	10 0
										£52,300 0 0		

- C This left a sum of £14,500 due from the appellant Douglas. To meet this position transfers of part only of the estate were given, and the remainder comprising 2,863 acres, which had been valued at £15,073 16s., remained in the trustees' names being held by the appellant Douglas on the terms of an agreement for sale, which provided for completion on June 30, 1909, and for payment of interest at 5 per cent. per annum on the unpaid purchase money. By March, 1909, the
- D appellant Douglas had repaid to the trustees £4,500, leaving a balance of £10,000 due. This sum was paid by the appellant Douglas in March, 1920. In April, 1907, Douglas resigned his trusteeship, but he had already arranged with his co-trustee that a sale should also be made of Windermere. A like offer was made of Windermere to him and accepted by him. Valuers were appointed, and Windermere was valued as follows: Windermere (including Chapman's block) was valued at £4,527
- E for Chapman's block, and the rest of the property at £17,444, making a total of £21,971 (which was taken as £22,000) and the stock was valued at £4,000, making in all £26,000. No transfer of the land was taken and the appellant Douglas held the property under an agreement for sale which provided for completion on May 12, 1913, and for payment of interest at 5 per cent. per annum on the unpaid purchase money. The transaction was completed as follows :

F	Mortgage to A.M.P. Society										£8,000	
	Deposit										800	
	Leaving a balance outstanding of										17,200	
Total										£26,000		

- G This balance of £17,200 was provided for as follows. The mortgage of £8,000 was paid off by the appellant Douglas on July 1, 1921, and £1,200 was repaid to the trustees, leaving the appellant Douglas's liability at £16,000, of which he owned five-eighths. The balance of three-eighths is represented by £6,000, which the appellant still owes the trustees in respect of Windermere, and which is secured by portions of Windermere valued at £10,145 still held by the trustees in their own
- H names. The security is found to be ample. All members of the family, including the three daughters, were cognisant of these transactions. One other matter of fact requires to be explained. There was a piece of land known as Chapman's block above mentioned, which lay conveniently to Windermere. This was purchased by the trustees in 1905, and merged in Windermere. The purchase of real property was not authorised by the will. Since the date of the various transactions
- I the whole of the properties have gradually risen in value.

In 1924 the present action was raised by Mrs. Morgan, one of the three daughters of the testator, and her infant children, by their guardian. It asked that it should be declared that the various sales to Douglas should be set aside, and accounts taken of the profits made, so that these might be restored to the trust estate. The trial judge, after inquiry, pronounced an interim judgment by which he held that the option to purchase the landed property given by the will to Harry Herbert was assignable, and was duly assigned to Douglas. Consequently, the sale of the landed properties to Douglas was good, and could not be set aside, but as regards

the stock he held that as it was not covered by the option, the sale of it by the trustees to Douglas, who himself was a trustee, was bad, and he ordered inquiry to be made. His order was :

“(6) Inquiries shall be made and accounts shall be taken by the registrar of this court and an accountant to be appointed by the registrar. (1) As to the price paid for the live and dead stock the property of the trust estate, purchased by Douglas George Wright from the trustees; whether the price so paid was fair and reasonable, and if not by how much it was under-paid. (2) As to the rate of interest paid by Douglas George Wright in respect of trust moneys from time to time owing by him to the trust or sub-trust from and including the year 1908 to and including the year 1924, and as to the current rate of interest payable in respect of loans of similar nature during the same period, and as to whether, and if so to what amount, interest was under-paid during such period. As to the securities now held by the trustees in respect of the sub-trust, and as to whether the same are in order, and as to whether they are good and sufficient securities with a margin not less than that required by ‘The Trustee Act, 1908,’ and if not which securities are inadequate and to what extent.”

Appeal being taken to the Court of Appeal, that court held that the option to Harry Herbert was not assignable to another trustee to the effect of enabling that trustee to buy the trust estate. They therefore set aside the sales and made the following order :

“(1) That the defendant Douglas George Wright was not entitled to purchase either Surrey Hills or Windermere (including Chapman’s block) and he is liable to account for the purchase money received by him from the sales made by him of parts of these estates and he holds the balance of these estates upon the trusts of the will of the testator. (2) All accounts and inquiries necessary to afford relief on this basis shall be taken and made in accordance with directions to be given hereafter. And it is further ordered that these directions be given by the Supreme Court on the application of the plaintiff, and it is further ordered that the appellants are entitled, in lieu of the first inquiry directed by para. 6 of the said judgment, to an inquiry as to the profits made by Douglas George Wright in his dealings with the live and dead stock on Surrey Hills and Windermere. And it is further ordered that the respondent Douglas George Wright pay the costs of this appeal on the highest scale as on a case from a distance.”

From this judgment appeal has been taken, after leave allowed, to His Majesty in Council.

The leading question, accordingly, is whether the option to purchase given by the will to Harry Herbert was assignable and assigned to Douglas to the effect of making him entitled to purchase the trust estate, he himself being a trustee. Technically speaking, he was not a trustee at the time of the purchase of Windermere, but their Lordships have no hesitation in holding with the Court of Appeal that, although he had actually resigned, the whole scheme had been arranged by him prior to his resignation, and that in law he must be treated as being a trustee at the time of the will. Speaking generally, any vested interest is assignable unless there is something in the nature of the interest, or something in the words of the settlement which creates the interest which contradicts the nature of assignability. Their Lordships do not doubt that Harry Herbert’s option might have been assigned to a third person. There is nothing in the nature of the interest itself which points to non-assignability, nor are there any words in the will which would seem to forbid assignation. When, however, it is found that the assignation is in favour of the person who is himself a trustee, quite another question arises. The appellant argued that this right to purchase was property in the person of Harry Herbert, who was a *cestui que trust*, and that it is well settled that a

- A trustee may purchase the interest of a c.q.t. In one sense of the word "property" it is true that this option was the property of Harry Herbert, but the quality of the property was not like the property of land or of a chattel. It was only a right to enter into a contract. If the option had been exercised by Harry Herbert himself, and the property bought, then Harry Herbert might have transferred to a trustee just as well as to anyone else. The object of the sale would, in that case, have been no longer trust property. So also if the option had been transferred to a stranger, the resulting contract which would have been its sequel would have been between the trustees, and, to use a colloquial expression, an outsider. But as it was, the option transferred to Douglas only gave Douglas a right to ask from the trustees a contract of sale, and that contract of sale was, *ex rei necessitate*, a contract between the trustees and himself as a trustee, and that is what the law will not allow.

- It would be profitless to quote the many cases which have arisen to illustrate the doctrine. They may all be referred to the same root idea, that equity will not allow a person, who is in a position of trust, to carry out a transaction where there is a conflict between his duty and his interest. Accordingly, the real test to be applied to the circumstances is, assuming that Harry Herbert's option was validly assigned, so far as power to assign was concerned, to Douglas, did a conflict of duty and interest arise which would prevent Douglas from entering into a binding contract with the trustees? It was argued that no such conflict would arise, because by the terms of the will, which was the wish of the testator, the whole conditions of sale are regulated; valuers are to be appointed, and their decision to be accepted as to the price to be payable. There was no possibility of the higgling of the market between vendor and purchaser. Nevertheless, a conflict of duty and interest may arise although there is no direct association between the two parties as vendor and purchaser. Probably no better illustration could be found than in the old case of the *York Buildings Co. v. Mackenzie* (1) in the House of Lords. It was a Scottish case, but the Scottish law is the same as the English in the matter, and was especially so stated to be in the subsequent case of *Aberdeen Rail. Co. v. Blaikie Bros.* (2). In the former case the person who had bought, and whose purchase was set aside after eleven years of possession, was what is called the common agent. The case occurred in an old form of process for the realisation of the landed estates of a debtor called a ranking and sale. The common agent was appointed by the court to look after and carry into effect the sale. He arranged the date of the sale, fixed the upset price, and answered questions to inquirers, but the actual sale was not conducted by him. It was by public auction and termed a judicial sale. The common agent, Mackenzie, bought at the judicial sale. It was not averred that the price was inadequate, but, although it was after eleven years, the House of Lords, reversing the judgment of the Court of Session, held that his position of common agent was a position of trust, and that his duty and interest so conflicted as to make it impossible that he should be a purchaser of the property at the sale. Now, applying the principles of that case to the present, their Lordships hold that the position of Douglas as a trustee and as the assignee of the option to purchase was one which would involve a conflict of duty and interest. It was of moment when the sale should take place, because the option could only be exercised when the trustees had decided that now was the moment to sell. The best moment for the trust was the moment when prices generally were high. The best moment for a purchaser was when prices generally were low, and such prices would be naturally reflected in the value fixed by the valuers. So also as to the terms of payment, the best term for the trust was cash down; the best term for the purchaser was some easier arrangement. Their Lordships do not think it necessary to go into the actual terms of payment here, although it is perhaps startling to find that the whole transaction was carried out by the payment in cash of quite an infinitesimal sum. The criterion, however, is not what was done, but what might be done. Their Lordships, therefore, come to the conclusion that this case falls within the general rule, and that the sale being as carried out a sale of trust

property to a trustee, cannot be allowed to stand, as in a question with infant beneficiaries who cannot be affected as the daughter might have been affected, by the lapse of time since the transaction was effected to her knowledge but not to theirs. A

So far, therefore, their Lordships agree with the result reached by the Court of Appeal. Two subsidiary questions, however, arise. The first point is as to Chapman's block. This is not dealt with as a separate question by the Court of Appeal. They seem to have thought that it was enough to say that it had practically been treated as part of Windermere. Their Lordships think, however, that this is not so. This is not a case of improper employment by the trustees of trust funds for the purposes of their own business and speculation. It is the case of an improper investment. If a trustee has made an improper investment, the law is well settled. The cestuis que trustent as a whole have a right, if they choose, to adopt the investment and to hold it as trust property. But if there is not unanimity, then it is not trust property, but the trustee who has made it must keep the investment himself. He is debtor to the trust for the money which has been applied in its purchase: *Parker v. McKenna* (3). It is admitted that there has been no unanimity on the beneficiaries' part to consider Chapman's block as trust property. Further, it is admitted that the money used in the purchase of Chapman's block has been refunded to the trust. The result is that the inquiry directed by the Court of Appeal must exclude inquiry as to Chapman's block. Finally, there is the question of stock. If the stock could be looked on as a business, e.g., if the trustees had bought a public house with the funds of the trust, the direction of the Court of Appeal would be right, but in the view of their Lordships that is not so. The stock is not a business. There is no identity between the stock as it now exists and the stock as it was bought from the trustees. The sale was not of a business; the sale was only of individual sheep and cattle. Consequently, their Lordships think that in this matter the direction of the trial judge was right. It is proper to notice that, though interest has been paid to the cestuis que trustent, yet if the sum which might be found under the remit of REED, J., was greater, the natural result would be that compound interest would have to be charged, but inasmuch as the sum due on interest would fall to be applied to the life interest of the daughters, and as Mrs. Morgan was fully aware of what was done, their Lordships do not think that compound interest should be charged and, therefore, that the direction of REED, J., was right. D E F

Their Lordships will humbly advise His Majesty that the judgment of the Court of Appeal should, in the main, be affirmed, but subject, as has been said, to the exclusion of Chapman's block in the inquiries directed by that court. The judgment must also be varied by setting aside so much of it as reversed the judgment of REED, J., as to the stock. The case should, therefore, be remitted to the Supreme Court in order that the inquiries directed may be proceeded with on the basis of this judgment. The respondents will have two-thirds of the costs of the appeal. The costs in the courts below will remain as dealt with by the Court of Appeal so far as past costs are concerned, but the Supreme Court will deal with the costs of the inquiries directed after the result of those inquiries has been arrived at. G H

Order varied.

Solicitors: Coward, Chance & Co.; Blyth, Dutton, Hartley & Blyth.

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.] I

A

KEPPEL v. WHEELER AND ATKINS

[COURT OF APPEAL (Bankes, Atkin and Sargant, L.JJ.), July 16, 19, 1926]

[Reported [1927] 1 K.B. 577; 96 L.J.K.B. 493; 186 L.T. 203]

B *Estate Agent—Duty to vendor—Procurement of best price for property—Offer made for property—Acceptance by vendor subject to contract—Higher offer subsequently made by another purchaser—Duty of agent to communicate second offer to vendor.*

C The plaintiff was the owner of house property, and, being desirous of selling it, placed it in the hands of the defendants, who were house agents, with a view to their finding a purchaser. On May 29, 1925, they received an offer from E. to purchase the property for £6,150 which they communicated to the plaintiff who instructed them to accept it "subject to contract." On June 2 D., who had also received particulars of the property from the defendants, made an offer to them, as the plaintiff's agents, to purchase the property for £6,750. The defendants communicated this higher offer, not to the plaintiff, but to E., with the result that E. and D. agreed that D. should purchase the property from E. for £6,950, on which figure the defendants were to receive a commission for introducing D. to E. This transaction having come to the knowledge of the plaintiff, he began an action against the defendants for damages for breach of their duty as his agents in not communicating D.'s offer to him.

E **Held:** the duty of the defendants under the contract of agency between them and the plaintiff was to obtain the best purchase price which they reasonably could; the contract of agency and that duty did not terminate when the defendants had introduced E. to the plaintiff as a person ready and willing to buy the property; and, therefore, the plaintiff was entitled as damages to the difference between D.'s first offer of £6,750 and the £6,150 which E. had agreed to pay, but, as the defendants had acted bona fide throughout, less their commission.

F **Notes.** Followed: *Harrods, Ltd. v. Lemon*, [1931] All E.R.Rep. 285. Applied: *Raymond v. Wooten* (1931), 47 T.L.R. 606. Considered: *George Trollope & Sons v. Martyn Bros.*, [1934] 2 K.B. 436; *Musson v. Mozley*, [1936] 1 All E.R. 64; *Way and Waller, Ltd. v. Verrall*, [1939] 3 All E.R. 533. Referred to: *Spottiswoode, Ballantyne & Co., Ltd. v. Doreen Appliances, Ltd.*, [1942] 2 All E.R. 65; *Eccles v. Bryant*, [1947] 2 All E.R. 865.

G As to the rights of a principal against his agent, see 1 HALSBURY'S LAWS (3rd Edn.) 183 et seq.; and for cases see 1 DIGEST 429 et seq.

Cases referred to:

- H (1) *Toulmin v. Millar* (1887), 12 App. Cas. 746; 57 L.J.Q.B. 301; 58 L.T. 96; 3 T.L.R. 836, H.L.; 1 Digest 504, 1738.
 (2) *Winn v. Bull* (1877), 7 Ch.D. 29; 47 L.J.Ch. 139; 42 J.P. 230; 26 W.R. 230; 12 Digest (Repl.) 94, 544.
 (3) *Chillingworth v. Esche*, [1924] 1 Ch. 97; 93 L.J.Ch. 129; 129 L.T. 808; 40 T.L.R. 23; 68 Sol. Jo. 80, C.A.; 12 Digest (Repl.) 98, 584.

I **Appeal** by the plaintiff from an order of FINLAY, J.

The plaintiff claimed damages in respect of a breach of duty which, he alleged, had been committed by the defendants while acting as his agents in connection with the sale of a block of flats at Walham Green, London. The statement of claim, so far as material, was as follows:

"2. On June 8, 1925, the plaintiff, through the instrumentality of his said agents the defendants, contracted to sell the said properties to one Francis Essam for the sum of £6,150. The plaintiff entered into the said contract in ignorance of the fact that the defendants had previously obtained an offer from

one Daniel to buy the said property for a sum of £6,750, and the defendants did not disclose as it was their duty to do to the plaintiff the said offer, but re-sold the said property on behalf of the said Essam to the said Daniel for the said sum of £6,950, whereby the plaintiff lost £800, being the difference between the amount for which the plaintiff sold the said property and the amount he would have received if the said offer had been duly communicated to him by the defendants. The plaintiff has lost and claims as damages interest on the said sum of £800 at 5 per cent. per annum from or about June 8, 1925, to date of payment on judgment."

The main ground of defence was that at the date when the breach of duty was alleged the duty of the defendants to find a purchaser had been fulfilled and the agency determined, and the defendants counter-claimed for commission. FINLAY, J., held that the plaintiff was not entitled to succeed against the defendants upon the ground that the defendants, having done what they were employed to do, had ceased to be the agents of the plaintiff for the purpose of finding purchasers. The plaintiff appealed.

Van den Berg for the plaintiff.

Hawke, K.C., and *Bowstead* for the defendants.

BANKES, L.J.—This case raises a point of considerable importance to house and estate agents, and I wish to make it quite plain that the decision which I am proposing to give is a decision upon the facts of this particular case. I also desire to say that this case must be decided upon the footing that the defendants were acting in good faith in this matter, but under a misapprehension as to what their legal position was in reference to their client.

Mr. Keppel, the plaintiff, was the owner of some house property. He, being desirous of selling the property, got into communication with the defendants in reference to that matter on May 28, 1925. They had some time previously valued the property at £7,000, but the plaintiff was anxious to sell the property and he named the price of £6,500, which they were to ask, and intimated that he would be prepared to consider favourably an offer of £6,000. The defendants got to work at once and put themselves into communication with a number of persons who were on their books, dealers in property, estate agents, and persons who they thought might be interested in this property. They at once got into touch with a Mr. Essam, who made an offer of £6,150 on May 29. As soon as he had made the offer Mr. Atkins, a member of the defendant's firm, went to see the plaintiff, and communicated the offer to him, and the latter expressed himself highly gratified at the offer coming forward so quickly and at that figure. He instructed Mr. Atkins to accept the offer subject to contract. I pause here to make it quite plain what is now well established that where a person accepts an offer subject to contract, it means that the matter remains in negotiation until the contract is settled and formal contracts are exchanged, so that although those instructions were given by the plaintiff to Mr. Atkins, the matter remained in negotiation. It remained in negotiation to the knowledge of Mr. Atkins and his firm until June 11. I think that is the proper date, because the contracts were signed on June 8, but were not exchanged until June 11, so that between May 29, when the authority was given, to close with Mr. Essam's offer subject to contract, and June 11, the matter as between the plaintiff and Mr. Essam remained in negotiation. Meanwhile, one of the persons to whom Mr. Atkins, as representing the plaintiff, had sent particulars of the property was a Mr. Daniel, who happened to be away from home at the time. When he returned home on June 2 he found the particulars of the property which Mr. Atkins had sent to him. He got into communication with Mr. Atkins and then ascertained that the property was sold subject to contract. Mr. Daniel, however, on being informed that the property had been sold subject to contract, was not by any means put off entirely, because he went to see Mr. Atkins, and an extract from Mr. Atkins's diary of June 3 shows what happened. "Mr. J. Daniel

- A called. Will purchaser take a profit on his deal. He made an offer of £6,750." When Mr. Daniel made that offer Mr. Atkins made the unfortunate mistake of communicating it to Mr. Essam instead of communicating to the plaintiff the fact that Mr. Daniel was prepared to give a larger sum than Mr. Essam. The communication with Mr. Essam appears in a note of a telephone message from Mr. Atkins to Mr. Essam on June 3 at 3.50 p.m., which is: "Asked if he would accept £600 profit on his deal, namely £6,750." That is to say he was passing on to Mr. Essam Mr. Daniel's offer. "Said I had offer of that amount. How much would our commission be? £150 about would be scale, but if he would accept offer we would take £100. Has to give Bickford something, so cannot accept. Lowest £7,250. Suggested he should make it £7,000, to which he eventually agreed. Commission £120." The matter went on and a contract was exchanged between Mr. Essam and Mr. Daniel at a price of £6,950. The matter then got to the plaintiff's ears, and a good deal of trouble ensued. Ultimately this action was brought by Mr. Keppel against the defendants for breach of their duty as agents in not disclosing to him the offer which they had received from Mr. Daniel. The defendants retaliated by saying that they were under no duty to him in reference to the matter at all and they counter-claimed for their commission.
- D So far as the claim is concerned the question turns entirely upon what the defendants' position was in reference to the plaintiff during the interval between Mar. 29 and June 11. They do not dispute that they were employed as his agents to dispose of the property; they do not dispute that so long as they continued his agents they were under an obligation to make to him all proper disclosures; and I do not understand that it is disputed that if they had, while they continued his agents, received this offer from Mr. Daniel of a larger sum than Mr. Essam had offered, they were under a duty to disclose that. But their position has been throughout—and Mr. Atkins made it quite plain in his evidence: "As soon as we introduced to you Mr. Essam, who was a willing purchaser and you accepted his offer, although it was an acceptance subject to contract, we had completed our obligation as your agent. We had earned our commission, and we were free to act as independent persons whose agency, so far as you were concerned, had terminated." The question there is what in these circumstances was the position in law of these defendants? I am satisfied after the very full discussion that has taken place, that at any rate their duty as agents did not terminate until the contracts had been exchanged between the plaintiff and Mr. Essam. When I say that their duty as agents did not terminate I do not mean that they were bound to look out for other purchasers. What I do mean in reference to this particular case is that so long as they continued agents it was their duty to communicate any offer which came to them which were larger or more satisfactory than the one which they had already submitted to the plaintiff. I think that duty is plain where, as here, the information comes as a result of submitting the particulars which they had submitted in the first instance to Mr. Daniel as agents for the plaintiff.
- H In these circumstances I am not going to discuss all the matters which have been discussed in testing this question whether the agency had or had not determined because it seems to me that an agent may well say: "I had done everything which, assuming the matter went through, would entitle me to receive my commission," and yet remain in the position, and subject to the duties of an agent, to disclose such matters as the particular offer in this case. Assuming that that is the correct view of the situation—I think it must be, because I will give three instances of what might have occurred during the interval between May 29 and June 11—of course Mr. Essam might have changed his mind. He was perfectly entitled to do so, as the matter was only in negotiation. In those circumstances it could not be said that the defendants were entitled to their commission upon the ground that they had done all that they were bound to do and had earned their commission directly the plaintiff accepted the offer subject to contract. Again I think (the defendants not having been employed as exclusive agents) that if the plaintiff had found a purchaser during this period who was prepared to give more,

or who for some reason was a more desirable purchaser, he would have been entitled to sell the property to that person and the defendants would have had no cause of complaint. Or again, if other agents had found, during this interval, a person whom the plaintiff preferred, or who would give a larger amount, I think that the plaintiff would have been entitled to accept that person and the defendants would have had no cause of complaint. I think those are three good tests of what the position as between these parties was and as indicating that it is not true to say that the relationship between them ceased as and from May 29 and that on that date the defendants were entitled to their commission and were entitled to say that they were free for all purposes from any duty as agents for the plaintiff.

I think, therefore, that the plaintiff succeeds in establishing that the defendants—and I give them credit for acting in perfect good faith—did misunderstand their position, and that they and other agents must understand that, given conditions the same as existed in this case, they were not free from the responsibility of agents merely because their client was prepared to accept an offer subject to contract, but that the relationship of agency would continue until formal contracts were approved and exchanged. The amount of damages seems to be fairly plain, that is to say it would be the difference between the amount which Mr. Essam in fact gave and the amount which the property was worth, in the sense of what Mr. Daniel would have given if the defendants had done what it was their duty to do and had communicated to the plaintiff the fact that he was a willing purchaser. I daresay if the defendants had done what I think they ought to have done Mr. Daniel would have got this property for less than he in fact gave for it, and the plaintiff would have got very much more than he in fact got. But it does not do to guess in these matters, and I do not think that the defendants, who have here committed a breach of their duty, are entitled to take up the position of saying: "If we had done our duty, Mr. Daniel would not have offered as much and the plaintiff would have got less." I think, as the parties have left the matter of damages to us, we are not guessing, but we are taking a fair estimate of the position when we say that Mr. Daniel's offer of £6,750 which he was prepared to give was one which the plaintiff would have accepted and that the measure of damages is the difference between the £6,150 and the £6,750, subject of course to the adjustment of commission. That, I think, leaves the damages at £591. It is said that the defendants have disentitled themselves to recover the commission, but I do not take that view. It seems to me that an agent may quite properly claim his commission and yet have to pay damages for committing a bona fide mistake which amounts to a breach of duty, and I think that the defendants are entitled to the claim which they make for commission. The appeal will, therefore, be allowed and judgment entered for the plaintiff for £591 with costs and for the defendants for the amount of their counter-claim with costs, the plaintiff to have the costs of the appeal.

ATKIN, L.J.—I agree. It is plain from the facts of this case that the plaintiff, the owner of this block of flats in Walham Green, when he was minded to sell them was prepared to sell them at a price which appeared to anybody who was in the market for that class of property at that time as a highly attractive price. The defendants were estate agents who had managed the flats for the owner. The latter had put the flats in the hands of well-known agents who for two or three weeks had failed to dispose of them. He then employed the defendants to sell the flats and within twenty-four hours Mr. Atkins, who was a member of the defendants' firm, had obtained a purchaser who was prepared to buy the flats at a price which the vendor was prepared to accept. The purchaser was introduced to Mr. Atkins by a Mr. Bickford, of whom we know nothing except that he is said to be an investor in this class of property, and he eventually got something out of the profit which Mr. Essam, the purchaser who was introduced, made on the transaction. Mr. Essam was in fact another estate agent in London, but apparently he concealed that fact from Mr. Atkins and only gave him an address in Nottingham.

A Mr. Atkins put his offer forward, having got it reduced to writing, and submitted it to his principal, the plaintiff, who accepted the offer subject to contract and signed a letter addressed to Messrs. Wheeler and Atkins, the defendants, to that effect. The result of that was, as it appears to me, that the matter still remained in negotiation, that the vendor of the flats had intimated that he was prepared to carry on the negotiations upon the footing of that price being agreeable to him, and that the negotiations were to be continued after that stage, not by the agents but by his solicitors.

A great deal was made—and I am not surprised at it—of this transaction with Mr. Essam and of the fact that his London address and occupation was not disclosed to the plaintiff, but after hearing the witnesses the judge decided that the matter went through in good faith on the part of Mr. Atkins, and I am not prepared to dissent from that decision. I think the bearing of it is that it is quite plain that these facts did excite suspicion in the minds of the plaintiff and his advisers when they knew of them, and it seems to me to be relevant as indicating that it was likely that the plaintiff would have withdrawn from the negotiations with Mr. Essam if he had discovered what the true facts were. That is the real bearing of these facts upon the matter which we have to discuss. This matter went through in the way I have described on the Friday before the Whitsun holiday, and on the Whit-Tuesday a Mr. Daniel, who it appears was a tenant of the flats and had been communicated with by Mr. Atkins and given particulars and an order to view, rang up and said that he had been considering the matter. He was told that the property had been sold subject to contract. Mr. Daniel, who obviously wanted the flats, then asked whether the purchaser would take a profit upon his deal. Eventually he was told that he must make a large offer and must bid at least £600 more than the purchaser had offered, and he was brought up to an offer of £6,950, which he made on or about June 2.

The matter was still in negotiation because there was no concluded contract between Mr. Essam and the plaintiff until June 8 or 11—it does not matter which. It appears that in those circumstances the agents were under an obligation to disclose the further offer which they had obtained to their principal, the plaintiff. They had got it from a person to whom they had communicated the particulars on behalf of the plaintiff, and they had got it from a person who had approached them as being the agents of the plaintiff. In these circumstances it appears to me that they were under a plain duty to disclose this offer of a better price to their principal, unless the employment had come to an end and they were under no contractual obligation to him at all. That really is the question which we have to discuss—were they under any contractual obligation at that time to Mr. Keppel? It appears to me to be a complete mistake to suppose that when agents are employed to sell a property their duty ends when they have introduced a purchaser ready and willing to buy the property. It is true that, if the transaction goes through, that is all they need do, but up to the time at which there is a concluded agreement between the purchaser and the vendor, it appears to me that the agents still owe a duty to their principal. For instance, supposing after they have introduced a purchaser ready and willing to purchase, the matter still being in negotiation, they discovered that the person so introduced was a person who was either insolvent or of bad character, or a person who intended to employ the premises for some purpose contrary to law, or, perhaps, contrary to the conditions in the vendor's agreement, then it appears to me to be plain that it would be their duty to their principal to disclose those facts to him. On the other hand, supposing that the purchaser, while still in negotiation, applied to the agents for further particulars of the property in order to complete the negotiations, which particulars had been entrusted to the agents by the vendor for the purpose of imparting them to prospective purchasers, it seems to me that they would be committing a breach of their duty to their principal, the vendor, if they declined to give those particulars, and said: "No, we owe no duty to anybody hereafter in respect to that matter." If the proposed sale went off because of that refusal it seems to me that their principal

would have a substantial cause of complaint against them, a complaint which would amount to a claim for breach of the contract to use reasonable skill and diligence in the obtaining of a purchaser, i.e., a person who would purchase the property. For those reasons, in my opinion, it is a mistake to suppose that the contractual relationship of principal and agent ends as soon as a person has been introduced who is ready and willing to purchase, but while the negotiations between him and the vendor have not been concluded. To my mind, that is made plain by what I agree are obiter dicta of LORD WATSON, but which I think are still valuable, in *Toulmin v. Millar* (1). I think, therefore, that there was a breach of contract.

Has it caused damage? It appears to me that on the facts it is plain that Mr. Daniel was a purchaser of this property at a sum which eventually turned out to be £6,950. It is true that he began by making a lower offer, and it may very well be that if his offer had been disclosed to the plaintiff he might have got the property at a smaller sum. I am not disposed to give damages based on the largest sum mentioned as the purchase price because I am not satisfied that the largest sum would necessarily have been obtained, but I think it is right to fix the sum at which Mr. Daniel apparently began without any demur, namely £6,750 as being the sum which would have been obtained. I think on the facts of the case that the proper inference is that the plaintiff would have been prepared to entertain the further offer, and would not have considered himself bound by the negotiations which had begun, even although he had put his signature to a document that he was prepared to accept the offer subject to contract. At any rate, if it was intended to be shown that the plaintiff would not have taken the higher price I think it was for those who affirmed that proposition to prove it and obviously they did not do so. Therefore it appears to me that the damages should be as has been stated. The other question is whether the defendants should succeed on their counter-claim. I am quite clear that if an agent, in the course of his employment has been guilty of some breach, or has been proved to be guilty of some breach of fiduciary duty, in practically every case he would forfeit any right to remuneration at all. That seems to me to be well established. On the other hand, there may well be breaches of duty which do not go to the whole contract, and which would not prevent the agent from recovering his remuneration, and having found in this case that the agent acted in good faith and as the matter did go through, and the plaintiff has had the benefit of the transaction, it appears to me that he must pay the commission. Therefore, I think the defendants are entitled to recover on their counter-claim. The result is that the appeal must be allowed with costs, and the judgment should be varied by entering judgment for the plaintiff for £591, the judgment on the counter-claim to stand.

SARGANT, L.J.—I am of the same opinion. In my view, counsel for the defendants were seeking unduly to limit the responsibility of their clients, both in respect of the extent and in respect of the time. As regards extent, it seemed at one time in the argument as if they were seeking to say that the agents were merely agents for the purpose of finding a purchaser. That is not so. They were agents for the purpose of obtaining the best purchase price which they reasonably could, and it is quite clear that, if the offer of Mr. Daniel had come before the making of the quasi contract with Mr. Essam, it would have been a gross dereliction of duty if the agents had not informed the principal of the receipt of that larger offer. With regard to the time, I think that the defendants have not fully apprehended what is now a definite rule of the court, namely, that an agreement subject to contract is negotiation only. That has been said over and over again since SIR GEORGE JESSEL enunciated it in *Winn v. Bull* (2), but it has been chiefly laid down in *Chillingworth v. Esche* (3) where it was held that so much was that the case that when, in the case of such a contract, a so-called deposit was paid, that deposit was not really in the nature of a deposit, but remained the property of

A the person paying it, and had only been intended to form a deposit in the true sense in case it should happen that ultimately a formal and definite contract was entered into. The defendants seem to have thought—and I think persons who are half laymen or entirely laymen might well think—that some definite change took place in the relationship between them and the vendor directly this agreement had been made subject to contract—and if the matter had proceeded without such a definite

B form of words and by way of clear negotiation only, I doubt very much whether they would have attempted to draw this hard and fast line as on the date when that agreement subject to contract was made. To my mind, it is quite clear as regards time that when agents are employed to find a purchaser for a property their position as agents cannot definitely end at any time short (at the earliest) of the time when a definite contract is entered into and exchanged, and that if in the

C interval they receive information—whether as in this case from someone with whom they had originally communicated on behalf of their principal, or from some outside source—tending to show that the value of the property was greater than had been supposed, or otherwise of a nature greatly to influence the judgment of their principal in going on with, or ceasing to go on with, the contract which was being negotiated, they are bound to communicate that information to their

D principal, and if they do not do so they are guilty of a breach of their duty as agents. Assume for a moment that the defendants had heard, two days after this agreement subject to contract, that the property had been scheduled to be taken for the purposes of a public improvement, or that some other event had happened, quite disconnected with the agency, which necessarily increased the amount which the vendor might expect to obtain, then it seems to me that they would be

E definitely bound, in their capacity of agents for sale for this vendor, to communicate that information to him. That being so, it follows that in my judgment the plaintiff is entitled to succeed upon the claim. On the other part of the case I have nothing to add to what has fallen from my Lord and ATKIN, L.J.

Appeal allowed.

Solicitors: *Fowler, Legge & Young; Williams & Poole.*

F [Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]

G

HARMS INCORPORATED AND ANOTHER v. MARTAN'S CLUB, LTD.

[COURT OF APPEAL (Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.), November 10, 1926]

H

[Reported [1927] 1 Ch. 526; 96 L.J.Ch. 84; 136 L.T. 362; 43 T.L.R. 21; 70 Sol. Jo. 1219]

Copyright—Infringement—Musical work—Public performance—Performance at proprietary club—Audience of 130 members and 50 guests—Copyright Act, 1911 (1 & 2 Geo. 5, c. 46), s. 1 (2), s. 2 (1).

I

The orchestra employed by the defendants at a proprietary club owned by them, where facilities for meals and dancing were provided, played part of the music of a play the copyright in which belonged to the plaintiffs. There were some 1,800 members of the club who were entitled to visit the club when they chose and to bring guests, and on the occasion in question there were present 130 members and fifty guests. In an action by the plaintiffs for the infringement of their copyright on the ground that the defendants had performed the music in public without their consent within the meaning of s. 1 (2) and s. 2 (1) of the Copyright Act, 1911,

Held: the question whether there had been a performance in public was one of fact; on the evidence in the present case there had been a performance to members of the public who had paid for the privilege of hearing the music by an annual subscription preceded by an entrance fee, and were entitled to, and did, invite other members of the public to accompany them to the club as their guests; and, therefore, there had been a performance of the music in public and an infringement of the plaintiffs' copyright.

Decision of Eve, J., [1926] 1 Ch. 870, affirmed.

Notes. The Copyright Act, 1911, was repealed by the Copyright Act, 1956. s. 1 (1) and s. 2 (1), (5) (c), of which replace s. 1 (1) (2) and s. 2 (1) of the Act of 1911. For the Act of 1956, see 36 HALSBURY'S STATUTES (2nd Edn.) 67.

Considered: *Jennings v. Stephens*, [1936] 1 All E.R. 409; *Ernest Turner Electrical Instruments, Ltd. v. Performing Right Society, Ltd., Performing Right Society, Ltd. v. Gillette Industries, Ltd.*, [1943] 1 All E.R. 413. Referred to: *Messenger v. British Broadcasting Co.*, [1927] 2 K.B. 543; *Performing Right Society, Ltd. v. Gillette Industries, Ltd.*, [1943] 1 All E.R. 228.

As to the "public performance" of a musical work, see 8 HALSBURY'S LAWS (3rd Edn.) 429, 430, and LAWS, Cum. Supp. For cases see 13 DIGEST (Repl.) 114-117.

Cases referred to:

- (1) *Duck v. Bates* (1884), 13 Q.B.D. 843; 53 L.J.Q.B. 338; 50 L.T. 778; 48 J.P. 501; 32 W.R. 813, C.A.; 13 Digest (Repl.) 118, 594.
- (2) *Russell v. Smith* (1848), 12 Q.B. 217; 17 L.J.Q.B. 225; 11 L.T.O.S. 286; 12 Jur. 723; 116 E.R. 849; 13 Digest (Repl.) 64, 114.
- (3) *Caird v. Sime* (1887), 12 App. Cas. 326; 57 L.J.P.C. 2; 57 L.T. 634; 36 W.R. 199; 3 T.L.R. 681, H.L.; 13 Digest (Repl.) 63, 109.
- (4) *Wall v. Taylor* (1883), 11 Q.B.D. 102; 52 L.J.Q.B. 558; 31 W.R. 712, C.A.; 13 Digest (Repl.) 114, 553.
- (5) *Kelly v. London Pavilion, Ltd., Kelly v. New Tivoli, Ltd., Kelly v. The Oxford, Ltd.* (1897), 77 L.T. 215; 13 T.L.R. 584; affirmed (1898), 14 T.L.R. 234, C.A.; 42 Digest 915, 102.
- (6) *Planché v. Braham* (1837), 4 Bing.N.C. 17; 3 Hodg. 288; 5 Scott, 242; 7 L.J.C.P. 25; 1 Jur. 823; 132 E.R. 695; 13 Digest (Repl.) 118, 588.

Appeal from an order of Eve, J., made in an action for an injunction to restrain the defendants from infringing the copyright in a musical number, called "That Certain Feeling" (which formed part of a musical play entitled "Tip Toes"), by performing it or authorising the performance of it in public without the consent of the plaintiffs, or by permitting the Embassy Club or other place of entertainment to be used for the performance of the work without the plaintiffs' consent.

The plaintiffs were Harms (Incorporated), an American company, the owners of the copyright in the work in question, and Chappell & Co., Ltd., musical publishers, of New Bond Street, W. The defendants, Martan's Club, Ltd., were the proprietors of the Embassy Club, a dancing club in London. The plaintiffs alleged that on Mar. 4, 1926, a part of the musical play, "Tip Toes," namely, "That Certain Feeling," was performed by the orchestra at the Embassy Club without the plaintiffs' consent. On that occasion there were 130 members present and also fifty persons as their guests. The plaintiffs had sent the defendants a notice or notices warning them against infringement of their copyright in the "Tip Toes" music.

By Copyright Act, 1911:

"Section 1 (1). Subject to the provisions of this Act, copyright shall subsist throughout the parts of His Majesty's Dominions to which this Act extends for the term hereinafter mentioned in every original . . . musical . . . work if . . . (b) in the case of an unpublished work, the author was at the date of the making of the work . . . resident within such parts of His Majesty's Dominions

A as aforesaid; but in no other works, except so far as the protection conferred by this Act is extended by Orders in Council thereunder relating . . . to foreign countries. (2) For the purposes of this Act, "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, [or] to perform . . . the work or any substantial part thereof in public. . . .

B Section 2 (1). Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright. . . . (3) Copyright in a work shall also be deemed to be infringed by any person who for his private profit permits a theatre or other place of entertainment to be used for the performance in public of the work without the consent of the owner of the copyright, unless he was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of copyright.

C Section 35. "Performance" means any acoustic representation of a work. . . ."

D EVE, J., held that the fact that, subject to the necessary limitations of space, the performance could have been attended by all the 1,800 members of the club, each bringing one or more guests, members of the general public, introduced an element so alien to any idea of privacy or domesticity as to stamp the performance with a publicity sufficient to make it an infringement of the plaintiffs' copyright, and he, therefore, made a declaration to that effect and ordered the defendants to pay the costs. The plaintiffs could have liberty to apply for an injunction if necessity arose. The defendants appealed.

E *Vaisey, K.C.*, and *Winterbotham*, for the defendants, referred to *Duck v. Bates* (1), *Russell v. Smith* (2), *Caird v. Sime* (3), *Wall v. Taylor* (4), and *Kelly v. London Pavilion, Ltd.* (5).

Gover, K.C., and *S. O. Henn Collins*, for the plaintiffs, were not called upon.

F **LORD HANWORTH, M.R.**—By the Copyright Act, 1911, s. 1 (1), it is enacted that, subject to the provisions of the Act, copyright shall subsist for the term provided in the Act in every original literary, dramatic, musical, and artistic work, and by s. 1 (2) for the purposes of the Act "copyright" is defined to mean the sole right to produce or reproduce a work or any substantial part thereof in any material form whatever, or to perform the work or any substantial part thereof in public.

G By s. 2 (1):

"Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred upon the owner of the copyright."

H This action is brought by the owners of the copyright in a musical play which was published and produced in America, but which at the time we are concerned with had not yet been produced in England, against the owners of a club called the Embassy Club, in respect of a performance of part of this musical play which took place on Mar. 4 of this year [1926] at the Embassy Club. At that performance there were some 130 members of the club present, and exercising the privilege to which they were entitled under the rules of the club, there were in addition some fifty guests. EVE, J., held that what was done was unauthorised and was an invasion of the plaintiffs' right, because there was a production of the work or of a substantial part thereof in public, and that, therefore, the plaintiffs' copyright had been infringed.

I The appeal is brought to this court on the ground that EVE, J., incorrectly interpreted the words "in public." He thought that, in view of the fact that the performance was given at a club before a certain number of its members and their guests, there was no domesticity about it to prevent the performance being one which was in public. We have to consider whether EVE, J., was right. It is

quite obvious that the use of the words "in public" is one which gives rise to a number of difficulties. It is not an easy expression to define. It is commonly used in connection with a number of activities which concern the community at large, and are of a far-reaching nature and effect. There are one or two cases to which our attention has been called, such as *Wall v. Taylor* (4) and *Duck v. Bates* (1) on which EVE, J., relied. The actual terms of the Copyright Act, 1911, differ from those under which copyright in musical compositions had been secured to their authors previously. By the Dramatic Copyright Act, 1833, [repealed by the Act of 1911] the author of a dramatic composition was given the sole liberty of representing it at any place of dramatic entertainment, and by s. 2 there were penalties imposed upon anyone who offended against the right of the author. By the Copyright Act, 1842 [also repealed in 1911], the privileges given in copyright by the Act of 1833 were extended to musical compositions and the sole liberty of representing any dramatic or musical composition was to be the property of the author. The effect of those two statutes and the sections to which I have referred was to give the author of a dramatic composition such protection as to enable him to prevent the representation of musical compositions in any place of dramatic entertainment to which his assent had not been secured. The words, therefore, of the Acts which were in force previously to 1911 are different from the words used in the Act of 1911.

One has at the outset to consider what is the right which is given to the author of a musical composition. LORD ESHER, M.R., in *Duck v. Bates* (1) says:

"I agree that what was intended to be protected was the value of the author's invention, that is the key to the construction of the Act: he does not want sentimental protection, he has power himself to represent his drama, and to confer upon others the right to represent it. That power gives a value to his production. If an author performs his drama, and if it is performed also by another the author will be injured."

We have, I think, therefore, to consider that the Act of 1911 secured protection to the author; it gives him what is a valuable right. It is true it gives it by entitling him to a monopoly, but that word must not be used in any sinister sense; it is a right given to him under the statute, and in respect of which he is entitled to have protection. The cases to which I have referred discussed what was the meaning of the words "place of dramatic entertainment," but I think it is noteworthy that the court in both these cases said that the answer must largely depend upon the facts of the case. In a much earlier case, *Planché v. Braham* (6), the question arose what was a dramatic representation or dramatic production because there the defendant had made use of a portion of the libretto for the music of Weber's opera "Oberon," and TINDAL, C.J., in considering what was a dramatic production said:

"It is difficult to say what is or is not a representation of part of a dramatic production; the subject patitur majus et minus, and it must be left to the jury to determine the fact."

In *Wall v. Taylor* (4) BRETT, M.R., said that what is "a place of dramatic entertainment," and what is a representation or performance, are questions of fact, and in *Duck v. Bates* (1) in the Court of Appeal the question what is a place of dramatic entertainment was held to be determined largely by the facts. BOWEN, L.J., says:

"Then the question of fact will arise whether the place has not been so appropriated on any particular occasion. . . . There is a broad distinction between the present case and a performance to which the public at large or any portion of the public are invited; but the question must be to a certain extent a question of fact."

It appears to me that the authorities which I have cited are an abundant foundation for what EVE, J., has determined, namely, that the question whether there was a performance in public is largely a question of fact to be determined by

A the facts of each case. From the cases which we have had cited to us it appears, therefore, that one starts with the questions: What is it that has been secured to the author? What is it in respect of which he is entitled to protection? In considering whether or not there has been a performance in public so as to be within s. 2 (1), so that his copyright shall be deemed to have been infringed, one must consider whether or not, upon the facts as a whole, the true view is that there has been a representation of the composition in public. In dealing with the tests which have been applied in the cases, it appears to me that in considering the facts one must apply one's mind to see whether there has been any injury to the author. Did what took place interfere with his proprietary rights? When one is considering that, profit is a very important element. Next one must consider whether there has been the admission of any portion of the public, with or without payment, and when one is considering what one means by any portion of the public one will find in *Duck v. Bates* (1) that SIR BALIOL BRETT, M.R., said that that means the public who would go either with or without payment—the class of persons who would be likely to go to a performance, if there was a performance, at a public theatre for profit. Then one has also to consider whether or not the performance was a domestic one in the sense that it was private and domestic, a matter of family and household concern only. Then, again, one must consider where the performance took place bearing in mind that the place where the performance takes place need not be one which is kept habitually for the exhibition of dramatic entertainments.

I apply those tests to the present case. The club is a high-class club, of which only persons can be members who are prepared to pay a substantial entrance fee and subscription. Great care is exercised in preventing any undesirable persons from becoming members, and that is secured by the fact that re-election takes place annually. On Mar. 4 there was an entertainment of members, that number being 130, and there were in addition fifty persons who were guests and not members of the club. Who were those guests? Is it possible to deny that they were properly called members of the public? One hundred and eighty persons saw and heard this performance, persons of a class who would be able to pay entrance to any public theatre where the music should be performed, and they had the advantage of listening at a place with which they were familiar in the sense that it was on the club premises. I cannot see that one can answer the question: "Was the author injured?" in the negative. It seems that a number of persons had an opportunity there of hearing this music who were of the class who would be likely to go to a performance of the play if an entrance fee was required at a theatre or concert hall. That brings me, therefore, to saying that upon these facts EVE, J., came to a right conclusion.

I desire to say that I do not merely depend upon his decision having been come to on materials which entitled him to come to that conclusion, for upon the facts as presented to him I should have come to the same conclusion. If one applies another fact, namely, that this is a proprietary club, which to some extent depends upon the activities of the committee and the members in providing entertainments, it appears that one has an added factor not to be discarded which leads to the conclusion that it was in public. I do not, however, myself rely upon that factor. But it appears to me that upon the tests which I have applied the answer must be that there was here a performance in public. If it were possible to get round the Copyright Act, 1911, by such a performance, if an author had no means of asserting his right in such a case, it appears to me that a very serious inroad would have been made upon his property. When the Act gives in s. 2 (1) a test by which copyright is to be deemed to be infringed, it intends to indicate that the protection given to the author is large, and, although it may be difficult to say whether or not an actual loss has been suffered, still certain facts are such as to enable the inference to be drawn that there has been an infringement so that the author may be protected. For these reasons it seems to me that the appeal fails and the judgment of EVE, J., must be affirmed.

SARGANT, L.J.—I am of the same opinion. It seems to me that it is as right to say with regard to this Act as it was to say with regard to the Act under which *Duck v. Bates* (1) was decided that the aim of the Act is the protection of composers of musical works. If possible, I think it is made clearer here by the direct language of this Act, because the Act proceeds by way of making an express grant to the composer of the sole right to produce and reproduce the work or any substantial part thereof in public, and under the ordinary principles of a grant—which apply, I think, quite as much to a statutory grant as to a private grant—the grant is to be construed in favour of the grantee, and, accordingly, the composer becomes entitled to a right which is not to be lightly defeated by the acts of others in derogation of that grant. The word “monopoly” has been used, but I think that all suggestions that lie in the word “monopoly” adverse to the principle of monopoly are singularly wanting in the case of the protection of the property of authors and composers. I suppose there is no property which, juristically speaking, is more entirely the property of the individual, than work which has been the direct result of the labour and the talent or genius of the author or composer who has given it to the world, and the copyright which is given to him is not in derogation of the right of any other person to perform something similar which has come from the brains and intelligence of that person, but it is merely the right to prevent other people appropriating that which is the true property and the true invention of the original author or composer.

With these remarks, I want to consider whether there has here been a performance in public such as to derogate from the right of the composer and probably or possibly to inflict loss on him in consequence. Reference has been made to *Duck v. Bates* (1), and, although the circumstances were different there in many respects, no doubt the lines on which the reasoning of the court went are very appropriate to be considered in the present case. To my mind the case here is very much stronger in favour of the plaintiffs than in *Duck v. Bates* (1), which it must be remembered was very much upon the borderline and in which the defendant only just managed to escape. In *Duck v. Bates* (1), it seems to me, there was a very strong flavour of privacy and domesticity present. The performance was one that was not for profit, which is very important. It was given to the nurses and staff of Guy's Hospital; the persons who were admitted were persons connected with the management and carrying on of the hospital, together with a certain number of persons who were friends of the amateurs. In that state of things it seems to me that the whole performance was of the nature of an enlarged family or domestic performance, and was, therefore, such as might well be held not to be within the restrictions of the statute then in existence or to be likely to derogate from the exclusive rights which had been given to the author. But, as I say, the case was so very near the line that there was a dissentient judgment of FRY, L.J., and a very little might have turned the scale in that case. Here it seems to me that the matter is totally and entirely different, and the difference is all against the defendants. Here we have a proprietary club run by the defendants. I have not a word to say against the club itself. It appears to be a club the rules of which provide for admission of persons of a certain social standing, and the subscription to it ensures that they are persons with a certain amount of ready money, but the membership of the club and the question of the persons who are to benefit from the running of the club are entirely distinct. Each member, no doubt, when elected has to take a preference share in Martan's Club, Ltd., but it is quite obvious that the ordinary shares of that company or the shares of some nominees which do not come to members of the Embassy Club, are held by persons who run the club as a club, giving entertainments on the premises of the club and deriving a profit from the entertainments so given. Here, apparently, is a paid orchestra provided by the proprietors of the club and dancing takes place—I do not know how often, but frequently—and the members of the club purchase the advantages of the club, including the advantage of listening to the orchestra and dancing to its strains, not by making a payment on each occasion on entering the club, but by

A paying an entrance fee and an annual subscription, and as between themselves the members of the club and the defendants, who run the club, it appears to me that they are in very much the same position as that in which persons who subscribe to a season of grand opera and get their boxes or their stalls for the season, are with relation to the entrepreneur who runs the opera. With regard to the Embassy Club there has to be an election of the members of the club, but, in my opinion, B the defendants are and have been inviting a portion of the public to come in and be elected members of the club in exchange for the subscriptions which they will thereupon pay to the defendants to provide them with an orchestra to which they can dance as well as other advantages. Therefore, I think in this case, when the orchestra is playing music which is the copyright of the plaintiffs, you do have a real performance of the tune in question, played for profit to a portion of the public C who have paid for the privilege by an annual subscription and an entrance fee. To my mind, that is clearly in derogation of the sole right of public performance given to the author, and likely to operate in very serious derogation of the pecuniary profit that may be derived from it.

That appears from the evidence which was given in the case, but of course that evidence alone would not be sufficient, because, although the plaintiffs might be D injured if that which the defendants were doing was in derogation of the monopoly given to them, the mere pecuniary damage could not in itself be sufficient to constitute a cause of action. I associate myself with the views expressed by the Master of the Rolls, but I wish in addition to lay very great stress upon this clear feature in the present case, namely, that there has been an invitation to members of the public able to become members of the club upon the terms of getting in E return for their subscription the performance of music, so that you do really get an invitation to the public to listen for a payment, though the payment is an annual one. Beyond that, the members of the public who have become members of the club by passing through the not very severe test which is imposed have also the privilege of bringing in other members of the public upon whom no test is imposed, but who happen to be their friends and are invited on any particular evening. I F am not sure whether this was mentioned below, but, though there was a single performance of this music on the night in question, I suppose the right which is claimed would be to play this tune, among other tunes, on any night on which there was dancing at the club and so long as the comparative freshness of the tune would be an inducement to persons to come and dance at the club. If that were so, it seems to me that there again you find a very serious derogation of the G plaintiffs' right because the tune is liable to be played until its freshness has worn off, and, therefore, a very large part of the value of the composition to the plaintiffs has disappeared. For these reasons I agree that the appeal should be dismissed.

LAWRENCE, L.J.—I agree. It is not disputed by the defendants that the question whether any particular performance is a performance in public within H ss. 1 and 2 of the Copyright Act, 1911, is a question of fact. EVE, J., properly treated this case as one of fact and held that the performance complained of was a performance in public. In arriving at that decision the learned judge has, in my opinion, taken into consideration all the relevant factors, and I entirely agree with the decision which he has reached. Therefore this appeal fails.

Solicitors: *Whitelock & Storr; Pollock & Co.*

I [Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

A

SINGLETON ABBEY (OWNERS) *v.* PALUDINA (OWNERS). THE PALUDINA

[HOUSE OF LORDS (Viscount Dunedin, Lord Sumner, Lord Phillimore, Lord Carson and Lord Blanesburgh), April 20, 22, 23, July 8, 1926]

B

[Reported [1927] A.C. 16; 95 L.J.P. 135; 135 L.T. 707;
17 Asp.M.L.C. 117]

Negligence—Defence—Novus actus interveniens—Act of injured person or third party—Act of original wrongdoer putting injured person or third party into situation of alternative danger—Damage passed on by injured person to third party to save himself—Right of third party to recover against original wrongdoer—Shipping—Collision—Right of third ship to recover against original wrongdoer.

C

If the act which causes the injury for which damages are sought to be recovered in an action for negligence is a human act, either of the injured person himself or of some third party, this *novus actus interveniens* will break the chain of causation unless the act of the original wrongdoer has put the injured person, or, it may be, a third party into such a situation of alternative danger that it is uncertain whether it would be better for him to act or not to act, in which circumstances his not unnatural action does not break the chain of causation. Where, therefore, a man by a wrongful act has caused damage or impending damage to either the person or property of another, and that other can only save himself by passing on the injury to a third, this third party can recover for his damage from original wrongdoer.

D

Vessels A., B., and C. were moored inside a harbour. A. broke from her moorings and came into collision with B. In trying to get clear of B. with the assistance of a tug, A. fouled the anchor cables of B., thereby releasing her from her moorings and causing her to collide with C., whose moorings were also cut as the result of the collision. B. and C. then got up steam in order to proceed into positions of safety, but C., not having enough steam to get clear, was struck by B., with the result that she sank.

E

Held (by LORD SUMNER, LORD CARSON and LORD BLANESBURGH, VISCOUNT DUNEDIN and LORD PHILLIMORE dissenting): that the conduct of C. in relation to the second collision with B. constituted a *novus actus interveniens*, and that A., not having directly caused the injury, was not liable for the loss of C. by reason of her second collision with B.

F

Decision of the Court of Appeal, [1925] P. 40, affirmed.

G

Per LORD SUMNER: the proposition laid down in *Adams v. Lancashire and Yorkshire Rail. Co.* (1) (L.R. 4 P.C. at p. 742) that if a person is put by the negligence of another party in a situation of alternative danger, that is to say, that he will be in danger by remaining still and in danger if he attempts to escape, then, if he attempts to escape, any injury that he may sustain in so doing is a consequence of the other party's negligence, refers to personal danger; it has not been extended to danger to property.

H

Notes. Referred to: *Canadian Pacific Rail Co. v. Kelvin Shipping Co.* (1927), 138 L.T. 369; *The Kite*, [1933] All E.R. Rep. 234; *The Stranna*, [1937] 2 All E.R. 383; *The Millie*, [1940] P. 1; *Smith v. Harris*, [1939] 3 All E.R. 960; *The Oropesa*, [1943] 1 All E.R. 211; *Summers v. Salford Corpn.*, [1943] 1 All E.R. 68; *Temple Bar (Owners) v. Guildford (Owners)*, *The Guildford*, [1956] 2 All E.R. 915.

I

As to the defence of *novus actus interveniens*, see 23 HALSBURY'S LAWS (2nd Edn.) 594, 595; and as to imminent personal risk, see *ibid.* 719, 720. As to negligence in collision actions, see 30 HALSBURY'S LAWS (2nd Edn.) 819 et seq. For cases see 36 DIGEST (Repl.) 40–45, 158, 159, and 41 DIGEST 768 et seq.

A Cases referred to:

- (1) *Adams v. Lancashire and Yorkshire Rail. Co.* (1869), L.R. 4 C.P. 739; 38 L.J.C.P. 277; 20 L.T. 850; 17 W.R. 884; 36 Digest (Repl.) 911, 1010.
- (2) *The Mellona* (1847), 3 Wm. Rob. 7; 5 Notes of Cases, 450; 9 L.T.O.S. 474; 11 Jur. 783; 166 E.R. 865; 36 Digest (Repl.) 162, 859.
- (3) *The Pensher* (1857), Sw. 211; 29 L.T.O.S. 12; 166 E.R. 1100; 41 Digest 770, 6255.

B

- (4) *Admiralty Comrs. v. Volute (Owners), The Volute*, [1922] 1 A.C. 129; 91 L.J.P. 38; 126 L.T. 425; 38 T.L.R. 225; 66 Sol. Jo. 156; 15 Asp.M.L.C. 530, H.L.; 41 Digest 780, 6417.
- (5) *The City of Lincoln* (1889), 15 P.D. 15; 59 L.J.P. 1; 62 L.T. 49; 38 W.R. 345; 6 Asp.M.L.C. 475, C.A.; 36 Digest (Repl.) 40, 196.

C

- (6) *British Columbia Electric Rail. Co., Ltd. v. Loach*, [1916] 1 A.C. 719; 85 L.J.P.C. 23; 113 L.T. 946, P.C.; 36 Digest (Repl.) 182, 981.
- (7) *Scott v. Shepherd* (1773), 2 Wm. Bl. 892; 3 Wils. 403; 96 E.R. 525; 36 Digest (Repl.) 23, 100.

D

- (8) *Jones v. Boyce* (1816), 1 Stark. 493, N.P.; 36 Digest (Repl.) 23, 101.
- (9) *Collins v. Middle Level Comrs.* (1869), L.R. 4 C.P. 279; 38 L.J.C.P. 236; 20 L.T. 442; 17 W.R. 929; 36 Digest (Repl.) 44, 237.
- (10) *Whalley v. Lancashire and Yorkshire Rail. Co.* (1884), 13 Q.B.D. 131; 53 L.J.Q.B. 285; 50 L.T. 472; 48 J.P. 500; 32 W.R. 711, C.A.; 36 Digest (Repl.) 289, 366.
- (11) *Greyvensteyn v. Hattingh*, [1911] A.C., 355; 80 L.J.P.C. 158; 104 L.T. 360; 27 T.L.R. 358, P.C.; 36 Digest (Repl.) 323, 678.

E

- (12) *The Bywell Castle* (1879), 4 P.D. 219; 41 L.T. 747; 28 W.R. 293; 4 Asp.M.L.C. 207, C.A.; 36 Digest (Repl.) 190, 1006.
- (13) *Weld-Blundell v. Stephens*, [1920] A.C. 956; 89 L.J.K.B. 705; 123 L.T. 593; 36 T.L.R. 640; 64 Sol. Jo. 529, H.L.; 36 Digest (Repl.) 201, 1064.

Appeal from an order of the Court of Appeal (BANKES, SCRUTTON and ATKIN, L.JJ.) reported [1925] P. 40, in an action for damage by collision.

F

The plaintiffs were the owners of the steamship *Singleton Abbey*, 2,324 tons gross, and 1,429 tons net register, 303 ft. in length, and the defendants were the owners of the steamship *Paludina*, 5,818 tons gross and 341 tons net register, 425 ft. in length. The facts appear fully from VISCOUNT DUNEDIN's opinion. The Court of Appeal held, reversing the decision of SIR HENRY DUKE, P., that there was no presumption of law or fact that any damage arising to a ship subsequent to a collision must be deemed to be the result of that collision unless the defendant proved the contrary, and that the observations in *The Mellona* (2) and *The Pensher* (3), in which the contrary was suggested by Dr. Lushington, must be taken to be confined to cases where the damage that followed the collision was of such a kind, and followed so immediately—e.g., stranding—that, unless it was proved that there was some other cause, it was to be assumed that the damage

G

directly resulted from the collision. In the result the court held that the *Singleton Abbey* was liable for the loss of the *Sara*. The owners of the *Singleton Abbey* appealed.

H

Sir John Simon, K.C., Dunlop, K.C., and Lewis Noad for the appellants.

Butler Aspinall, K.C., Stephens, K.C., and Langton, K.C., for the respondents, the owners of the *Paludina*.

I

The House took time for consideration.

July 8. The following opinions were read.

VISCOUNT DUNEDIN.—There is only one question in this appeal, but in order to make that question intelligible it is necessary to tell the story of the circumstances antecedent to the incident which raises the question. As to these preliminary circumstances there were at one time controversies, but these controversies have been quieted by the decision in which the learned President and the Court of Appeal have agreed. The question that remains is alone the point of difference.

On the evening of Nov. 21, 1922, the following vessels took up their position on the quay in the harbour of Valetta, Malta. Their sterns were secured by moorings attached to bollards on the quay; their stems were secured by anchors. Beginning from left to right as a person standing on the quay would see them, they were the *Paludina*, the respondents' steamship; the *Singleton Abbey*, the appellants', the *Sara*, and then there were other vessels which do not come into the story. During the night the wind freshened and became very strong—not exactly what by seamen would be called a gale, but causing a commotion of waves and what is termed a "scend" in the harbour. The direction of the wind was such as would blow the vessels, supposing them to be free, along the quay and on to a lee shore. At 8 a.m. something went wrong with the moorings of the *Paludina*. Her anchors dragged, her moorings to the stern paid out, and she fell with her starboard beam on the port beam of the *Singleton Abbey*. The effect of the actual collision was not serious; the *Singleton Abbey* had been securely moored, and she was able not only to maintain her own position, but also to support the weight of the *Paludina* leaning against her. At 11 a.m., or thereby, the *Paludina* was minded to get out. For that purpose she secured the services of two tugs and got up steam to proceed to go forward. Unfortunately, she and the tugs between them made a very bad job of the proceeding; one of the tugs fouled her own propeller with a rope and probably became inefficient; at any rate, the result was that the *Paludina* scraped along the port side of the *Singleton Abbey* without doing much damage, and then getting past her stem trod on the ropes which secured the *Singleton Abbey* to her anchors, shortened them and tore the *Singleton Abbey* away from her shore moorings. The *Paludina* then lumbered out of the way, but remained immediately in proximity to the *Singleton Abbey*, and did not finally get off for some time, in the course of her eventual progress fouling another ship. The effect of the tearing away of the shore moorings of the *Singleton Abbey* was that she fell down on her next neighbour, the *Sara*. The *Sara* was a small boat, and the impact of the *Singleton Abbey* tore her from her moorings. The actual collision did not do much damage. About twenty minutes passed, and then the *Sara*, which had got up steam and was struggling to get out, fell down from her anchors alongside the *Singleton Abbey*. The *Singleton Abbey* all this time was using her engines to prevent herself being driven on the lee shore. The *Sara* scraped along her side, and as she passed came into contact with the propeller of the *Singleton Abbey*, damaging it by breaking off the points. The propeller avenged itself, for it cut such a hole in the *Sara* that she shortly thereafter sank.

The present action was raised by the *Singleton Abbey* against the *Paludina*. The *Paludina* made several defences, such as that the *Singleton Abbey*, having come in after her, had given her a foul berth, and also by denying that she had committed any fault in herself breaking away. All these defences were repelled by the learned President, and the Court of Appeal agreed with him. It is, therefore, no longer in dispute that the *Paludina* was in fault in breaking away from her moorings and causing the first collision with the *Singleton Abbey*, and that she was also in fault in treading on the moorings of the *Singleton Abbey* and tearing her from her shore moorings and sending her down on the *Sara*, thus causing the second collision. The whole trouble is as to the third collision and the damage to the crew. The learned President held this was the direct consequence of the act of the *Paludina* and held her liable. The Court of Appeal disagreed and held that the collision was not due to the original fault of the *Paludina* but was due to a novus actus interveniens. This is the question, and the only question, before your Lordships. BANKES, L.J., states it very clearly and distinctly:

"Here the case for the plaintiff is this: The chain of causation is quite complete. The *Singleton Abbey* and the *Sara* were both turned adrift by the negligence of those in charge of the *Paludina*. There is no novus actus interveniens; the chain is quite complete, and, therefore, the view taken by the President is right. The suggestion for the defendants upon the evidence

- A given by the plaintiffs, is this: On your own showing there are two links wanting, and the links are these. True, the *Sara* was turned adrift by the negligence of the *Paludina*, our vessel, but, being turned adrift she was a free agent. The inference to be drawn from the evidence is that her steam was up and she could have gone to any part of the harbour she liked, and have been quite safe, and altogether out of the way of the *Singleton Abbey*, and you cannot say that
- B the chain of causation is complete when you find the *Sara* having this opportunity of which, through a want of proper skill and proper seamanship, she did not avail herself. That, I understand, is the case of the appellants with regard to the *Sara*. Then they say: There is another link in the chain missing, and the missing link is to be found—or the place where the link ought to be but is missing from—is found in the action of the master of the *Singleton Abbey*, because, again, after this interval he was in the position which I have indicated, and he had steam up. He saw, and had an opportunity for twenty minutes of realising, the position in which the *Sara* was. He realised that the *Sara* was coming down upon him; he was told by the second officer that the engines ought to be stopped. I had better use his own words about it; he was very frank about it. He was asked this question in cross-examination: ‘The suggestion is made, as I understand it, that you ought to have stopped your engines, or rung them to stop, before you did, so as to avoid hitting the *Sara* with your propeller. What do you say with regard to that?—A. I had to keep my engines going as long as I could because I did not want the wind to take control of my ship. I wanted to have that in my own hands if I could, so I was going to hang on as long as I could. When I thought she was getting dangerously near I stopped the engines, but it apparently must have been a little too late.’ The appellants say that upon that there is a clear break in this chain. They say: The damage of which you complain, was not the result of the original negligence of our vessel, it was due to your captain’s own fault. The respondents answer that by saying: It ought not to be attributed to him as a fault; he was in a position of danger; it was a position in which you had placed him, and it ought not to be attributed to him as a fault or as an act of negligence, and, under those circumstances, the chain is complete. Now, on both these points upon which it is said the chain is not complete, of course the matter is one very largely of the right and proper thing to do in the particular circumstances; and that is a matter upon which we should naturally take the advice of our assessors. I have asked them the question whether, assuming that the *Sara* had steam up—and I assume that for the purposes of the question—were those in charge of the *Sara* guilty of a want of reasonable care and good seamanship in not keeping the *Sara* clear of the *Singleton Abbey*? They give a reasoned answer, and the result of their reasoning is that they say ‘No’ to that. So whether the issue is upon the plaintiffs or the defendants is immaterial. It seems to me that the suggested break in the chain does not
- H exist.”

I That is perfectly distinct, and SCRUTTON, L.J., as to this agrees with him. It is true that ATKIN, L.J., scarcely takes the same view. He states that he cannot see why the *Sara* should have come into contact with the propeller blades of the *Singleton Abbey* at all. It seems to me that it is absolutely necessary to make up one’s mind as to the first question before one considers the second, and one’s mind must be made up yea or nay; it cannot be left as a question in abeyance. Now, I take it that the reason why the President, BANKES and SCRUTTON, L.JJ., and both sets of assessors agreed that the action of the *Sara* was not *novus actus interveniens* was that she was set adrift by the wrongful action of the *Paludina*, who knocked the *Singleton Abbey* against her. The argument for the *Sara* was that after that she was a free agent, but that is not so. She was free in the sense of being unmoored, but she was still struggling to extricate herself from the position—a very dangerous one—in which the *Paludina* had put her, and as soon as one

comes to the conclusion, as all these learned persons did, that there was no fault on the part of the *Sara* in doing as she did, the result is inevitably that the chain of causation from the original fault remains unbroken. A

Having fixed that, and, as I say, being bound to fix it yea or nay, immediately we come to the last question. Here I quote again from BANKES, L.J., and SCRUTTON, L.J., with doubts, and ATKIN, L.J., without doubts, agree with him. The assessors also agree with the learned lords justices: B

"The other question is one, again, upon which we asked their opinion. It was this. In the circumstances in which he was placed, was the master of the *Singleton Abbey* guilty of a want of reasonable care and good seamanship in not stopping his engines in time to prevent the damage by the *Sara* striking the propeller? And their answer is Yes. After having heard the arguments of counsel for the appellants upon the point, in that opinion, so far as I am able to give an opinion, I entirely concur." C

As regards the assessors, who in this matter differed from the assessors of the President, your Lordships have agreed with me that it was not a question for assessors at all, and consequently we did not consult our assessors on the subject. My Lords, it seems to me that once you have fixed that the action of the *Sara* in coming down on the *Singleton Abbey* was not due to fault of her own, but was, therefore, necessarily the sequel of the original wrongful action of the *Paludina*, the question which arises on the action of the *Singleton Abbey* is rather shifted from the domain of novus actus interveniens to that of contributory negligence. It is just the same as if the *Paludina* herself had come down along the side of the *Singleton Abbey*. Here there is ample authority. I will take one of the latest and most authoritative, the judgment of LORD BIRKENHEAD, L.C., in *The Volute* (4). The learned Lord says this ([1922] 1 A.C. at p. 136): D

"At the other end of the chain A.'s negligence makes the collision so threatening that though by the appropriate measure B. could avoid it, B. has not really time to think, and by mistake takes the wrong measure. B. is not held guilty of any negligence and A. wholly fails." E

Here, if I am right so far, the position of danger occasioned by the *Sara* coming down by the side of the *Singleton Abbey* has been directly occasioned by the *Paludina*. Is it to be held a fault on the part of the *Singleton Abbey* that the captain did not stop his engines five seconds sooner? I do not think we should so hold. I think he was put in a position of extraordinary difficulty; he acted for the best. I should like to add that even supposing he had stopped his engines, doubtless the injury to the *Sara* would have been less grievous—that damage is not in question in this case—yet the end of his propeller, especially if it was a four-blade propeller, would probably have been injured all the same. That, however, is only a remark. As it is, I think the master of the *Singleton Abbey* committed no fault, and, consequently, I agree with the result reached by the learned President, and think that the appeal should be allowed. F

LORD SUMNER.—In order to succeed as to the fourth collision—i.e., the second with the *Sara* when she was holed by the revolving propeller of the *Singleton Abbey*—the plaintiffs must prove that the *Paludina's* negligence was the cause of it. The injury must have been caused directly, though not necessarily solely, by that negligence. If the *Paludina* merely created the occasion, upon which this injury was inflicted, they fail. G

I take the clear and candid evidence of the master of the *Singleton Abbey*. He says, in effect, that he miscalculated by a few seconds the time when the *Sara*, moving along his ship's side and in contact with it, would be drawn under his counter by the revolutions of his propeller, and that he kept it revolving those few seconds too long. He clearly means, and he is right, that, if he had signalled his engines to stop that much earlier, the accident would not have happened. There would have been no contact or, at any rate, no injurious contact of the *Sara* with H

A his screw. Neither would any misfortune have happened to his own ship. The situation was one of some difficulty, in the sense that it required nice judgment, prompt decision, and rapid action, but it was in no way analogous to what is called the "agony of the collision"—that is, of the first three collisions or any of them—it was in no way analogous to cases where, as the direct result of a collision with one vessel, a ship is forced into contact with another or has perforce to let herself drive into such contact. The situation was in no respect uncommon; the weather was not such as to tie a captain's hands, and he was at his post, in broad daylight, with steam up and in charge of an undamaged ship. He could do as he chose and he did so, none the less that he had to decide and act quickly. If ever a captain was a free agent, Captain Hughes was. If it is to be said that he was not, it must simply be because the presence and actions of neighbouring ships had set him a nice problem to solve. If so, few ships moving in harbours are ever free agents. The *Paludina* is not liable for mere negligence, but only for negligence causing damage. The *Singleton Abbey* herself is the cause of the damage she has suffered, not merely if her captain's action brought it about negligently. She will be the cause of that damage, if her captain, freely and as the direct consequence of his own decision, brought it about at all. This aspect of the matter does not seem to have been called to the attention of the learned President, such was the complexity of the whole case, and so subordinate was this particular collision. Now that it is the only remaining matter in issue, the question becomes crucial.

Two answers have been attempted to this obvious proposition. It is said, first of all, that the captain's action, though free and voluntary, was not the sole cause of this collision, because the *Singleton Abbey* was then dragging her anchors. It is said that they were dragging because the negligence of the *Paludina*, some twenty minutes before, had loosened them in the ground or torn them from their hold, and that accordingly the *Singleton Abbey* was pro tanto a crippled ship, which could only be kept from further disaster by such handling as was possible to her in that condition, namely, by steady use of her engines. If this were so, *The City of Lincoln* (5) would apply. In that case the captain, it is true, steered his own course, as every navigator must, but he steered it wrong because his means of observation, the log, &c., had been carried away in the collision. The hand of the original wrongdoer was still heavy on his ship and his own navigation was not the sole human agency determining her fortunes. But for this the decision must have been otherwise: see also *British Columbia Electric Rail. Co. v. Loach* (6). I ask, then, have the plaintiffs made out that the *Paludina's* negligence was still operating, as a legal cause of injury, when Captain Hughes made his miscalculation, or, in other words, was it proved that the anchors of the *Singleton Abbey* were dragging then? I think this has not been proved. We hear of this dragging of her anchors at the time, when the *Paludina* fell down on the *Singleton Abbey's* cable and also burst her moorings, but Captain Hughes describes the satisfactory position into which his ship had got before the *Sara* subsequently bore down upon him, in language which is quite inconsistent with the anchors dragging then. Naturally, lying as near to a shoaling shore as he did and in such a wind as there was, with his stern moorings gone and with other vessels in like difficulties near him, he kept using his engines as required to keep control, but, as he says: "I was all right, once I got her head to wind—quite satisfied then." The subsequent action of the *Sara* forced him to port and brought him nearer to the shore and with the wind more on his broadside. He then had to put his engines full ahead to try to get up to windward again, but all this and all his account of it is inconsistent with his anchors continuing to drag still, or causing him any apprehension or compelling him to any particular action. I do not mean that Captain Hughes was negligent, but that he miscalculated his action. Still his action was his own. No part of it was a "natural" consequence of the *Paludina's* action, except in a sense that would make negligence on his part also a "natural" consequence. His action was wilful, and, though rapid, was deliberate. The *Paludina's* negligence did not make him take it. Cause and consequence in such a matter do not depend on the question

whether the first action, which intervenes, is excusable or not, but on the question whether it is new and independent or not.

With the greatest respect I am not able to accept either the proposition, that the *Paludina* put the *Singleton Abbey* in such a position of alternative danger, that her captain's "not unnatural" action does not break the chain of causation between the *Paludina's* bad management and the *Singleton Abbey's* revolving propeller, or the proposition that "when a man by his wrongful act has caused impending damage to the property of another and that other can only save himself by passing on the injury to a third, this third person can recover his damage from the original wrongdoer." As to the first, "alternative danger," as used in *Adams v. Lancashire and Yorkshire Rail. Co.* (1), refers to personal danger. It has not been extended to danger to property. *Adams's Case* (1) was one in which it was held that no situation of alternative personal danger had arisen and that expression referred to *Scott v. Shepherd* (7) and *Jones v. Boyce* (8), cases where, in a situation of imminent peril caused by the wilful or negligent act of the defendants, the plaintiff has taken instant action on the first alarm. Jones was presented of a sudden with the choice "to jump or not to jump"—he chose automatically and without reflection. *Scott v. Shepherd* (7) was the same. I cannot but think that, if it had been suggested to Captain Hughes that he acted like Mr. Jones, his repudiation would have been emphatic. If anything put him in danger, it was the action of the *Sara*, taken not because she was a helpless instrument in the *Paludina's* careless hands, but because she got up her anchor before she had enough steam on her main engines. The relevancy of the second proposition would arise if the *Sara* sued the *Paludina* for the damage by the *Singleton Abbey's* propeller, which sank her, but it leaves untouched the question whether the *Sara* might not equally recover from the *Singleton Abbey*, nor does it solve the problem how the *Singleton Abbey* can recover from the *Paludina* for injury to her own propeller, which her captain, and not the *Paludina's*, kept revolving a little too long. *Collins v. Middle Level Comrs.* (9) I have long doubted and should, when it becomes material, desire to re-consider with much care. The report shows that it was a somewhat summary decision. It is at any rate difficult to reconcile with *Whalley v. Lancashire and Yorkshire Rail. Co.* (10), nor do I think that the principle of *Greyvensteyn v. Hattingh* (11) can be applied to support it, but it may be that it can be justified by treating the commissioners' flood-water as a cause of danger, operating by their negligence simultaneously and concurrently with the action of the parties who turned it off their own land on to that of Collins, in which case the commissioners would not escape liability for their continuing wrong merely because third parties had given a particular direction to the dangerous element which they had let loose and had kept unrestrained in the neighbourhood. In any case it is remote from the present issue. The second answer connects the action of the *Singleton Abbey* with the *Paludina* by way of the compelling effect which the negligent action of the *Paludina* is supposed to have had upon the behaviour of the *Sara*. It puts the innocence or fault of the *Sara* in the forefront. It first asks: "Was the action of the *Sara* novus actus interveniens?" And having answered this in the negative, it goes on to the action of the *Singleton Abbey*, and asks: "Was that action contributory negligence?" In this view, if the *Sara* was not to blame, it is said to follow inevitably that the chain of causation from the *Paludina's* original fault to the *Sara's* contact with the *Singleton Abbey* remains unbroken. Her action was necessarily the signal of the original wrongful action of the *Paludina*, and the *Singleton Abbey*, finding herself suddenly in a difficult place, cannot be convicted of contributory negligence. Her captain committed no fault and, if he committed none, all the fault must be the *Paludina's*.

In view of these considerations it becomes necessary to come to a decision as to the *Sara*, but the true issue is: "Aye or no, has the *Singleton Abbey* proved the *Sara* to have been free from blame, and, therefore, a mere link in the chain of causation between the *Paludina's* blunder at 11 a.m. and the error in judgment of

A the captain of the *Singleton Abbey* at 11.20?" The evidence is practically all given by Captain Hughes, and in any view of the matter he certainly does not prove that the *Sara* was free from blame. Obviously he thought that she was in fault, though he spoke of her ironically, and there is much to be said for that view. The *Sara* first of all cut her stern moorings; then she steamed up to her bow anchors; then she got them out of the ground; and then she went astern. What for? If she had steam on her main engines, why did she not steam ahead, as soon as her anchor was up, and get out of the *Singleton Abbey's* neighbourhood? If she had not steam on her main engines, why did she get her anchors out of the ground and go adrift at all? In spite of the *Paludina* and her sins, the *Sara*, as long as she let her bow anchors alone, was safely riding on the starboard bow of the *Singleton Abbey*, and the *Singleton Abbey* was safely anchored clear of the *Sara* relieving any strain on her own anchors by suitable engine action. Captain Hughes was not in any extraordinary difficulty; he could see all the risks to which he was exposed; he had time enough, though short, in which to decide, and without saying he was to blame, he was, on his own showing, just a little too sanguine. There was nothing merely instinctive about his action. It was deliberate and it was almost right. I certainly cannot say that the *Singleton Abbey* proved the *Sara* to have been free from blame, or to have been a mere instrument in the hands of the *Paludina*, and this conclusion prevents me from finding for the *Singleton Abbey* on the second view. Accordingly, I think the appeal fails.

LORD PHILLIMORE.—I agree with VISCOUNT DUNEDIN, who has spoken before me, that the *Sara* cannot be deemed to have been negligent in the matter of the fourth collision in this case, and that the judgment of the learned President (confirmed as it was on this point by the judgment of the Court of Appeal) should stand. I agree also that in respect of the charge of negligence against the master of the *Singleton Abbey*, the judgment of the President was right, and that the Court of Appeal was too severe in finding negligence on his part. I find support for this conclusion in *The Bywell Castle* (12). As the learned lords justices based their judgment in favour of the *Paludina* upon this finding of negligence, it might seem that there was nothing further to be said, and that their judgment must be reversed forthwith. But, in my view, there is still a serious question to be considered. The act of the master of the *Singleton Abbey* in keeping his engines going as the *Sara* was passing down his side, and keeping them going a little too long so that the propeller was still moving when the *Sara* got under his counter, was an act of volition—not automatic, reflex, or without consciousness of what he was doing. And it is a nice question whether this interposition of human agency breaks the chain of causation which connects the original wrongdoing of the *Paludina* with this fourth collision, or as may be otherwise expressed the second and last collision with the *Sara*.

I address myself, therefore, to this point. In the case of a tort or quasi-delict, the wrongdoer is certainly liable for damages not directly produced by his own act but supervening in direct and natural consequence. Since this case was heard, I have looked into a number of the reported authorities and have also perused the speeches of the noble and learned Lords who sat in *Weld-Blundell v. Stephens* (13), and I do not think it necessary to re-state many of the conclusions to which those cases point. Two propositions and two only should, I think, govern our present decision. (a) If the action which brings the injury for which damages are sought to be recovered is human action, either of the injured person himself or of some third person, this novus actus interveniens will break the chain of causation unless (b) the act of the original wrongdoer has put the injured person, or it may be a third party, into such a situation of alternative danger that it is uncertain whether it would be better for him to act or not to act. His not unnatural action in such circumstances does not break the chain of causation. As LORD ELLENBOROUGH says in *Jones v. Boyce* (8):

"It is sufficient if he was placed by the misconduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap or to remain at certain peril."

And as MONTAGUE SMITH, J., says in *Adams v. Lancashire and Yorkshire Rail. Co.* (1):

"If the negligence of a railway company puts a passenger in a situation of alternative danger, that is to say, if he will be in danger by remaining still and in danger if he attempts to escape, then, if he attempts to escape, any injury he may sustain in so doing is a consequence of the company's neglect."

In *The City of Lincoln* (5) the master of a ship seriously injured by a collision and reasonably and properly making for the Thames, being deprived of the ordinary helps to navigation, made a mistake in his course and ran the ship aground, and it was held by the Court of Appeal that this grounding might be deemed a natural consequence of the collision, or, as it is sometimes expressed, a direct and natural consequence. It is true that LORD ESHER, M.R., in that case expressed himself as not intending to carry the principle so far, but, if the details of the case be looked into, it would be seen that he only arrived at his conclusion of fact by accepting this very principle. LINDLEY, L.J., in the same case, says:

"We have then to consider what is the meaning of 'the ordinary course of things.' Counsel has asked us to exclude from it all human conduct. I can do nothing of the kind. I take it that reasonable human conduct is part of the ordinary course of things. So far as I can see my way to any definite proposition I should say that the ordinary course of things does not exclude all human conduct, but includes at least the reasonable conduct of those who have sustained the damage, and who are seeking to save further loss."

Then he, too, quotes *Jones v. Boyce* (8). LOPES, L.J., thinks he has done enough when he has decided that there was no want of skill on the part of those on board the injured ship. The second proposition, (b), is that where a man by wrongful act has caused damage or impending damage either to the person or to the property of another, and that other can only save himself or his property by passing on the injury to a third, this third person can recover for his damage from the original wrongdoer. *Scott v. Shepherd* (7) is the case of danger to person, and *Collins v. Middle Level Comrs.* (9) is a case of danger to property.

Applying these principles to the present case, it would seem that the master of the *Singleton Abbey* took the action which is now complained of, or which is now said to break the chain of causation, when he was in a situation of alternative danger, and that he took a reasonable, though as it happened in the end an unfortunate, step, and that, if he thereby injured his propeller and damaged his neighbour the *Sara*, he did so in a legitimate attempt to transfer the risk from his own ship to another. After all, I cannot put the point more simply than by saying that I ask myself whether it was a natural thing for the master of the *Singleton Abbey* to do to keep his engines going; and as I think it was, and that the *Sara* was not negligent, the consequence was a natural consequence of the first mismanagement of the *Paludina*. Therefore, I think that the conclusion which the Court of Appeal arrived at was wrong, and that the judgment of the President should be restored.

LORD CARSON (read by LORD BLANESBURGH).—I agree with VISCOUNT DUNEDIN that in considering the question whether the third collision which led to the sinking of the *Sara* was due to the original fault of the *Paludina* or to a novus actus interveniens, one must first make up one's mind whether the *Sara* in doing what she did, was, or was not, guilty of any fault upon her part. Upon this point, ATKIN, L.J., puts the case very clearly. He says,

"Here are two ships set loose in harbour by the admitted negligence of the defendants, but twenty minutes afterwards one of the ships comes into collision

A with the other ship and the mere collision itself practically causes hardly any damage at all. The material question is whether on the second contact, it was the result of the collision that the *Sara* was sunk by coming into contact with the moving propeller of the *Singleton Abbey*. In this case I am bound to say that, speaking for myself, I can see no evidence, first of all, that the collision caused the *Sara* to drop down upon the *Singleton Abbey*. Indeed, I think that

B that is the result of the learned President's finding, so far as I can see, because he says he has consulted the Elder Brethren and they tell him that in the state of things he has described they cannot say the *Sara* was to blame for this collision, but they cannot tell him why it probably was the *Sara* was not able to avoid the propeller blades of the *Singleton Abbey*."

C I cannot agree with the noble Viscount that there was no fault on the part of the *Sara* in doing as she did and that the chain of causation for the original fault remains unbroken. As LORD SUMNER points out, the evidence on this point is practically all given by Captain Hughes, the master of the *Singleton Abbey*, and shortly amounts to this, that if she had made proper use of her steam power she ought not to have fallen down upon the *Singleton Abbey*, as after the first impact with the *Sara*, when she shifted ahead, she was clear of the *Singleton Abbey* for

D fully a quarter of an hour. I may add that no evidence was called for the *Sara*, and I find it impossible to come to the conclusion, as LORD SUMNER has said, "that the *Singleton Abbey* proved the *Sara* to be free from blame or to have been a mere instrument in the hands of the *Paludina*," and I cannot, therefore, hold that the chain of causation for the original fault remains unbroken. In these circumstances I am of opinion that this appeal fails. I think, however, it is right that I should

E state that as regards the action of Captain Hughes in keeping his engines going and thereby causing the propellers to revolve for a few seconds too long, I am in agreement with the opinion expressed by VISCOUNT DUNEDIN.

LORD BLANESBURGH.—I am in entire agreement in this case with my noble and learned friend LORD SUMNER, whose opinion I have had the advantage of reading and considering. It may be that when he entered the witness-box in this suit the influence of the proceedings at Malta between the *Sara* and the *Singleton Abbey*, in which the captain of the *Singleton Abbey* gave evidence, remained strong upon him. Whether so or not, however, it was here his task to prove, if he truthfully could, that the *Sara* was free from blame for her second collision with the *Singleton Abbey*. He made no effort to prove anything of the kind. His view of the conduct

G of the *Sara*, in relation to that collision, quite plainly was that it could not be rationally explained. Having the whole harbour to manœuvre in, she, twenty minutes after the first of the two collisions, raised her anchors, either without having steam up at all, or with steam up, having enough, not using it. If she had steam available—as either was or should have been the case—there was no reason why she should have fallen upon the *Singleton Abbey*. On this Captain Hughes is

H quite express, and, as to the conduct of the *Sara*, his is the only evidence adduced. In these circumstances, my Lords, so far from the *Singleton Abbey* proving that the *Sara* was free from blame in relation to this second collision, and the damage to the *Singleton Abbey* resulting therefrom, all the *Singleton Abbey* has succeeded in suggesting, as my noble friend has so clearly shown, is that this damage is due to her own direct action in the working of her engines, coupled with the action or

I want of it on the part of the *Sara*, which, whether or not grossly negligent, was at any rate something for which the *Paludina* was in no way responsible, except in the sense that her original fault may have created the occasion. As this clearly is not enough for the *Singleton Abbey*, it follows that, in my judgment, this appeal of hers fails.

Appeal dismissed.

Solicitors: *Downing, Middleton & Lewis, for Downing & Handcock, Cardiff; Waltons & Co.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

LAGAN NAVIGATION CO. v. LAMBEG BLEACHING, DYEING AND FINISHING CO., LTD.

[HOUSE OF LORDS (Viscount Dunedin, Lord Atkinson, Lord Shaw, Lord Wrenbury and Lord Carson), October 21, 22, 25, November 25, 1926]

[Reported [1927] A.C. 226; 96 L.J.P.C. 25; 136 L.T. 417;
91 J.P. 46; 25 L.G.R. 1]

Negligence—Statutory powers—Exercise—Liability of undertakers—Option whether to exercise powers in manner hurtful to or innocuous to other persons.

Nuisance—Abatement—Abatement without notice—Need of absolute necessity to prevent special injury and performance without unnecessary damage.

The principle that if undertakers have statutory powers which they may at will exercise in a manner hurtful to or innocuous to other persons they will be held to be guilty of negligence if they choose the former mode of exercising their powers and not the latter depends on their having an option as to which of two possible courses they would select for the exercise of their powers and the discharge of their statutory duties. Where they have no option they cannot be held liable for damage caused by such exercise or discharge.

The abatement of a nuisance without notice having been given to the person alleged to be committing it is a remedy which the law does not favour, and its wrongful exercise destroys any right of action in respect of the nuisance. Such an abatement, to be justifiable, must be absolutely necessary to prevent a special injury, and no unnecessary damage must be done.

Notes. Referred to: *Robins & Son, Ltd. v. Minister of Health, Re Brighton (Everton Place Area) Housing Order*, 1937, [1938] 4 All E.R. 446; *Sedleigh-Denfield v. O'Callagan*, [1940] 3 All E.R. 349; *Tutin v. Northallerton R.D.C.* (1947), 91 Sol. Jo. 383.

As to powers and duties of a canal company, see 27 HALSBURY'S LAWS (2nd Edn.) 330 et seq.; and for cases see 38 DIGEST 394 et seq., 412 et seq.

Cases referred to:

- (1) *Geddis v. Bann Reservoir Proprietors* (1878), 3 App. Cas. 430, H.L.; 38 Digest 25, 137.
- (2) *Bligh v. Rathangan River Drainage District Board*, [1898] 1 I.R. 205; 38 Digest 27, t.
- (3) *Earl of Lonsdale v. Nelson* (1823), 2 B. & C. 302; 3 Dow. & Ry.K.B. 556; 2 L.J.O.S.K.B. 28; 107 E.R. 396; 36 Digest (Repl.) 303, 486.
- (4) *Colchester Corp'n. v. Brooke* (1846), 7 Q.B. 339; 15 L.J.Q.B. 59; 5 L.T.O.S. 192; 10 J.P. 217; 9 Jur. 1090; 115 E.R. 518; 36 Digest (Repl.) 303, 491.
- (5) *Campbell Davys v. Lloyd*, [1901] 2 Ch. 518; 70 L.J.Ch. 714; 85 L.T. 59; 49 W.R. 710; 17 T.L.R. 678; 45 Sol. Jo. 670, C.A.; 36 Digest (Repl.) 303, 485.
- (6) *Dimes v. Petley* (1850), 15 Q.B. 276; 19 L.J.Q.B. 449; 16 L.T.O.S. 1; 14 J.P. 653; 14 Jur. 1132; 117 E.R. 462; 36 Digest (Repl.) 303, 492.
- (7) *Roberts v. Rose* (1865), L.R. 1 Exch. 82; 4 H. & C. 103; 35 L.J.Ex. 62; 13 L.T. 471; 30 J.P. 5; 12 Jur.N.S. 78; 14 W.R. 225, Ex.Ch.; 36 Digest (Repl.) 305, 512.
- (8) *Nield v. London and North Western Rail. Co.* (1874), L.R. 10 Exch. 4; 44 L.J.Ex. 15; 23 W.R. 60; 38 Digest 413, 1027.
- (9) *R. v. Pagham, Sussex Sewers Comrs.* (1828), 8 B. & C. 355; 2 Man. & Ry.K.B. 468; 108 E.R. 1075; sub nom. *R. v. Bognor Sewer Comrs.*, 61 L.J.O.S.K.B. 338; 36 Digest (Repl.) 322, 672.
- (10) *Gerrard v. Crowe*, [1921] 1 A.C. 395; 90 L.J.P.C. 42; 124 L.T. 486; 37 T.L.R. 110, P.C.; 36 Digest (Repl.) 323, 676.

A (11) *Farquharson v. Farquharson* (1741), cited in 3 Bli.N.S. at p. 421; 4 E.R. 1389, H.L.; 44 Digest 27, 201.

Appeal by the plaintiffs from an order of the Court of Appeal in Northern Ireland (MOORE, C.J., and ANDREWS, L.J.), reversing an order of WILSON, J., in the Chancery Division of the High Court of Justice in Northern Ireland.

B The action was brought by the appellants for, inter alia, an injunction to restrain the respondents from entering on the appellants' undertaking and removing the soil and portion of the embankment at the appellants' lock, known as lock 8. The respondents justified their acts as being executed in the abatement of a nuisance caused by the appellants raising their banks at lock 8, and they counter-claimed for an injunction to restrain the appellants from raising their banks so as to cause flooding to the respondents' premises. The Court of Appeal in Northern
C Ireland held that, though the plaintiffs were entitled under their private Acts from time to time to amend their canal works, they were bound in so doing to take reasonable precautions to prevent the defendants' lands from being flooded, that their failure to do so amounted to negligence, and, applying *Geddis v. Bann Reservoir Proprietors* (1), that they were liable for the resulting damage to the defendants. They held further that the defendants' remedy was damages for the
D tortious and negligent acts complained of and not compensation for loss resulting from a legitimate exercise of powers under the statute authorising the plaintiffs' works.

J. B. Matthews, K.C., and *Edmond Warnock* (of the Irish Bar) for the appellants. *Maugham, K.C.*, and *Arthur Black* (of the Irish Bar) for the respondents.

E The House took time for consideration.

Nov. 25. The following opinions were read.

LORD ATKINSON.—This is an appeal from an order of His Majesty's Court of Appeal in Northern Ireland, hereinafter styled simply the Court of Appeal, which reversed an Order of WILSON, J., made by him, sitting in the Chancery Division of the High Court of Justice in Northern Ireland, in an action wherein
F the appellants were plaintiffs and the respondents were defendants. This action was brought by the appellants for, inter alia, an injunction to restrain the respondents from entering on the appellants' undertaking and removing the soil and portion of an embankment at the appellants' lock 8 and for damages. The respondents justified their acts as being executed in the abatement of a nuisance caused by the appellants in raising embankments on the sides of their canal at lock 8
G thereof. They counterclaimed for an injunction to restrain the appellants from raising these banks so as to cause certain lands and premises belonging to them to be flooded. The questions at issue between the parties resolve themselves into these, namely, whether the respondents were, under the circumstances proved to exist, justified, on Jan. 18 and 21, 1924, in digging through and removing certain of the earthen banks built by the appellants on both sides of this lock No. 8,
H situate on the Lagan Canal, which had been formed by the appellants under statutory powers conferred upon them.

Before referring to the several statutes passed by the Irish and English legislatures respectively enabling the persons and bodies therein respectively named to make a passage by water from Lough Neagh to Belfast, the River Lagan being utilised for that purpose, it would be well to refer to the respondents' defence and
I counterclaim to ascertain the grounds upon which they endeavoured to justify their action, especially as the case was decided in the Court of Appeal upon a ground never mentioned in the pleadings or in the notice of appeal, or dealt with at the trial of the action either in evidence or in argument. As I understand it, the ground was that the appellants, though by the several statutes hereinafter referred to authorised to do the particular work complained of, did it negligently, and that, therefore, on the authority of *Geddis v. Bann Reservoir Proprietors* (1) they had no defence to the respondents' counterclaim. MOORE, C.J., said, in delivering judgment in the Court of Appeal:

"The defendants' case really rests on a different footing. It depends not on wrongs flowing from an unauthorised power exercised by the plaintiffs, but on misuse of powers which give the plaintiffs authority to conduct the navigation".

The other judge who heard the appeal, ANDREWS, L.J., said :

"The sole question to be determined appears to me to be whether the plaintiffs, who, as I hold, acted within their statutory powers, were guilty of negligence in the execution of the works complained of."

This involves a minute examination of the evidence given before WILSON, J., in order to discover, if possible, the proof of the negligence relied upon so confidently by the Court of Appeal in Ireland. I think, however, there can be no doubt that it is most unsatisfactory to have a case decided upon a point like this, not raised in the pleadings or apparently dealt with at the trial by the learned judge who presided there, or by the counsel appearing for the parties, or by the witnesses who were examined.

The paragraphs of the respondents' defence and counterclaim on which they mainly rely run as follows :

The defendants were at the time of the matters alleged in the statement of claim and still are the owners and occupiers of certain lands and premises adjoining the said Lagan Canal and the River Lagan. Prior to the dates of the matters complained of in the statement of claim the plaintiff company by their servants, agents, and workmen wrongfully and improperly constructed and maintained certain mounds of earth on the banks on both sides of the said Lagan Canal adjoining the said number 8 lock, the effect of which was to pen back and raise the level of the water in the part of the said canal and River Lagan above the said lock in time of flood, and to throw the water of the canal and River Lagan upon the said lands of the defendants and to occasion serious flooding of the said lands and to cause the water of the said canal and river to flow into and contaminate certain spring water dams and filter beds of the defendants situated upon their said lands. The defendants had before the dates mentioned in the statement of claim frequently requested the plaintiff company to remove the said mounds of earth and to level down the banks of the said canal at the said lock to their original level, but the plaintiff company neglected and refused to do so. On or about the dates mentioned in paras. 2 and 3 of the statement of claim the waters of the said canal and River Lagan were, by reason of the said mounds of earth, wrongfully constructed and maintained as aforesaid by the plaintiff company, penned and forced back and overflowed and flooded the said lands of the defendants and seriously injured the said lands and damaged and contaminated the defendants' said spring water dams and filter beds and occasioned serious loss and damage to the defendants. The defendants, therefore, by their servants and workmen for the purpose of abating the said nuisance and relieving the said flooding and preventing damage to their property removed the said mounds of earth or part thereof on the dates mentioned in the statement of claim doing no more than was necessary for the said purpose, and these acts of the defendants are the trespasses alleged in the statement of claim.

Many statutes were enacted by the Irish Parliament, from the 27 Geo 2, c. 3 downwards, enabling the undertakers therein named to make a passage by water from Lough Neagh to Belfast, the River Lagan being utilised for the purpose. The most important of these statutes is the local Act (54 Geo. 3, c. ccxxxi, s. 2). By it the undertakers therein named were incorporated into a company by the name of the company of undertakers of the Lagan Navigation. It authorised and empowered this company, among other things, to separate part of the said Lagan Navigation between the eighth and ninth locks thereof from the said River Lagan by carrying the said navigation through certain lands of Tullynacross and by diverting the said River Lagan through certain lands in the parish of Lambeg, and to make and complete and maintain a track road for horses from Belfast aforesaid

A to Lough Neagh along the banks of the said navigation and further in such places
as the said company may think fit to make deeper and wider the bed of the River
Lagan of the said navigation, and to repair, maintain, amend, and uphold all such
work and other things as have already been erected, made or done under and by
virtue of the said recited Acts or any of them, and to make, execute, do, and
perform all such works, matters, and things as shall be requisite and convenient
B for completing and maintaining the several canals by this Act authorised to be
made and the navigation thereof, and for supplying the same with water, and the
making, completing, and maintaining the several improvements and other works
above mentioned according to the true intent and meaning of the Act. By s. 17 of
this statute the Act was to continue in force for twenty-one years from December,
1814. The next statute to which it is necessary to refer is 6 & 7 Viet, c. civ, by
C which the appellant company was incorporated. It was entitled "An Act to in-
corporate the persons having claims upon the Lagan Navigation in Ireland, and to
provide for the future management and improvements of the said Navigation",
and by s. 1 it was provided that the parties therein named should be a corporate
body by the name of the Lagan Navigation Co. By ss. 2 and 3 of this statute
D with several other statutes, the last of which was the Ulster Canal and Tyrone
Navigation Act, 1888, it was enacted that the Acts dealing with the Lagan Canal
were to continue in force for 999 years. By s. 2 of this Act of 6 & 7 Viet., c. civ,
the lands, waters, watercourses, bridges, sluices, drains, locks, weirs, banks, dams,
roads, towing paths, and other ways, rights, privileges and advantages whatsoever
which, on and previously to Dec. 24, 1835, had been vested in the Company of
Undertakers of the Lagan Navigation were vested in the Lagan Navigation Co., and
E it was provided that they should thenceforth have, for the purposes of the naviga-
tion, all such powers (except as hereinafter provided, which exception is im-
material to the present appeal and need not be stated) as, on or before Dec. 24, 1835,
belonged to or might rightfully have been exercised by the said Company of Un-
dertakers of the Lagan Navigation. By s. 62 of the Act it was enacted, inter alia, that
F the appellants should at all times keep the said navigation and every part thereof,
and all locks, weirs, banks, dams, roads, towing-paths and other ways belonging or
appertaining thereto, and all works to be thereafter executed for the improvement
thereof, in good substantial and serviceable repair and in an efficient state for all
the purposes thereof and of the traffic on the same respectively. By s. 95 it was
enacted, inter alia, that if any difference should arise as to the amount of damages
G occasioned to any lands by the exercise of the powers given by said Act and for
which any party might be entitled to demand compensation according to the pro-
visions of said Act, the amount of the compensation to be paid by the appellants
in every such case should be settled by the verdict of a jury in manner hereinafter
mentioned. By s. 144 it was enacted, inter alia, that the appellants might repair,
maintain, amend and uphold all such works and other things as had already been
erected, made or done under or by virtue of the therein recited Acts or any of them.
H Then s. 204 imposed a penalty on any person who should wilfully and maliciously
break down or damage or cause to be broken down or damaged any of the works
already made, or which should be made for the use of the navigation.

I These are very wide powers. The paramount purpose and object of the statutes
conferring them was to secure that the system of inland navigation, which it was
designed to establish, should be kept in repair and in effective working order, the
damage occasioned to any lands by the exercise of those powers to be compensated
for in the manner provided by s. 95. The maps, which presumably were lodged in
the Parliamentary offices in England and Ireland respectively, when the aforesaid
statutes were passed, have not been put in evidence. There is nothing to show
what was the ordnance datum of the water in the caral which was to be main-
tained or not exceeded, nothing to show what lands adjoining the canal were liable
to floods and were thereby injuriously affected, or that compensation in respect
of that damage had been paid.

Under the provisions of these Acts, the Lagan River was canalised so as to make

possible navigation from Lough Neagh to Belfast Harbour. Part of the navigation consists of part of the River Lagan and part of artificial channels. A series of locks (numbered consecutively from Belfast to Lough Neagh), operating in the usual way, enabled barges to be raised to higher levels, and lowered to lower levels of the navigation as required. A portion of the navigation from lock 9 down towards Belfast consists of the River Lagan. About halfway down between lock 9 and lock 8, an artificial channel began and continued to lock 8. The navigation between lock 8 and lock 7 consists of an artificial channel and below 7 the canal joins the River Lagan. Lock 8 was in existence prior to the year 1843. About halfway down between lock 9 and lock 8, a stone weir had been placed across the bed of the River Lagan in height 60·5 O.D. [Ordnance Datum] and further down the river another stone weir of the average height of 60·5 was placed. On the top of this latter weir there were placed boards 15 in. high, which, at will, could be raised or lowered. These boards have been in existence for over forty years. There is no evidence as to when or by whom or in what circumstances they were first erected. As they were proved by the respondents to have been removed for four days prior to Jan. 18, 1924, they do not appear to affect materially the question at issue between the parties litigant after that date. The effect of the first weir is to turn the water of the River Lagan up to a height of 60·5 into the artificial channel from the weir down to lock 8 and allow any water above that height to flow down the river to the second or lower weir. The effect of the latter weir is to form a dam, from which a company called the Lambeg Weaving Co., Ltd., can draw water for their works by means of a sluice on the right bank of the river. There is a sluice on the left bank of the river also, beside the lower weir, which can be used to lower the water in times of flood. This sluice is 6 ft. below the level of the lower weir. The respondents own the land lying on both sides of the banks of the canal between lock 9 and lock 8, but not in close proximity to the latter lock. The land in close proximity to it belongs to the appellants. The respondents carry on their business in buildings adjoining lock 9, beyond the east or right bank of the canal, and obtain a portion of the water they require from an open artificial drain running outside the right bank of the canal on the east side thereof. This artificial drain is admittedly supplied with water from three sources. (i) from the Lagan Canal, the water passing through a culvert made through the right or eastern banks of the canal and emptying itself into a hole or sump (which is merely an enlargement of the back drain); (ii) from a stream running through the respondents' land on the east side of the canal, and (iii) from part of the respondents' premises named Gilmore's Moss in which there is a spring. It was proved at the hearing that this Moss is flooded from time to time, but not by water coming from the canal. The banks of the Moss are 64 O.D. high and no water from the canal could enter it unless the water in the canal rose to a height above that level, 64 O.D. There is, moreover, an aqueduct running from the respondents' artificial drain right under the canal, and thence through the respondents' lands lying on the other side of the canal down to a point on the river below the lower weir. The respondents consequently can by opening a sluice or valve on their own lands allow the water in their artificial drain to flow, before it reaches their works, through their aqueduct into the river at this latter point. Lock No. 8 was at the hearing of the case proved to be 70 ft. long. It had at one time on both sides of it a coping of masonry from 3 to 3·3 wide with wooden gates at both ends of its chamber. The towing path is actually on the east side of the canal. The level of the stone coping varied from 62·7 O.D. to 62·85 O.D. The lock is not as wide as the canal, and the latter is consequently narrowed above the lock so as to form a mouth or entrance to it. These are some of the most important features of the terrain.

The case was heard by WILSON, J., sitting in the Chancery Division of the High Court of Justice in Ireland. A considerable body of evidence was given before him, and he arrived at certain conclusions of fact on the most important points in controversy at the hearing. As I understand, the conclusions so arrived at by the learned

A judge were substantially accepted by both parties at the hearing of the appeal in the Court of Appeal in Ireland. He deals with the facts leading up to the dispute between the parties in the following passage of his judgment, which I think it well to set out in extenso. It runs thus :

B "I find the facts leading up to the dispute to be that some time prior to August, 1912, the plaintiffs raised the coping along the upper mouth of lock 8 and down to the upper gate by placing concrete along it to the height of about 15 in. and raised the embankment on both sides of lock 8 with earth so as to correspond with the raised coping. I think this is proved both by the oral evidence and the condition of the old Pawl which has been partly excavated and shows grooves on it below the surface of the ground. The object of this
C erection was to prevent flood water coming down this reach of the canal flowing over lock 8 and into its chamber or on down to the lower reaches of the canal. I conclude that it was made effectual for this purpose and that until the flood water at lock 8 rose 15 in. over the level of the old coping this flood water was penned back in the reach of the canal above lock 8. The defendants cannot complain of this erection save to the extent to which it
D injures them, which I will endeavour to ascertain later. In 1912 the defendants objected to this erection and called for its removal, and after a tedious correspondence the additional coping was removed in February, 1921, without prejudice to the plaintiffs' rights. It was alleged by the defendants that the embankments at the back of the coping still remained, and that sod banks had been erected at each end of the lock to control the flow of water in time of
E flood. Nothing happened from 1921 till Jan. 18, 1924, when there evidently was a very heavy flood both in the river and the canal and all over this part of the country. On that day a number of the defendants' servants proceeded from their works along the towing-path up to lock 8, found an embankment along the mouth and sides of the lock which prevented the flood water getting away over lock 8, and, against the protests of the plaintiffs' only employee, cut
F channels right along the length of the lock on both sides and let the water above the level of the old coping run along lock 8 and into the lower reaches of the canal. The plaintiffs immediately restored the embankments and the defendants again, on Jan. 21, 1924, entered on lock 8 and removed them.

Counsel for the appellants pointed out that the learned judge fell into error in using in this passage the words "about 15 in." instead of the correct words
G "about 12 in."

The learned judge then proceeds to point out that the first question to be decided in the action is whether the respondents were entitled to cut away the embankment down to the level of the old coping at lock 8 as they had, in fact, done. As bearing upon this question he proceeds to analyse the several statutes already referred to and points out their application to the facts proved, the rights their provisions
H confer, and the obligations they impose. He deals with the difficulty of carrying out the system of inland navigation authorised by these statutes. He says the undertaking authorised by the statutes was carried out by using the channel of the river where it was permanently navigable, and where it was not so navigable by cutting a canal leading out of the river and carrying it through a series of locks to a lower level where it again joined the river at a point at which it, the river,
I had become navigable, the necessary supply of water for the canal being obtained by erecting a weir of an ascertained height in the river which necessarily retained and sent along the canal all the water below that height, and afforded to all the water above that height a free vent over the weir and away from the canal. The object of this arrangement obviously was to supply the artificial portion of the canal with sufficient water for the navigation of it, and to divert as far as possible the flood water from the canal so as to keep it navigable. These results, he says, were effected, or intended to be effected, as regards the portion of the canal leading to lock 8, by the weir erected, the level of which was proved to be

60.5 O.D., while the level of the coping along the sides of lock 8 was 62.7 O.D. or 62.8 O.D. The learned judge says he could not believe that the engineers who constructed this reach of the canal anticipated that in flood times the water in the canal would ever rise beyond the height of 62.7 O.D. and flow along and over lock 8 and into the chamber of the lock, or down to the lower reaches of the canal, that this would turn the lock 8 into a waterfall or cascade making it impossible to raise water in the chamber to the same height as in the canal above lock 8, and in the result to make navigation of the canal impossible. He further says he does not accept the contention of the defendants that lock 8 was constructed as a vent for flood water in addition to the vent over weir 1, and considers that it would be utterly inconsistent with the making of a navigable passage from Belfast to Lough Neagh that the towing-path and one of the locks should in flood time be continuously submerged, and the earth at the back of the masonry along the sides of the chamber of the lock be constantly washed away. The learned judge sums up his conclusion on the evidence touching the points in controversy in the following passage of his judgment:

"It seems to me that, having regard to the flood in the river on this occasion, it is very difficult to say to what height the water in the defendants' lands would have risen even if there had been no embankment at lock 8. The onus of proving this was on the defendants, and it has not been discharged. At the same time, I am of opinion that the additional embankment made when the coping at lock 8 was raised prevented the water when it rose about 62.7 getting away over this lock as quickly as it would have done if there had been no embankment there, and that flood water must have been kept on the defendants' premises somewhat longer than it would have been if no embankment existed. The defendants have not satisfied me on the evidence that the water from the canal would not have mixed with the spring water in Gilmore's Moss even if no additional embankment above the height of the original coping had been made, but I am satisfied that the embankment had the effect of keeping water from the canal for a longer time and at a greater depth on defendants' lands than would have been the case if no additional embankment had been raised at lock 8."

Were, then, he asks, the defendants entitled to take the law into their own hands and remove this embankment which the plaintiffs made for the protection of lock 8 and the navigation through their canal. He points out that the plaintiffs own the property on both sides of lock 8, that the lock house is theirs, and that under the express words of s. 5 of 6 & 7 Vict., c. civ, as being necessary for the purposes of navigation, the property in the towing path is theirs. He adds:

"The right of abatement of nuisance undoubtedly exists, but it is not favoured by the law. The plaintiffs' property extends through many miles of country, and is necessarily exposed and unguarded. Any interference with it may cause irreparable damage to a great public work. For this reason, as in the case of railways, provision is made making any person who wilfully breaks down or damages any works made for the use of the said navigation guilty of a criminal offence punishable by fine and possibly imprisonment, and the defendants broke down this embankment without giving any notice and the embankment made to protect the lock 8. Is any person, be he mill owner, mill manager, farmer, labourer, or other person who conceives that he is injured by some work made by the plaintiffs for the use of this canal to be at liberty to break down the work, and say that he thought it was unauthorised in the teeth of such a section?"

Even if the defendants were owners of the land on the west side of the lock down to the edge of the lock chamber, they would, he thinks, hold it subject to the right of the plaintiffs under the statutes to use this land for the purpose of their undertaking, including the making, if otherwise legal, of the embankment complained of.

A He justly points out that in reference to the field of the defendants' land marked made liable to floods, it was proved that this field is flooded from the river before it is flooded from the canal, and that any flooding of it, therefore, from the canal was not proved to be caused by any act of the plaintiffs' works. The learned judge winds up his judgment by stating that in his view the defendants in doing what they did committed what was *prima facie* a criminal act under the statutes, and that on that ground alone the plaintiffs would be entitled to the injunction they claim. He winds up his judgment by stating that, whether the act done by the defendants was a criminal act or not, he was of opinion that when the plaintiffs discovered, prior to 1912, that owing to an increased rainfall, or to more extensive drainage in the upper reaches and catchment area of the River Lagan, or to some other cause for which the plaintiffs were not responsible, flood water over the original level of the coping of the lock 62·7 would come along their reach of the canal, and would, if permitted to flow over the lock, have prevented the canal from being navigable and destroyed the lock, the plaintiffs were entitled under their statutory powers to do the acts complained of to preserve and uphold their lock as portion of the navigable system from Belfast to Lough Neagh. He, accordingly, granted the plaintiffs the injunction they asked for, fixed the damages at £20, and dismissed the contention of the respondents with costs, on the ground that the respondents were not entitled to do the acts they committed.

I have read most carefully the evidence given in the case. There possibly may be a question whether the respondents were responsible criminally for the action they permitted themselves to take. It was, however, in my view, illegal even if not criminal. I entirely concur with WILSON, J., in all the conclusions to which on the evidence he has come, especially all his findings of fact. They are, I think, sound and reliable. There was no evidence given before either of the courts to show that the level of the water in the canal or in its lock should only reach a certain height. It was proved before WILSON, J., that great flooding in lock 8 and its chamber would impede navigation of the lock, and, in my view, it is perfectly clear that, if the respondents erected clay banks on their own property along each side of this lock to protect their property from being flooded to the injury of the navigation of the lock and canal, it was within the right of the appellants to raise those embankments. Their erection would forward the main and paramount purpose and object of the cited statutes, the facilitation of the navigation of the canal. If the respondents have land near this lock, they must, I think, hold it subject to the main purpose of the statute of navigation. I fail altogether to see what expedient other than the erection of these banks of clay the appellants could have resorted to in order to facilitate in time of any flood the navigation of the lock in the way described.

In the Court of Appeal this judgment of WILSON, J., was reversed. It would appear to me to have been held by that court that the principle laid down in *Geddis v. Bann Reservoir Proprietors* (1) and in *Bligh v. Rathangan River Drainage District Board* (2) and several other authorities to the like effect applied to this case, and that the appellants have been guilty of negligence within the meaning of LORD BLACKBURN's judgment in the former of these two cases in the exercise of their statutory powers, with the result of thereby flooding the lands of the respondents. These cases establish, I think, this principle—that if a man or a public body has or have statutory powers which he or they may at will exercise in a manner hurtful to third parties, or in a manner innocuous to third parties, that man or body will be held to be guilty of negligence if he chooses or they choose the former mode of exercising his or their powers and not the latter, both being available to him or them.

The facts of *Geddis v. Bann Reservoir Proprietors* (1) and of the Irish case which followed it are so entirely distinguishable from those of this case that the decisions are inapplicable to it. In the first the respondents had statutory powers to collect water into a large reservoir and discharge it therefrom from time to time as might be deemed necessary through the channel of a little stream, to be carried into the

River Bann, but the persons incorporated under the Drainage Acts neglected to cleanse the channel of this little stream of the mud and silt accumulated in it by reason of the increased discharge of the water into it, with the result that, it being thus choked through this silt, it overflowed its banks, flooded the appellants' lands, and injured them. In this case the Bann Reservoir Co. had clearly an option as to which of the two following methods they would choose for the exercise of the statutory powers they possessed—namely, the plan of cleansing and keeping free from silt the channel of the little stream into which they were empowered to discharge considerable quantities of water to be carried along that stream to the River Bann, or the method of discharging the same body of water into the little stream without any periodical cleansing of its bed. They chose the latter, which caused the flooding. The facts of the Irish case are almost identical in character with those of *Geddis v. Bann Reservoir Proprietors* (1), and the same legal principles apply to it. The vital distinction between both these cases and the present case is that here the appellants had no option as to which of two possible courses they would select for the exercise of their statutory powers and the discharge of their statutory duties. In my view, therefore, there was no evidence given in the case, which, rightly considered, established that the appellants were guilty of negligence in the exercise of their statutory powers. They had either to erect these clay banks, as they were, *primâ facie*, entitled to do in order to protect their own lands from being flooded, and to secure that the navigation of the lock should not be interfered with or impeded, or utterly to disregard the obligations imposed upon them by the provisions of the statutes I have referred to.

In my view, therefore, there was no evidence given at the trial to establish that the appellants in their dealing with the management and protection of lock 8 and the erection of these clay banks had, as regards the respondents, done any wrongful act or been guilty of creating a nuisance on their property either near lock 8 or elsewhere. But, assuming that the erection of these clay banks with the resultant flooding caused by them was a nuisance to the respondents, the question remains: Were they entitled, without giving any notice of their intention, to enter upon the bank of the canal in the high-handed and aggressive manner in which they did, and cut two small drains or aqueducts on each side of the lock and do the other things described? It has been well said that the abatement of a nuisance is a remedy which the law does not favour and is not usually advisable, and that its exercise destroys any right of action in respect of the nuisance. In *Earl of Lonsdale v. Nelson* (3), BEST, J., said (2 B. & C. at p. 311):

"The security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen, to remedy it. In such cases, an individual would be justified in abating a nuisance from omission without notice. In all other cases of such nuisances, persons should not take the law into their own hands, but follow the advice of LORD HALE, and appeal to a court of justice."

In the abatement of the nuisance, unnecessary damage must not be done: *Colchester Corpn. v. Brooke* (4). In *Campbell Davys v. Lloyd* (5) COLLINS, L.J., in delivering judgment, expressed himself in the following terms ([1901] 2 Ch. at p. 524):

"The right of abatement by individuals is not regarded with favour by the law. In the words of LORD HALE: 'But because this many times occasions tumults and disorders, the best way to reform public nuisances is by the ordinary courts of justice,' see this cited in *Earl of Lonsdale v. Nelson* (3)."

LORD CAMPBELL in *Dimes v. Petley* (6) said:

"If there be a nuisance in a public highway, a private individual cannot of his own authority abate it unless it does him a special injury, and he can only interfere with it as far as is necessary to exercise his right of passing along the highway; and, without considering whether he must show that the abatement

A of the nuisance was absolutely necessary to enable him to pass, we clearly think that he cannot justify doing any damage to the property of the person who has improperly placed the nuisance in the highway, if, avoiding it, he might have passed on with reasonable convenience."

B Again, where there are two ways of abating a nuisance, the less mischievous is to be followed unless it would inflict some wrong on an innocent third party or the public, and previous notice is given when necessary. This proposition is supported by the following case of high authority decided in the Court of Exchequer, *Roberts v. Rose* (7). BLACKBURN, J., in delivering the judgment of the court, lays down some general propositions. He said :

C "We are all agreed that where a person attempts to justify an interference with the property of another in order to abate a nuisance, he may justify himself as against the wrongdoer, so far as his interference is positively necessary. We are also agreed that, in abating the nuisance, if there are two ways of doing it, he must choose the least mischievous of the two. We also think that if by one of these alternative methods some wrong would be done to an innocent third party or to the public, then that method cannot be justified at all, D although an interference with the wrongdoer himself might be justified."

I have already shown, I hope successfully, that the appellants, in building these clay banks along the sides of lock 8 to protect their own lands from floods and protect their canal, were not wrongdoers, and, according to the judgment of WILSON, J., should not have been interfered with. The respondents have, therefore, in my view, in acting in the high-handed and violent manner in which they E have chosen to act, violated every principle laid down by the authorities I have cited touching the abatement of nuisances. The respondents gave no notice of their intended action. They have not proved that they did not do any unnecessary damage. They have not proved that there was not an alternative method other than the cutting of these banks to reduce successfully the flooding of their lands. They have, I think, altogether failed to justify the course they took. On the F whole, therefore, I am of opinion that the order appealed from was wrong and should be reversed; that the judgment of WILSON, J., was right and should be affirmed; and that this appeal should be allowed with costs here and in the Irish Court of Appeal.

G LORD SHAW.—I agree. The fundamental question at issue between these parties is whether the appellants, the Lagan Navigation Co., acted in breach of their duty towards the Lambeg Bleaching, Dyeing, and Finishing Co., the owners of lands on both sides of the banks of the canal. The duty cast upon the navigation company included not only the construction of the canal, but by s. 62 of the Act 6 & 7 Vict. c. civ,

H "the said company shall at all times during the continuance of this Act maintain and keep the said navigation and every part thereof and all bridges, sluices, drains, locks, weirs, banks, dams, roads, towing-paths . . . and all works to be hereafter executed for the improvement thereof in good and substantial and serviceable repair and in an efficient state for all the purposes thereof and of the traffic on the same respectively."

I It is maintained by the respondents that the result of raising, in the year 1921, the level of the coping of the embankment and supporting it from behind by earthwork by the navigation company has been to flood their lands, and that ipso jure the navigation company are responsible in law for the damage so caused. It is not suggested that the raising of the coping was caused by anything of the nature of an alteration in the use or management of the canal, that is to say, any such alteration in the use or management thereof as would have involved a new constructional system. It may well be argued that even although this had been the case, yet the duty of the navigation company under the section which I have just

quoted would have been the same as in the present case. It is unnecessary, however, to make any pronouncement as to such a case because the circumstances which brought about the raising of the coping arose because experience had shown that on rare occasions such floods had occurred as to demonstrate the necessity of the coping being raised for the protection of the canal. It is not denied that the effect of the flood if the coping was not raised, but was left as before, would be to expose the lock in such a manner that the overflowing water would cut away the back thereof and, if allowed to continue, would wash it away. Had, accordingly, measures not been taken by the raising of the coping to prevent such an overflow, and had the result been the breaking down of the damming works, there would apparently have occurred such a breach of duty upon the part of the navigation company as would have formed a good ground of action by any parties endamaged thereby.

The foundation of the present complaint by the riparian owners is precisely to the opposite effect, namely, that the Lagan Navigation Co. did not neglect to take, but did take, steps which were necessary to protect the canal and the navigation thereof in terms of the statute. The whole case as to their having improperly done that—so far as such protection was concerned—has disappeared, and what is left is the complaint—and that alone was urged at the Bar of the House—that a statutory duty rested upon the Navigation Company to construct, not only works protective of their own property, but also works protective of the property of their neighbours. This raises in a bold form a question which I hold to have been long settled. The authorities are entered upon with fulness in the judgment of my noble and learned friend who has preceded me, and I, therefore, do not presume to re-enumerate them at length, and make my observations brief. This is a case of a common danger caused by an act of nature.

I refer to *Nield v. London and North-Western Rail Co.* (8) and especially to the judgment of BRAMWELL, B.; to *R. v. Sussex Sewers Comrs.* (9), and further to the judgment of TENTERDEN, C.J. (a case of a public authority executing works against inroads of the sea). In *Gerrard v. Crowe* (10) a riparian proprietor had protected his land from flooding overflow with the result that there was an increase of overflow on an opposite proprietor's lands. The authorities are collected and analysed by LORD CAVE, L.C., who said: "The general rule is well settled." In *Farquharson v. Farquharson* (11) the rule was stated as follows (3 Bli. N. S. at p. 421):

"It was found lawful for one to build a fence upon his own ground by the side of a river to prevent damage to his ground by the overflow of the river, though thereby a damage should happen to his neighbour by throwing the whole overflow in time of flood upon his ground."

The Lord Chancellor uses the phrase as to protection against a "common enemy" which had been used in preceding cases. If the above, so often repeated, be the law with regard to the duty of each riparian proprietor being bound to protect himself in a case where one has executed protective work upon his own property, it may well be argued that the present case is an a fortiori one in which the same principle ought to be applied, seeing that the works protective of the navigation were here in the nature of a statutory requirement. Upon decision, the avoidance of liability by authorities acting strictly in execution of statutory powers and without negligence is clear. The words of LORD BLACKBURN in *Geddis v. Bann Reservoir Proprietors* (1) remain of the highest authority, namely:

"I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to any one; but an action does lie for doing that which the legislature has authorised, if it be done negligently."

In one view, it is not necessary in the present case to enter upon that inquiry, and for the following reason. Up to this moment it is not suggested with any

A clearness or plainness what it is that the Lagan Navigation Co., in supplement to and as a corollary of their statutory duties to protect the canal and navigation, should have done. The case, as pleaded, made no such suggestion and was rested simply upon the footing that damage was caused to the defendants by reason of the plaintiffs' having done what the statute required. In my view, when the action of a party has conformed to a statutory obligation, it would require a case of great
B precision of statement upon the part of the adjoining owner to set out what works additional to those needful under the statute were also impliedly to be undertaken. There was no such statement of pleading before WILSON, J. That learned judge, however, acted, in my view, in the interests of both parties and with great propriety in getting a report under the terms of which both parties could come together in their mutual interest, so as to avoid a common danger. The report
C suggested certain things to be done, including the acquisition of other property in order that works of a relatively small but safeguarding kind should be executed on lands other than those now possessed by the Navigation Company. It was objected in the Court of Appeal that this was not evidence in the cause, and that objection, which was repeated at their Lordships' Bar, is technically sound; but the odd thing is that in the Court of Appeal in Ireland one of the judges suggested,
D at his own hand, another scheme of the nature of lateral escape by a grid-work arrangement, while in this House the counsel for the appellants proposed a scheme, neither sanctioned by the report nor suggested in the court below, to the effect that the Navigation Company should do effectively and lawfully something of the nature of the very thing which had, high-handedly and ineffectively, been done by the respondents themselves. I think this manner of handling rights in law should
E not be sanctioned, and it confirms me in the view of the need for a precise conception being formed and stated of the scheme of protective works which is alleged to be supplementary to and arising out of statutory obligations. In deciding this case, and noting the absence from the beginning of the pleadings, or now, of any feasible suggestion of such a scheme of protective works, I further do not conceal from myself that enough has been shown in the case to indicate that if the parties
F meet together in a reasonable spirit, they can achieve protection all round, both for the canal and the riparian interests. In my view, the appeal should be allowed and the judgments pronounced in both cases by WILSON, J., should be reverted to. I agree entirely in condemning the unauthorised and high-handed proceedings of the respondents in committing a trespass upon the appellants' property and attempting at their own hands, and against the will of the appellants, to provide
G a remedy by violent entry and operations upon that property.

LORD WRENBURY.—In my opinion, the decision of the trial judge was right and this appeal must be allowed. I do not find that the case involves any difficult question of law. I content myself with stating some facts which are not in dispute and which, in my judgment, lead without doubt to the conclusion at which
H I have arrived. [HIS LORDSHIP reviewed the evidence and concluded:] From the above statement of facts it results that the respondents would not have suffered any flooding from the navigation cut if they had not opened a culvert from the cut into their land—neither would they have suffered if they had opened the culvert but had raised the walls of their sump to (say) 65 ft. instead of 64 ft. No water would have flowed from the navigation cut over the respondent's lands if
I the respondents had not by their own act on their own land provided the means for its access. The navigation cut from the point where it leaves the river to the top gate of the lock was and was intended to be for the purposes of the Navigation Company's operations dead water. There would never be any flow along it except when the lock was operated and water was caused to flow for the service of the lock. The acts of the respondents threw upon the cut a flow whose object was to keep down the level of the river and which made that which should have been dead water into a stream running to a weir with the object of assisting the river in discharging the flood water. This was wholly illegitimate. The Navigation

Company owed no duty to do that and the respondents were wholly wrong in arbitrarily altering the company's works so as to cast that duty upon them. For these reasons and without discussing any question of law I am of opinion that this appeal succeeds.

VISCOUNT DUNEDIN and **LORD CARSON** concurred.

Appeal allowed.

Solicitors: *H. H. Wells & Sons*, for *White, M'Millan & Wheeler*, Belfast; *Blyth, Dutton, Hartley & Blyth*, for *Robert Wallace*, Belfast.

[Reported by **E. J. M. CHAPLIN**, Esq., Barrister-at-Law.]

SMITH v. GREAT WESTERN RAIL CO. AND ANOTHER

[KING'S BENCH DIVISION (Avory, J.), March 16, 1926]

[Reported 135 L.T. 112; 42 T.L.R. 391]

Railway—Nuisance—Damage to neighbouring property—Act of third party—All reasonable steps taken by company.

An oil tank was consigned by an oil company to a railway company for conveyance to a destination where it was found to be leaking with the result that a large quantity of oil penetrated into a watercourse on the plaintiffs' premises, rendering the water unfit for the plaintiffs' cattle to drink. On the leakage being discovered by the railway company's servants, every effort was made by the railway company to stop it. The plaintiffs sued the oil company and the railway company for damages for nuisance arising from the pollution of the watercourse.

Held: (i) that the oil company were liable, as they ought by the exercise of reasonable care to have discovered the defective condition of the tank before consigning it by rail, but (ii) that the railway company were not liable, as they did not omit to do anything which a reasonable man would have done in the circumstances and so did not permit the continuance of the nuisance, and as the damage was caused by the wrongful act of a third party, the oil company, in sending a defective tank to the railway company's premises.

Notes. Considered: *Sutcliffe v. Holmes*, [1946] 2 All E.R. 599. Referred to: *Southport Corpn. v. Esso Petroleum Co.*, [1953] 2 All E.R. 1204.

As to defences to an action for nuisance, see 24 HALSBURY'S LAWS (2nd Edn.) 93 et seq., and for cases see 36 DIGEST (Repl.) 292–298, 320 et seq.

Cases referred to:

- (1) *Barker v. Herbert*, [1912] 2 K.B. 633; 80 L.J.K.B. 1329; 105 L.T. 349; 75 J.P. 481; 27 T.L.R. 488; 9 L.G.R. 1083, C.A.; 36 Digest (Repl.) 297, 419.
- (2) *Job Edwards, Ltd. v. Birmingham Canal Navigations*, [1924] 1 K.B. 341; 93 L.J.K.B. 261; 130 L.T. 522; 40 T.L.R. 88; 68 Sol. Jo. 501, C.A.; 36 Digest (Repl.) 316, 628.
- (3) *Fletcher v. Rylands* (1866), L.R. 1 Exch. 265; 35 L.J.Ex. 154; affirmed sub nom. *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, 334.
- (4) *Rickards v. Lothian*, [1913] A.C. 263; 82 L.J.P.C. 42; 108 L.T. 225; 29 T.L.R. 281; 57 Sol. Jo. 281, P.C.; 36 Digest (Repl.) 37, 177.

- A (5) *Nichols v. Marshland* (1875), L.R. 10 Exch. 255; 44 L.J.Ex. 134; 33 L.T. 265; 23 W.R. 693; affirmed (1876), 2 Ex.D. 1; 46 L.J.Q.B. 174; 35 L.T. 725; 41 J.P. 500; 25 W.R. 173, C.A.; 36 Digest (Repl.) 297, 421.
- (6) *Box v. Jubb* (1879), 4 Ex.D. 76; 48 L.J.Q.B. 417; 41 L.T. 97; 27 W.R. 415; 36 Digest (Repl.) 298, 424.
- B (7) *Bullock v. London General Omnibus Co.*, [1907] 1 K.B. 264; 76 L.J.K.B. 127; 95 L.T. 905; 23 T.L.R. 62; 51 Sol. Jo. 66, C.A.; Digest Practice 878, 4185.

Further Consideration of action tried by AVORY, J., without a jury at Bristol Assizes.

- C Three farmers, Daniel Smith, Edward Davis, and Frances Pursey, in the parish of Stoke Gifford, Gloucestershire, brought an action against the Anglo-American Oil Co. and the Great Western Railway Co. for damages arising from the escape of a quantity of oil from a defective tank belonging to the oil company. The tank was consigned by the oil company to the railway company for delivery to their depôt at Stoke Gifford in April, 1923. Upon arrival at the depôt the tank was found to be leaking, the oil penetrated into a watercourse which ran through lands occupied by the plaintiffs, and polluted the water so that the plaintiffs' cattle were
- D unable to drink from it and had to be removed from the fields adjoining the watercourse.

Rayner Goddard, K.C., and *Harold Murphy* for the plaintiffs.

Stuart Bevan, K.C., and *J. A. Stanton* for the Great Western Rail Co.

H. du Parcq, K.C., for the Anglo-American Oil Co.

E *Cur. adv. vult.*

- Mar. 16. **AVORY, J.**, read the following judgment.—In this case the three plaintiffs are farmers who occupy different farms in the parish of Stoke Gifford, through which a watercourse and brook flows, from which their cattle were accustomed to drink. The action is brought to recover damages in consequence of the pollution of the watercourse and brook by a large quantity of gas-oil, which had
- F escaped from an oil tank, the property of the Anglo-American Oil Co., when it was on the premises of the Great Western Rail Co. at Stoke Gifford, whereby the water in the watercourse and brook was rendered unfit for cattle to drink, and the plaintiffs severally were compelled to remove their cattle to other pastures and suffered damage. The undisputed facts are that the oil-tank, loaded with oil, was consigned by the defendant oil company to the defendant railway company at Avon-
- G mouth on April 14, 1923, to be carried on the railway to Stoke Gifford, and that it arrived at Stoke Gifford, a distance of eight miles, attached to a goods train, about 3.50 a.m. on Sunday, April 15. It was then observed to be leaking, and one of the railway company's servants, after working for two hours under the tank, succeeded in temporarily stopping the leak with clay and cotton waste. The tank wagon was then put in what was called the cripple siding, where it remained till 2 p.m.
- H on Monday, April 16, when it was sent back by rail to Avonmouth, and, upon arrival, was leaking, to use the expression of a witness, "like a house-tap turned on." In the meantime, a large quantity of the oil leaking from the tank found its way through a drain on the railway company's premises into the watercourse and brook, rendering it unfit for cattle to drink therefrom for many weeks thereafter, during which the plaintiffs' cattle had to be depastured on other fields which
- I had been put up for mowing hay or clover.

With regard to the liability of the Anglo-American Oil Co., the material facts as I find them are as follows. The tank wagon in question had been purchased by these defendants in 1921, having then upon it a register-plate representing that it had been constructed in 1908 in accordance with the Railway Clearing House standard specification then in force with regard to such tank wagons. Whether it was so constructed at that time is left uncertain, but on April 14, 1923, when it was delivered to the defendant railway company, it did not comply with that specification in that the outer valve lever bracket was secured by bolts and nuts

and not by rivets as shown on the diagram produced at the trial, and the said bolts were fitted with the nuts inside the tank instead of outside as required by the specification. Whether any alteration had been made by the oil company, of which there is no evidence, or not, I find that by the exercise of reasonable care and diligence they ought to have discovered that the tank was defective, and that, in fact, when delivered to the railway company, the tank was in an unsafe and dangerous condition, owing to the likelihood of the oil escaping therefrom. I find as a fact that the leakage occurred through the bolts, or one of them, working loose on the journey to Stoke Gifford, and that there was no rough usage or unusual treatment of the tank wagon by the railway company or its servants which would account for the defective condition of the bolt or bolts. I reject altogether the evidence given by the witness who did the repairs on April 17, in regard to the condition of the bolts and nuts being tight; I am satisfied that the nuts in fact had worked loose and the packing become defective, as this witness had both stated and written immediately after the occurrence. In these circumstances, I entertain no doubt that the defendants, the Anglo-American Oil Co., having consigned the tank in this condition, are responsible to the plaintiffs for the pollution of the watercourse and the nuisance caused thereby. A B C

With regard to the liability of the railway company, the question is more difficult. Under s. 105 of the Railway Clauses Consolidation Act, 1845, they were not bound to carry goods of this dangerous nature on the railway, but they had undertaken to do so under certain conditions, namely, among others, that private owners' tank wagons should be constructed in accordance with the Railway Clearing House specification, and that all inlets and outlets of such tanks should be air-tight and water-tight. If the railway company had discovered the defective condition of this tank upon delivery to them, they might have refused to accept it. I do not think they were guilty of any negligence in not discovering the defect before the tank wagon left Avonmouth on April 15. When it arrived at Stoke Gifford and the leak was discovered, I am satisfied that every effort was made, in the difficult circumstances, to stop the leak, with the result that it was temporarily checked by 6 a.m. on the 15th, and on that day, being Sunday, it was found impossible to get into touch with the Anglo-American Oil Co. There was no train on Sunday back to Avonmouth, and the tank wagon remained in the cripple siding until it was taken back to Avonmouth on Monday the 16th, by the ordinary train, at 2 p.m. or thereabouts. In the meanwhile the leakage of oil re-commenced, and continued till after the arrival at Avonmouth; it was there found necessary to pump out the oil from the tank, the representative of the oil company stating at the trial that there was no other way of dealing with the situation, the reason for this being, as I understand, that it was necessary to get inside the tank in order to remedy the defective condition of the bolts. D E F G

On behalf of the plaintiffs, it is suggested that after 6 a.m. on Sunday, April 15, something further should have been done by servants of the railway company to stop the leakage, either by way of renewing the plugging or otherwise. In fact, an effort was made on Monday morning to get assistance from the wagon-repairers who had a contract with the oil company for the repair of these tank wagons, but without success. In view of the admission made by the representative of the oil company that the only way of dealing with the situation was to pump out the oil from the tank, and in view of the danger of moving it with this inflammable oil escaping from it, I am unable to say that the railway company or its servants, being in this predicament, omitted to do anything which a reasonable man would have done in the circumstances. On behalf of the plaintiffs, it is contended that the railway company are, nevertheless, liable, as the owners or occupiers of premises on which a nuisance existed to their knowledge, or that of their servants, for permitting it to continue: *Barker v. Herbert* (1) and *Job Edwards, Ltd., v. Birmingham Canal Navigations* (2). But, assuming that the nuisance can be said in this way to have existed on the railway company's premises, I do not think they can be said to have permitted that to continue which they could not by any reason- H I

A able means prevent. It is further contended for the plaintiffs that in any event the railway company are liable on the principle of *Fletcher v. Rylands* (3), on the ground that they brought this dangerous matter on to their premises, and were bound to keep it in at their peril, but it is to be observed that in the well-known passage from the judgment delivered by BLACKBURN, J., in that case, which was approved by the House of Lords, he indicates that exceptions to the rule may arise; B and in *Rickards v. Lothian* (4), LORD MOULTON, delivering the judgment of the Judicial Committee of the Privy Council, laid down as law that a defendant is not liable on the principle of *Fletcher v. Rylands* (3) for damage caused by the wrongful acts of third persons. It is true that in that case the wrongful act was a wilful and malicious act, but I see no difference in principle for this purpose between the act of a mischievous boy who has bored a hole in a cistern, which C was the illustration put by BRAMWELL, B., in *Nichols v. Marsland* (5), and the wrongful act of the Anglo-American Oil Co., who caused this tank to be sent on to the railway company's premises in a condition in which it was bound to leak; and this view is, I think, supported by the decision in *Box v. Jubb* (6), approved in *Rickards v. Lothian* (4), where KELLY, C.B., said:

D "It seems to me to be immaterial whether this is called vis major, or the unlawful act of a stranger; it is sufficient to say that the defendants had no means of preventing the occurrence."

For these reasons, the plaintiffs have failed to establish the liability of the railway company for the damage suffered by them. I give judgment for the railway company with costs, but with the usual order that the costs paid by the E plaintiffs to the railway company shall be added to the costs which have to be paid by the Anglo-American Oil Co. That is the order made under *Bullock v. London General Omnibus Co.* (7).

Order accordingly.

Solicitors: *Ellis & Fairbairn; A. G. Hubbard; Piesse & Sons.*

F [Reported by T. R. F. BUTLER, ESQ., Barrister-at-Law.]

McFARLANE v. HUTTON BROS. (STEVEDORES), LTD.

[COURT OF APPEAL (Lord Hanworth, M.R., Atkin and Lawrence, L.JJ.), December 8, 1926]

[Reported 96 L.J.K.B. 357; 136 L.T. 547; 20 B.W.C.C. 222]

Workmen's Compensation—Accident—Death of workman from heart disease—Collapse while at ordinary work—No exceptional strain on workman—Workmen's Compensation Act, 1925 (15 & 16 Geo. 5, c. 84), s. 1.

Where a workman was suffering from coronary disease of the heart from which, while engaged in the ordinary performance of the work to do which he was employed, he died,

Held: the death could be due to an "accident" within the meaning of the Workmen's Compensation Act, 1925, s. 1, even though it was not attributable to any sudden, unusual strain having been put on the workman, and, therefore, his widow was entitled to an award of compensation under the Act.

Notes. The Workmen's Compensation Act, 1925, was repealed by the National Insurance (Industrial Injuries) Act, 1946, which prescribes a system of insurance against injuries caused by industrial accidents, but s. 1 (1) of the latter Act provides that the insurance shall be "against personal injury caused . . . by accident arising out of and in the course of" employment, thus adopting the wording of s. 1 (1) of the Act of 1925. See also s. 7 (1).

Considered: *Muscroft v. Stewarts and Lloyds* (1928), 21 B.W.C.C. 274. Applied: *Hore v. General Steam Navigation Co.* (1929), 22 B.W.C.C. 100. Explained: *Davies v. Vipond & Co.* (1932), 146 L.T. 498. Applied: *James v. Partridge Jones and John Paton, Ltd.* (No. 2) (1932), 25 B.W.C.C. 328; *Treloar v. Falmouth Docks and Engineering Co.* (1932), 31 B.W.C.C. 359. Referred to: *Walter v. John Brown & Co.* (1932), 25 B.W.C.C. 166; *Whittle v. Ebbw Vale Steel, Iron and Coal Co.*, [1936] 2 All E.R. 1221; *Oates v. Earl Fitzwilliam's Collieries Co.*, [1939] 2 All E.R. 498; *Wilson v. Chatterton*, [1946] 1 All E.R. 431.

As to "accidents" within the Workmen's Compensation Acts, see 34 HALSBURY'S LAWS (2nd Edn.) 816 et seq; and for cases see 34 DIGEST 266 et seq. For Workmen's Compensation Act, 1925, see 16 HALSBURY'S STATUTES (2nd Edn.) 202; and for National Insurance (Industrial Injuries) Act, 1946, see *ibid.* 797.

Cases referred to:

- (1) *Clover, Clayton & Co., Ltd. v. Hughes*, [1910] A.C. 242; 79 L.J.K.B. 470; 102 L.T. 340; 26 T.L.R. 359; 3 B.W.C.C. 275; sub nom. *Hughes v. Clover, Clayton & Co.*, 54 Sol. Jo. 374, H.L.; 34 Digest 273, 2316.
- (2) *M'Ardle v. Swansea Harbour Trust* (1915), 85 L.J.K.B. 733; 113 L.T. 677; 8 B.W.C.C. 489, C.A.; 34 Digest 273, 2317.
- (3) *Fenton v. Thorley & Co., Ltd.*, [1903] A.C. 443; 72 L.J.K.B. 787; 89 L.T. 314; 52 W.R. 81; 19 T.L.R. 684; 5 W.C.C. 1, H.L.; 34 Digest 266, 2264.
- (4) *Beaumont v. Underground Electric Railways Co. of London, Ltd.* (1912), 5 B.W.C.C. 247, C.A.; 34 Digest 334, 2711.
- (5) *Maxwell v. Ruabon Coal & Coke Co., Ltd.* (1916), 86 L.J.K.B. 428; 116 L.T. 176; 10 B.W.C.C. 138, C.A.; 34 Digest 334, 2710.
- (6) *Hensey v. White*, [1900] 1 Q.B. 481; 69 L.J.Q.B. 188; 81 L.T. 767; 63 J.P. 804; 48 W.R. 257; 16 T.L.R. 64; 2 W.C.C. 1, C.A.; 34 Digest 266, 2261.
- (7) *Stewart v. Wilson and Clyde Coal Co.* (1902), 5 F. (Ct. of Sess.) 120; 34 Digest 270, 2293iii.

Appeal from an award of the judge of the Middlesbrough County Court sitting as arbitrator under the Workmen's Compensation Act.

The following statement of the facts is taken from the judgment of the Master of the Rolls. The deceased man, McFarlane, was employed as a stevedore. He was working in the after-hold of a ship, when iron ore was being unloaded by

A being lifted out of the hold in a big tub which was lowered into the hold. The tub was carried on a chain and had to be deflected from the perpendicular in order to avoid the top of the tunnel which covered the shaft of the propellers, and to be lowered right down to the iron ore in the hold. The height of the tunnel was, I think, 10 ft., and there was, therefore, a certain point in the transit of the tub from the deck of the ship down to the bottom of the hold during which the men
B who were handling the tub had to exercise a certain amount of energy in deflecting the tub so that it cleared the tunnel. The deceased man was working with some colleagues in doing this. As well as deflecting the tub when it was resting in proximity to the iron ore it was their business with shovels to put the iron ore into the tub. They began work at an early hour in the morning and they were working in the ordinary course. The deceased man never ailed, his wife said,
C and he worked sometimes three shifts and sometimes five, and he never complained of his work, but we know from subsequent events that he was at the time suffering from disease of the coronary arteries of the heart, which sooner or later would cause death. As the facts are reported the workman, while he was engaged in pushing or pulling the tub into the right position, suddenly felt ill, which the learned county court judge thought, and I think rightly, was attributable to the
D fact that he had a heart attack. He ceased work for a moment and either stood or sat at the side, but presently, recovering himself somewhat, he endeavoured to put three or four shovelfuls of the iron ore into the tub. Again he felt ill and stopped. He went up a ladder to the top of the tunnel, and there he sat obviously in distress, if not in pain. Eventually he was laid in a recumbent posture with some clothing under his head, but he seemed to be dead at the time that that was
E done, or he was in the act of dying. By the time the doctor arrived it was found that he was dead. At the most the space of time that passed between his first attack and his being found dead was not more than half an hour. Proceedings were brought by his widow as a dependant claiming compensation on the ground that he died from an accident arising out of and in the course of his employment. The learned county court judge came to the conclusion that, applying the principle
F which he finds in *Clover, Clayton & Co., v. Hughes* (1) and relying on the medical evidence, the workman died from the disease alone. It is common ground that a sudden strain might have caused his death in the condition in which his heart was, but I am satisfied that there was no sudden strain. The county court judge said that he might have died of the disease at any moment. He died while at work, there being no accident such as a sudden strain. The widow appealed.

G *Shakespeare*, for the widow, referred to *Clover, Clayton & Co., Ltd. v. Hughes* (1), *M'Ardle v. Swansea Harbour Trust* (2), *Fenton v. Thorley & Co., Ltd.* (3).

C. W. Muir, for the employers, cited *Beaumont v. Underground Electric Railways Co. of London Ltd.* (4), *Maxwell v. Ruabon Coal and Coke Co. Ltd.* (5).

H LORD HANWORTH, M.R., stated the facts as set out above and continued :
The appeal to this court is on the ground that the learned judge misdirected himself in treating, as I think he does treat it, as essential that there should be some accident before he can find that the widow is entitled to recover. It appears to me that he has been looking for some evidence which vis-à-vis a sudden strain would justify his finding that there was an accident, and that in the absence of a sudden strain, which connotes an accident, there was no accident within the
I meaning of the Workmen's Compensation Act in respect of which the widow could have recovered. It appears to me that in so applying the law the learned judge misdirected himself. There have been a great number of these cases, and, as more than one learned judge has said, it is not easy to find a precise path among them. But we have a decision in the speech of LORD MACNAGHTEN in *Fenton v. Thorley & Co., Ltd.* (3) which has always been held the leading authority in this class of case. In that case it was held that when one talks of an accident within the meaning of the Workmen's Compensation Act one is not speaking of something that is fortuitous or that has arisen from exterior and external causes. There may

be an accident to a workman which happens to him from internal causes without there being any mischance or mishap to the machinery or work on which he is engaged. LORD MACNAGHTEN says:

"A man injures himself suddenly and unexpectedly by throwing all his might and all his strength and all his energy into his work by doing his very best and utmost for his employer, not sparing himself or taking thought of what may come upon him, and then he is to be told that his case is outside the Act because he exerted himself deliberately, and there was an entire lack of the fortuitous element. . . . I come, therefore, to the conclusion that the expression 'accident' is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed."

He quotes with approval the words of LORD McLAREN in *Hensey v. White* (6), saying this:

"'If a workman in the reasonable performance of his duties sustains a physiological injury as the result of the work he is engaged in' . . . 'this is accidental injury in the sense of the statute.'"

Finally, LORD SHAND says "accident"

"denotes or includes any unexpected personal injury resulting to the workman in the course of his employment from any unlooked-for mishap or occurrence."

It appears that when one has got those words as a test it would be wrong (as the learned county court judge appears to have done) to look for an accident in the form of a sudden strain exercised on the workman, something which was more than ordinarily borne by him, or an application of pressure made at a moment to overcome some particular resistance. The true fact appears to be that if there is an unexpected personal injury arising from some physiological condition set up in the course of the work, that may be described as an accident even although there is at the moment nothing unusual or particular which sets it up. That is the basis of the principle or authority which we have to apply.

I am not going all through the cases. They give us some indication or illustration of how those words are to be applied. In *Clover, Clayton & Co., Ltd. v. Hughes* (1) the decision of the court was:

"A workman suffering from an advanced aneurism of the aorta was doing his work in the ordinary way by tightening a nut with a spanner. This ordinary strain caused a rupture of the aneurism, resulting in death."

It was held that the man's death resulted from personal injury. LORD LOREBURN said:

"In other words [we may ask ourselves this question] did he die from the disease alone, or from the disease and employment taken together, looking at it broadly? Looking at it broadly, I say, and free from over nice conjectures: Was it the disease that did it or did the work he was doing help in any material degree?"

That seems to indicate that one has to ask oneself two questions: Did the man die from the disease alone or did the work which he was doing help in a material degree in the sense that it brought on the mishap which, it may be, would not have happened if he had not had the diseased condition, but owing to the diseased condition and the work that he was doing it was set in motion? The next case is *M'Ardle v. Swansea Harbour Trust* (2), and I want to refer to three passages there. It was a case where a workman, fifty years of age, died from an advanced aneurism of the aorta while working and exercising an ordinary strain at work. LORD COZENS-HARDY said:

"I never saw a case in which death was so clearly arising out of the employment in the sense of being physically connected with it, because he died in the very act of doing the work which he was employed to do."

A The county court judge said :

"I came to the conclusion that the death was the result of long-standing heart disease, which reached its natural and ordinary fatal result while he was doing his ordinary day's work. I did not come to the conclusion that there had been any accident or that the death was substantially hastened by the light work the deceased was engaged on at the time."

B

If he had, then the man was entitled to succeed. PICKFORD, L.J., said that the county court judge was wrong in the sense

"that he was under the impression that in order to constitute an accident, in circumstances like these, the work must be something exceptional, and of the harder kind of his work, and that if it were only the ordinary kind of work, and the lightest part of his work, then that was not an accident."

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Supplementing the speech of LORD MACNAGHTEN in *Fenton v. Thorley & Co., Ltd.* (3) by the illustrations given in *Clover, Clayton & Co., Ltd. v. Hughes* (1) and *M'Ardle v. Swansea Harbour Trust* (2), it appears to me quite plain that a man may suffer an accident and be entitled to recover in respect of the injury caused by the accident within the meaning of the Workmen's Compensation Act, although the strain which sets up and puts in motion the cause of his death may arise in the ordinary exercise of his work which he is employed to do and is not of a special or momentary character. For these reasons, therefore, it appears to me that the learned judge has misdirected himself and applied a wrong basis on which he has reached his conclusion.

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Now comes the point, which I think is more difficult. It may well be that the award as made cannot stand because the learned judge has misdirected himself, but it is another question whether or not we can allow the appeal and order the award to be made in favour of the widow. I should be sorry if by any words I used in the judgment, or by any course I took, to invade the sphere which belongs exclusively to the learned county court judge, namely, the sphere of the facts.

F

He must decide the facts and the appeal is only on the question of law. But it appears to me that we can follow the course which was taken in *Fenton v. Thorley & Co., Ltd.* (3) and also in *M'Ardle v. Swansea Harbour Trust* (2), and do that without interfering with the proper sphere of the learned county court judge, for this reason. It appears to me that the evidence given before the learned county court judge was that there may be a strain which can cause sudden death—even

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a small strain—and that with the condition in which this man's arteries were he might have fallen dead at any moment. One doctor says that he would have expected, if any sudden strain occurred beyond the physiological limit, that the heart would be unable to get enough blood and the man would die, and he says that the whole of the morning's work and the work of the days before contributed to the death. Another doctor thinks that a sudden exercise brings on death with

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this disease. It appears to me upon that evidence, rightly directing one's mind in law, that it is unnecessary to find a sudden strain exterior to the causes which effected the death. The evidence before the learned county court judge was such that he would have and must have found in favour of the defendant if he had directed himself aright and if he had not sought to find what it was unnecessary to find. For these reasons it appears to me that the appeal must be allowed and

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the award made in favour of the defendant. As I understand the amount for which it is to be made is not in dispute, the award can be entered for the sum of £295 13s., with costs of the appeal and of the proceedings below.

ATKIN, L.J.—I agree. The question here is whether personal injury by accident was caused to the workman, and if it was whether it arose out of and in the course of the employment. The first question is: Was there or not personal injury by accident? Upon that the learned judge has only directed himself to one consideration, namely, whether there was some external cause which could be

described as an accident—a sudden strain—and in investigating that fact he has come to the conclusion, which I think is a correct conclusion on the facts, and at any rate a conclusion upon which there was evidence to support it, that there was in this case no sudden strain. The man, who was a stevedore, was working in unloading a cargo of iron ore from the bottom hold of a ship. Three men were engaged in filling the bucket which was lowered from the top deck. The bucket was lowered by a chain through the hatch down to about the top of the tunnel. It was then pushed off the level of the tunnel by the men who were standing on top of the tunnel, and lowered to the men at the bottom of the hold. The accident arose in this way. The workman was either pulling or pushing at the side of the bucket, when he was engaged in pulling it into position and he suddenly said “Oh!” and let the bucket go so that it swung back towards the tunnel. Then, apparently, it was got into position again by the two other men. The workman resumed work, but complained of the pain in his chest after dealing with about six shovelfuls of the ore. He went on again with another six shovelfuls, and then he said, “I am done.” His mates helped him up to the top of the tunnel and laid him on the top, and in about ten minutes he died. At the post-mortem it was found that he was suffering from a disease of the heart. It was not a case, as I understand, of a rupture. We know that arteries rupture, and in the disease known as apoplexy we know of the bursting of an aneurism. These arteries apparently put so much pressure upon the heart that the heart is unable to do its work, and, therefore, there is a strain upon the heart. If it is a heavy strain upon the heart it would probably produce death at once; if it is a smaller strain it will affect the heart to a less extent, but death will follow in the ordinary course even without any special strain at all. The learned judge here has found that there was no accident. That is the only matter which has given me any trouble in the case. It appears to me that he was clearly wrong, if I may say so with respect of a very experienced judge, if he only directed his attention to some external cause such as a heavy strain outside. Of course, he would have been right in directing his attention to an external cause if there was no evidence of an internal accident, because it is plain from LORD MACNAGHTEN’s judgment that injury by accident may result from an untoward and unexpected event occasioned by some external and entirely unexpected occurrence, or may be occasioned by some internal disarrangement of the physical arrangements of the man’s frame, though it is produced by the ordinary course of events without there being anything unexpected at all as far as external conditions are concerned.

In the case of an aneurism it appears to me plain that there is what one might call an internal accident. That has been decided now in *Fenton’s Case* (3) and in the *Clover, Clayton, Case* (1). In *Fenton’s Case* (3) it was a rupture in the ordinary sense; in *Clover, Clayton’s Case* (1) it was an aneurism. But this is a case where one cannot visualise an accident as obvious; that is, the bursting of a blood vessel, or the fracture of a bone, or the snapping of a sinew. It is a case where there is strain put upon the heart that causes the fact that the man dies. The question is whether in those circumstances it can be properly said that where such a strain is put upon a man’s heart that he dies, he died from accident or met with an accident. That must depend upon the cases relating to the definition of “accident.” The leading judgment is, and always has been from the time it was delivered, the judgment of LORD MACNAGHTEN in *Fenton v. Thorley & Co., Ltd.* (3). I need only refer to two passages in that judgment. One is the passage in which he says:

“I come, therefore, to the conclusion that the expression ‘accident’ is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed.”

I think that will cover the case of a strain on the heart which causes death within half an hour of the time when the cause began to operate, as to which I will say a word or two. But I think that the material passage which helps in this case is

A the citation by his Lordship of the Scottish case of *Stewart v. Wilson & Clyde Coal Co.* (7), to which LORD MACNAGHTEN refers by saying :

B "There is, however, a recent decision of the Court of Session in Scotland to which I should like to call your Lordships' attention, and in which I agree entirely. That was a case . . . of a miner who strained his back in replacing a derailed coal hutch, and the question was whether that was an accident, and all the learned judges held that it was, and it was said that he did it deliberately and in the ordinary course of his work. LORD McLAREN observed that it was impossible to limit the scope of the statute. He considered that 'if a workman in the reasonable performance of his duties sustains a physiological injury as the result of the work he is engaged in' . . . 'this is accidental injury in the sense of the statute.'"

C It appears to me that if it is established that a man suffers a strain of the heart which causes death as a result of the work engaged in, nobody can say that he has not sustained a physiological injury and, therefore, has met with an accidental injury. I think that the same result is arrived at from what LORD LINDLEY says :

D "Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause; and if the cause is not known the loss or hurt itself would certainly be called an accident."

E There is a further passage which I think confirms this, if it were needed, in LORD LOREBURN's judgment in the *Clover, Clayton Case* (1), where he says, dealing with the ordinary case, this :

F "No doubt the ordinary accident is associated with something external; the bursting of a boiler, or an explosion in a mine, for example. But it may be merely from the man's own miscalculation, such as tripping and falling. Or it may be due both to internal and external conditions, as if a seaman were to faint in the rigging and tumble into the sea. I think it may also be something going wrong within the human frame itself, such as the straining of a muscle, or the breaking of a blood vessel."

G If one comes to think of it, the strain on the heart is a strain of a muscle, and is precisely within the description which is referred to by LORD LOREBURN. Then there is another passage of LORD MACNAGHTEN in the same case. He is dealing with the question of an accident, which it is true is the material point here, and then he goes on to consider the other question : Did it arise out of his employment? In reference to that the passage which I have read is relevant. The county court judge, he said, has held that it did, that is, that it did arise out of the employment.

H " 'The death,' says the learned judge, 'was caused by a strain arising out of the ordinary work of the deceased operating upon a condition of body which was such as to render the strain fatal.' "

I That is precisely the contention which was contended for here. If that is the true inference of fact, I think there can be no question at all but that here there was a clear accident. There may be an accident in this sense, apart from there being any external cause—any sudden strain. The learned judge was, in my opinion, wrong in confining himself merely to the consideration of an external cause. He ought to have considered the other point whether there was an accident in the larger sense.

Then comes the question whether there was any evidence at all upon which he could come to the conclusion that the applicant was not entitled. Ordinarily speaking, it is a question of fact. There seems to be evidence, and there must be only one conclusion possible in law. When I have to consider that and when I find that it is just as capable of being an accident as the breaking of an aneurism, then I find myself quite unable to distinguish this case from *M'Ardle v. Swansea*

Harbour Trust (2). It appears to me to be exactly the same in every detail. The only difference is that the loss or hurt here took some twenty or thirty minutes to develop, whereas in *M'Ardle's Case* (2) the loss or hurt happened at once, according to the nature of the accident, because it was the bursting of an aneurism, and therefore death was caused immediately. But apart from that the passages which have been read by the Master of the Rolls, and which I do not propose to read again, from LORD COZENS-HARDY's judgment, seem to indicate that there is only one inference the judge could draw at law in this case, namely, that this accident did arise out of the employment. Therefore, it seems to me that the learned judge was wrong, and it appears to me that, following *M'Ardle's Case* (2), it is our duty to say that there is only one result possible in law, and that is that there should be an award in favour of the applicant.

LAWRENCE, L.J.—I agree. The facts in this case seem to me to be indistinguishable from the facts in *M'Ardle's Case* (2). In my judgment, the distinction made by LORD MACNAGHTEN in *Fenton's Case* (3) is wide enough to include the death of the workman in the circumstances appearing in this case. It seems to me on the evidence, including in that term the medical evidence, the inference is irresistible that there was an accident here. The erroneous idea underlying the learned judge's judgment, in my opinion, is that some external cause, such as a sudden strain, was necessary in order to support the claim of the dependant. I agree with what the Master of the Rolls and ATKIN, L.J., have said on that point and I do not think I can usefully add anything to it.

Solicitors: *Pattinson & Brewer*, for *Punch & Robson*, Middlesbrough; *Botterell & Roche*, for *Botterell, Roche & Temperley*, Hartlepool.

[Reported by H. LANGFORD LEWIS, ESQ., Barrister-at-Law.]

R. v. COPESTAKE AND OTHERS. Ex parte WILKINSON

[COURT OF APPEAL (Lord Hanworth, M.R., Scrutton, L.J., and Romer, J.), July 14, 1926]

[Reported [1927] 1 K.B. 468; 96 L.J.K.B. 65; 136 L.T. 100; 90 J.P. 191; 24 L.G.R. 562]

Bastardy—Order—Revocation—Power to revoke limited to part of order directing payment—"Fresh evidence"—Bastardy Laws Amendment Act, 1872 (35 & 36 Vict., c. 65), s. 4—Criminal Justice Administration Act, 1914 (4 & 5 Geo. 5, c. 58), s. 30 (3).

By s. 30 (3) of the Criminal Justice Administration Act, 1914: "Any order made . . . by a court of summary jurisdiction for the periodical payment of money may, upon cause being shown upon fresh evidence to the satisfaction of the court, be revoked, revived, or varied by a subsequent order."

Held: under this subsection an order for periodical payments made in affiliation proceedings under s. 4 of the Bastardy Laws Amendment Act, 1872, may be revoked, but not the determination of the paternity of the child contained in the order.

Per Curiam: Evidence, to be "fresh evidence" within s. 30 (3), must not only have come to the knowledge of the person applying for revocation, revival, or variation since the original hearing and be such as could not have been discovered by reasonable means before that time. It must also be of such weight

A as, if believed, would probably have had an important influence on the judgment of the court if it had been given at the original hearing.

Notes. Section 4 of the Bastardy Laws Amendment Act, 1872, and s. 30 (8) of the Criminal Justice Administration Act, 1914, have been repealed. See now Affiliation Proceedings Act, 1957, s. 4 (37 Halsbury's Statutes (2nd Edn.) 40) and s. 53 of the Magistrates' Courts Act, 1952 (*ibid.*, vol. 32, p. 463).

B Considered: *Batchelor v. Smith* (1935), 72 Sol. Jo. 49; *Nicholson v. Inverforth* (1935), 79 Sol. Jo. 816; *Markham v. Markham*, [1946] 2 All E.R. 737; *Re D. (an infant)*, [1953] 2 All E.R. 1318. Referred to: *Underwood v. Underwood*, [1945] 2 All E.R. 561; *Tomling v. Universal Bulb Co.*, [1951] 2 T.L.R. 289; *Leeder v. Ellis*, [1952] 2 All E.R. 814.

C As to the revocation, &c. of affiliation orders, see 3 HALSBURY'S LAWS (3rd Edn.) 127-131; and for cases see Digest Supps.

Cases referred to:

- (1) *Colchester v. Peck*, [1926] 2 K.B. 366; 95 L.J.K.B. 1038; 135 L.T. 32; 90 J.P. 130; 42 T.L.R. 535; 28 Cox, C.C. 225, D.C.; Digest Supp.
- (2) *Timmins v. Timmins*, [1919] P. 75; 88 L.J.P. 78; 120 L.T. 544; 63 Sol. Jo. 287, D.C.; 27 Digest (Repl.) 728, 6943.
- D (3) *Johnson v. Johnson*, [1900] P. 19; 69 L.J.P. 13; 81 L.T. 791; 64 J.P. 72; 16 T.L.R. 26, D.C.; 27 Digest (Repl.) 727, 6940.
- (4) *Brown v. Dean*, [1910] A.C. 373; 79 L.J.K.B. 690; 102 L.T. 661; sub nom. *Dean v. Brown*, 54 Sol. Jo. 442, H.L.; 13 Digest (Repl.) 449, 720.
- (5) *Nash v. Rochford Rural Council*, [1917] 1 K.B. 384; 86 L.J.K.B. 370; 116 L.T. 128; 81 J.P. 57; 15 L.G.R. 103, C.A.; 22 Digest (Repl.) 471, 5194.
- E (6) *Shedden and Shedden v. A.-G. and Patrick and Patrick* (1860), 2 Sw. & Tr. 170; 30 L.J.P.M. & A. 217; 3 L.T. 592; 6 Jur.N.S. 1163; 9 W.R. 285; affirmed sub nom. *Shedden v. Patrick and A.-G.* (1869), L.R. 1 Sc. & Div. 470; 22 L.T. 631, H.L.; 22 Digest (Repl.) 471, 5189.

Appeal by one Wilkinson, the applicant for a writ of mandamus directed to F justice, against an order of the Divisional Court.

The facts are stated in the judgment of the Master of the Rolls.

Bertram Long for the applicant.

J. F. Eales for the justices.

LORD HANWORTH, M.R.—This case raises the question whether under s. 30 G (3) of the Criminal Justice Administration Act, 1914, an application can be made to vary a bastardy order by justices on fresh evidence as to paternity.

An application was made on May 29, 1925, by a young girl who had given birth to a child on April 4 previously alleging that the applicant, Wilkinson, was the father of the child. On the hearing before the justices, Wilkinson gave evidence that he had had connexion with the girl towards the end of August, 1924, which H would make the child a seven months' child. The decision of the justices was that Wilkinson was the putative father of the child, and they made an order for him to pay 10s. a week until the child was fourteen years old, and also £1 10s., the expenses at birth and costs. It is said that later on Wilkinson learned from the nurse who took charge of the child that in fact the child was a full time child when born, which would necessarily put the act of coition in July, 1924. On I October 2, 1925, an application was made by the mother on the ground that Wilkinson had not made the payments under the order and on that application Wilkinson applied to the justices, under s. 30 (3) of the Criminal Justice Administration Act, 1914, for a variation of their order or that it should be set aside as the doctor would corroborate the nurse's statement that the child was a full time child. The justices took time to consider the case and a fortnight afterwards refused to set aside the order made by them. On November 4 there was a further summons against Wilkinson for non-payment of the 10s. a week as ordered and then counsel on his behalf again asked that the matter should be re-opened, but

the justices refused to do so. In February, 1926, Wilkinson applied to the Divisional Court and was granted a rule nisi for a mandamus against the justices. On the hearing of that application on May 4 the attention of the Divisional Court was called to a decision given by them in *Colchester v. Peck* (1) which decided the very point at issue in this case since they held that the justices were right in refusing to hear fresh evidence as to the paternity of a child because s. 30 (3) of the Act of 1914 did not enable them to vary the part of their order adjudicating on paternity as distinguished from the part of the order which directed a periodical payment to be made. The Divisional Court thereupon only gave a judgment stating that they would follow their decision in *Colchester v. Peck* (1) and discharged the rule. Wilkinson has presented this appeal. A

It is said that the order of May 29, 1925, was for the periodical payment of a sum to this girl. Section 30 (3) of the Criminal Justice Administration Act, 1914, provides : B

“Any order made either before or after the commencement of this Act by a court of summary jurisdiction for the periodical payment of money may, upon cause being shown upon fresh evidence to the satisfaction of the court, be revoked, revived or varied by a subsequent order.” C

It is claimed that in this case such an order was made; that there was fresh evidence; that on that fresh evidence there was power for the court to revoke the order they made for payment, and, therefore, that there was a jurisdiction which ought to have been exercised by the justices to hear the fresh evidence. The appellant also contends that s. 37 (2) of the Act of 1914 provides for an appeal to quarter sessions from such an order as this was, since it was an order by a court of summary jurisdiction relating to bastardy, and it is desired here to have the order of May 29, 1925, revoked. Section 37 (2) provides for an appeal to quarter sessions from any refusal by a court of summary jurisdiction to make an order under the enactments relating to bastardy, or from the revocation, revival, or variation by a court of summary jurisdiction of such an order, and Wilkinson says that that subsection contemplated the revocation of a bastardy order and not necessarily the order only for a periodical payment. That may be a plausible argument, but I have come to the conclusion that the Court of King's Bench were quite right in the decision they came to. D

A bastardy order is made under the powers for that purpose given by s. 4 of the Bastardy Laws Amendment Act, 1872, which provides in the first place that on evidence being given the justices may adjudge the man to be the putative father, and having so adjudged, the section proceeds E

“and they may also if they see fit, having regard to all the circumstances of the case, proceed to make an order on the putative father for the payment to the mother . . . of a sum of money weekly . . . for the maintenance and education of the child, and of the expenses incidental to the birth of such child.” F

By s. 9 of the Act on an appeal against any order made under that Act quarter sessions are given power, if they think fit, to reduce the amount directed to be paid. There are three things of importance to be observed in that Act of 1872, first, the power of the justices after hearing evidence which satisfies them to adjudge that the man was the putative father of the child; secondly they have power, when they have so adjudged, to order him to pay a periodical sum; and thirdly, quarter sessions have power to reduce the amount ordered to be paid. When the Criminal Justice Administration Act, 1914, was passed it dealt, by s. 30, with the periodical payments of money, and it established the practice that such payments could be made through an officer of the court or any other person specified in the order, and provided by s. 30 (3) that any such order for the periodical payment of money might, upon cause being shown upon fresh evidence to the satisfaction of the court, be revoked, revived, or varied by a subsequent order. But the adjudication that Wilkinson was the putative father of the child was not an order for a periodical payment, and, therefore, though sub-s. (3) should be construed in a wide sense, it G

A is not necessary that it should be held to impute power to revoke the order of adjudication that Wilkinson was the putative father of the child. That view of the interpretation of sub-s. (3) is made clearer by the provision made by sub-s. (5) which provided that nothing in s. 30 should prejudice or affect the powers and duties of courts of summary jurisdiction under the Affiliation Orders Act, 1914. By s. 7 of the Affiliation Orders Act, 1914, "affiliation order" means an order made under the Bastardy Laws Amendment Act, 1872, or any Act amending the same, adjudging a man to be the putative father of a bastard child and ordering him to pay a sum of money weekly or otherwise to the mother of the bastard child or to any other person who is named in the order. There is, therefore, in an Act passed a few days before the Criminal Justice Administration Act, 1914, an express term "affiliation order" used which combines in its meaning both the adjudication of a man as the putative father and an order for payment by him of a weekly sum, but both those elements are not included in sub-s. (3) of s. 30. Therefore, for the reasons given by LORD HEWART, C.J., in *Colchester v. Peck* (1), s. 30 (3) of the Criminal Justice Administration Act, 1914, is not so wide as to allow of the revocation of an order of adjudication that the man was the putative father. If the words of revocation in s. 30 (3) are confined to the periodical payment of money and are not interpreted to refer also to the order of adjudication, full effect will have been given to the words used in the subsection. For the reasons given by AVORY, J., in the Divisional Court I think that sub-s. (3) of s. 30 cannot be interpreted by reference to sub-s. (2) of s. 37 of the same Act.

On the main point I agree that the decision of the Court of King's Bench is right, and the appeal must be dismissed. That seems enough to dispose of the case, but I will say a word upon the subject of fresh evidence. As to the meaning of fresh evidence being shown to the court HILL, J., said, in *Timmins v. Timmins* (2), founding himself on what was said in *Johnson v. Johnson* (3), that this term "fresh evidence" meant evidence of something which had happened since the former hearing, or had come to the knowledge of the party applying since the hearing, and could not by reasonable means have come to his knowledge before that time. In *Brown v. Dean* (4) it was said by LORD LOREBURN that, in addition to the requirement that the evidence must be such as to come to the knowledge of the person applying for a re-hearing since the original hearing, and could not have been discovered by reasonable means before that time,

"when a litigant has obtained a judgment in a court of justice, whether it be a county court or one of the high courts, he is by law entitled not to be deprived of that judgment without very solid grounds, and where (as in this case) the ground is the alleged discovery of new evidence, it must at least be such as is presumably to be believed, and if believed would be conclusive."

That statement was not accepted by LORD SHAW, but the other learned Lords agreed with the Lord Chancellor, and the result of it would be to show that only in remarkably strong cases could any evidence be produced which was of such a kind as to come within the term "fresh evidence." That evidence must be of such a character that not merely is it relevant, but is of such importance that it would have affected the judgment of anyone if they had had the opportunity of hearing it at the original hearing of the case. For my own part, I am not satisfied that there was fresh evidence in this case because it seems to me that if Wilkinson had been alert the same evidence of the nurse and doctor could have been obtained by him before the hearing, but it is not in fact necessary to decide that point, as I agree with the conclusion of the King's Bench Court on the main question.

SCRUTTON, L.J.—My mind has fluctuated during the course of the arguments, as I gather did the minds of two of the judges in *Colchester v. Peck* (1). A young woman took out a bastardy summons against a man. The man knew he had had connexion with the girl, and the girl said the act of connexion took place at the beginning of August, 1924, but she said that the child was a seven months' child. The magistrates adjudged the man to be the father of the child and made an

order that he was to pay a sum of 10s. a week until the child was fourteen years of age. The time for appeal to quarter sessions expired. The man then got into touch with the nurse and doctor who had attended the confinement and told him that it was a full time, and not a seven months' child. If that evidence was true, the man was not the father of the child. He then took out a summons alleging that he had obtained fresh evidence, and asking to have the order revoked under s. 30 (3) of the Criminal Justice Administration Act, 1914. The magistrates decided that it was not open to him on fresh evidence to show that he was not the father. They held that he might tender evidence on the question of payment, but only on the ground that he was the father. Then there was the subsequent application to the King's Bench Division, and this is an appeal from the Divisional Court which discharged the rule nisi for a mandamus, following their own decision in *Colchester v. Peck* (1). The question on this appeal turns upon s. 30 (3) of the Criminal Justice Administration Act, 1914. That section deals with a lot of matters concerning periodical payments, and sub-s. (3) provides that any order made by a court of summary jurisdiction for the periodical payment of money may, upon cause being shown upon fresh evidence to the satisfaction of the court, be revoked, revived, or varied by a subsequent order. The applicant for the rule says: "I desire this order for a periodical payment of money to be revoked, because the fact upon which it is founded is not true, and I desire to prove that by fresh evidence."

Section 4 of the Bastardy Laws Amendment Act, 1872, is in two parts. The first is:

"The justices in . . . petty session shall hear the evidence of such woman and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father, and if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the justices, they may adjudge the man to be the putative father of such bastard child."

That is the first stage, and the order which is drawn up is that the man is adjudged to be the putative father. Then comes the second stage:

"and they may also, if they see fit, having regard to all the circumstances of the case, proceed to make an order on the putative father for the payment to the mother of the bastard child . . . of a sum of money weekly."

Upon that the justices, if they see fit, make the second part of the order, for payment of a weekly sum. The first part of the order is an adjudication as to paternity. When the summons is dismissed for want of sufficient evidence it is treated as a normal suit, and there are decisions which show that the mother may repeat her application within twelve months of the birth, and there are also decisions that when the matter is tried out on its merits and the justices give their decision, that decision is final, subject to an appeal to quarter sessions to reduce the amount directed to be paid.

If that were the position before 1914, one would expect that one could call in question both parts of the order, both the adjudication and the amount of payment, and in another section the legislature has put in another case, where there is adultery. But in this case Parliament has not provided for that. It is said that the order for payment may be revoked or varied by a subsequent order; but if the legislature were dealing with the final decision as to paternity, and meant that in future it could be re-opened, they would have said so, and I think we ought not so to hold unless there is a clear enactment to that effect. It has been argued that sub-s. (2) of s. 37 of the Act of 1914 is not consistent with that view. That section provides for appeals to quarter sessions from any order made by a court of summary jurisdiction under the enactments relating to bastardy, or from any refusal by such a court to make such an order, or from the revocation, revival, or variation by a court of summary jurisdiction of such an order. If s. 37 does not give any appeal except from the orders which that jurisdiction allows, it may have

A been a *casus omissus*, but I think that the justices were right in thinking that they had no jurisdiction to revoke the order as to the paternity. If, however, the justices had decided, and had been entitled to re-open the question of paternity, then I think that I should have held that there was fresh evidence of a kind enabling them to do so. In *Nash v. Rochford Rural Council* (5) the question of the admission of fresh evidence was before this court, and we followed the rule B laid down by LORD CHELMSFORD in *Shedden v. Patrick & A.-G.* (6) and stated it in much the same way as HILL, J., stated it in *Timmins v. Timmins* (2), to the effect that the evidence to be admitted must be of such importance as probably to influence the decision. It seems to me that we in this court have not gone so far as the full extent of LORD LOREBURN's dictum in *Brown v. Dean* (4) ([1910] A.C. at p. 374) that the new evidence must be of such a character that it is C "presumably to be believed, and if believed would be conclusive," but I think that we have clearly decided that it must be of such weight as, if believed, probably to have an important influence on the result. I agree that the appeal should be dismissed.

D ROMER, J.—On the construction of s. 30 (3) of the Criminal Justice Administration Act, 1914, and for the reasons given by the Master of the Rolls and SCRUTTON, L.J., I agree that the Court of King's Bench came to a right conclusion, and that the appeal ought to be dismissed, and it is, therefore, not necessary for me to express any opinion on the arguments relating to fresh evidence.

Solicitors: *J. Tickle & Co.*, for *H. M. Smith*, Derby; *Peacock & Goddard*, for *Moody & Woolley*, Derby.

E [Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

F

THOMPSON v. ROLLS

[KING'S BENCH DIVISION (Rowlatt and Wright, JJ.), May 19, 20, 1926]

G [Reported [1926] 2 K.B. 426; 95 L.J.K.B. 901; 135 L.T. 446; 42 T.L.R. 582; 70 Sol. Jo. 775; 24 L.G.R. 531]

Rent Restriction—Possession—Form of order—Landlord wishing for possession of two rooms sub-let by tenant—Tenant to retain rooms already occupied by her as "alternative accommodation."

H In 1924 the landlord bought a house within the protection of the Rent Restriction Acts which contained seven rooms, of which five were occupied by the tenant, the remaining two being sub-let furnished by the tenant. She informed the tenant that she required the two latter rooms for her own occupation as a residence, and that she would be prepared to allow the tenant as alternative accommodation the actual amount of accommodation the tenant had at present in the house, namely, the other five rooms. The tenant, I however, refused to give the landlord possession of the two rooms. The landlord then brought an action for possession of the whole house, on the ground that it was reasonably required for her own occupation as a residence within the meaning of s. 4 (1) (d) of the Rent and Mortgage Interest Restrictions Act, 1923. The county court judge made an order for possession, to be confined to the two rooms sub-let furnished by the tenant, subject to the condition that the tenant's rent should be reduced from 19s. 6d. to 9s. 6d. per week.

Held: (i) the form of the order should have been to give the landlord possession of the whole house, subject to her offering the tenant a tenancy of the

five rooms therein at the above-mentioned reduced rent; (ii) the fact that the alternative accommodation offered to the tenant was the same accommodation as she already occupied did not prevent it being suitable alternative accommodation satisfying the requirements of the Rent Restrictions Acts.

Notes. Section 5 (1) of the Increase of Rent, etc. (Restrictions) Act, 1920, as re-enacted by s. 4 of the Rent, etc., Restrictions Act, 1923, was repealed by the Rent, etc., Restrictions (Amendment) Act, 1933. As to the power of the court to make orders of possession, see now Sched. I to the Act of 1933.

Approved: *Parnee v. Mitchell*, [1950] 1 All E.R. 872. Referred to: *Fordree v. Barrell* (1931), 95 J.P. 141; *Murgatroyd v. Tresarden*, [1946] 2 All E.R. 723.

As to orders for possession and what is suitable alternative accommodation, see 23 HALSBURY'S LAWS (3rd Edn.) 813 et seq.; and for cases see 31 DIGEST (Repl.) 705-708, 714-720. For Rent, etc., Restrictions (Amendment) Act, 1933, see 13 HALSBURY'S STATUTES (2nd Edn.) 1044.

Cases referred to:

- (1) *Gidden v. Mills*, [1925] 2 K.B. 713; 95 L.J.K.B. 1; 134 L.T. 21; 24 L.G.R. 27, D.C.; 31 Digest (Repl.) 649, 7530.
- (2) *Salter v. Last*, [1924] 1 K.B. 754; 93 L.J.K.B. 685; 130 L.T. 323; 68 Sol. Jo. 420; 22 L.G.R. 296, C.A.; 31 Digest (Repl.) 697, 7885.
- (3) *Ellen v. Goldstein* (1920), 89 L.J.Ch. 586; 123 L.T. 644; 31 Digest (Repl.) 647, 7518.
- (4) *Leslie & Co., Ltd. v. Cumming*, post, p. 408; [1926] 2 K.B. 417; 95 L.J.K.B. 1007; 135 L.T. 443; 42 T.L.R. 504; 70 Sol. Jo. 738; 24 L.G.R. 315, D.C.; 31 Digest (Repl.) 639, 7468.
- (5) *Prout v. Hunter*, [1924] 2 K.B. 736; 93 L.J.K.B. 993; 132 L.T. 193; 40 T.L.R. 868; 69 Sol. Jo. 49; 22 L.G.R. 746, C.A.; 31 Digest (Repl.) 639, 7467.

Appeal from Wandsworth County Court.

The plaintiff, the landlord, claimed from the defendant, the tenant, possession of a dwelling-house, alleging that it was reasonably required for the occupation of herself and her mother as a residence within the meaning of s. 5 (1) of the Increase of Rent, etc. (Restrictions) Act, 1920, as re-enacted by s. 4 of the Rent and Mortgage Interest Restrictions Act, 1923, and that she had offered the tenant reasonable alternative accommodation. She had previously informed the tenant that she would be quite satisfied with possession of two rooms, and that the tenant could have the actual amount of accommodation she at present occupied, namely, the other five rooms. The county court judge made an order for possession to take effect in four months, to be confined to the two rooms and subject to the condition that the tenant's rent should be reduced from 19s. 6d. to 9s. 6d. per week.

The tenant appealed.

Frank Powell, for the tenant, referred to *Gidden v. Mills* (1), *Salter v. Last* (2), *Ellen v. Goldstein* (3), *Leslie & Co., Ltd. v. Cumming* (4).

H. Salter Nichols, for the landlord, cited *Prout v. Hunter* (5).

ROWLATT, J.—In this case the plaintiff, a woman of small means, bought a house containing seven rooms with the intention, as she said, of living in it. The defendant was the tenant of that house to the vendor. Of the seven rooms which the house contained the tenant herself occupied five and let the other two furnished. The landlord's family is such that she can actually be accommodated in two rooms, and probably does not absolutely require more, while ex hypothesi, the tenant does not require more than five, because she has let two furnished. The position, then, is that of the seven rooms in this house the owner wants two and the tenant wants five. *Prima facie*, one would have thought that there was obviously accommodation for the two families in the house; but the reason why the tenant objects to that arrangement is that a profit is made by her from the letting

A of the two rooms which she does not require and the owner does require. It is quite clear that this case is outside the mischief which these Acts intended to remedy. It is not a case of an unfortunate person being deprived of the only accommodation which she can get, but a case of an owner being deprived of rooms in her house occupied by a tenant who does not require them. Owing, however, to the able argument which has been addressed to us by counsel for the tenant,

B I felt great difficulty for some time in deciding this question. The county court judge has made an order giving the landlord possession of two rooms, and allowing the tenant to remain in occupation of the other five at a reduced rent of 9s. 6d. per week. I doubt whether, if it so stand, the order is correct in form, but it seems to me that in substance it is entirely correct.

The position is as follows. The landlord has given the tenant notice to quit

C in respect of the whole house, and at common law she is entitled to recover possession, but she is confronted with the difficulty that under the Rent Restriction Acts she has to prove that the dwelling-house is reasonably required for her own occupation as a residence. She brings her action for possession of the whole house; non constat, the tenant will raise the defence of the Act, but she does in fact raise it. The landlord then has to prove that the dwelling-house is reasonably

D required for her own occupation as a residence. She has only proved that she requires two rooms, and it is said on behalf of the tenant that, therefore, she has not proved that the whole house is reasonably required by herself. She has proved that she requires two rooms in that house, and that it is the only house which she has, and I am not at all certain that on those facts alone she does not reasonably require the whole house for her own occupation, but on looking further

E into the facts I am entirely satisfied that she does reasonably require the whole. The tenant says in effect: "You shall not get possession of the two rooms, and I will compel you to ask for the whole seven, in order to show that you do not want them." The landlord, therefore, is driven to ask for the whole seven rooms, and it seems to me that the part of the section dealing with reasonable requirement for the landlord's own occupation is satisfied. It was very adroitly argued

F by counsel for the appellant that the county court judge has never found in terms that the landlord requires the seven rooms, but inasmuch as he has found that she requires two and is compelled to ask for the seven, because the tenant insists that she shall do so by taking the point that she cannot sue for the two rooms, it seems to me that the county court judge has found the only fact required for the purposes of s. 4 (1) (d) of the Act of 1923.

G Next, the plaintiff has to prove that alternative accommodation within the meaning of the section is available for the defendant. Ex hypothesi, the plaintiff is getting the whole house for the moment, but eo instanti, it appears that the tenant can have the five rooms which she now occupies at a reasonable rent. Why, is not that alternative accommodation? It is true that it is not accommodation in another house: the tenant is leaving the whole house, but eo instanti she

H is obtaining the same five rooms in the house as she already occupies in which to live. In my opinion, that is alternative accommodation, except in the narrowest possible construction of the words. It is ingeniously said on behalf of the tenant that there is a moment of time in which she has not got any alternative accommodation, but that is too metaphysical a distinction for this court to consider. A difficulty has been raised in regard to the apportionment of the rent.

I To my mind, there was here no apportionment. The order should be that the landlord recover the whole house on condition that she undertakes that the tenant shall have five rooms therein at a reasonable rent. That condition is imposed only to demonstrate the availability of alternative accommodation for the landlord. The tenant is merely told that the landlord has furnished her with an undertaking that she shall have the requisite number of rooms at a reasonable rent. I am of opinion, therefore, that here the requirement of alternative accommodation is satisfied.

It has further been contended by counsel for the tenant that the order made by

the county court judge will lead to hopeless difficulties, because the court has no jurisdiction to give to the landlord the right to use the common conveniences of the house. That argument, however, is based on a misconception. The county court judge has said that the landlord is to recover possession of the whole house, on condition that she offers the tenant a tenancy of five rooms therein. The tenant need not accept that tenancy, but if she does she must understand that she occupies as a tenant on terms and that she is not in the position of a statutory tenant, who could deprive the landlord of the use of these appurtenances. She is to remain because she has elected to take the rooms in the exercise of the rights given by the undertaking of the landlord. In my opinion, this is sufficient to dispose of the appeal, and it is not necessary for me to express any opinion on the question whether the sub-letting of the two rooms furnished by the tenant constituted them a separate dwelling-house unprotected by the Act. I think, for the reasons that I have already stated, that this appeal must be dismissed. A B C

WRIGHT, J.—I agree. It would, in my opinion, be a most lamentable result if, in the circumstances of the present case, the landlord were unable to obtain the relief sought. She is the owner of the dwelling-house in question and has claimed the right to possession. She bought the house in order to obtain accommodation where she could live, with the knowledge that the existing tenant had actually sub-let two rooms, and with the hope and intention of taking over the two rooms from the tenant and leaving her in possession of the remainder. The defendant has refused to come to any arrangement, and has left the plaintiff to her strict rights. D

I agree that the order which the county court judge has made needs to be redrawn as a matter of form, though it is correct in substance. I have some doubt what was the actual finding of the county court judge on what the landlord had established in regard to the reasonable requirement of the premises for her own occupation. One version of his judgment uses the words "part of the premises" as being required, another says "the premises" simply, but I attach no importance to the difference. I think that the substance of his finding was that the landlord desired to occupy two rooms only, but, being met by the opposition of the tenant, could obtain occupation of the two rooms only by obtaining occupation of the whole house. If she obtained occupation of the whole house, she could use the house, first, for providing for her own requirements and, secondly, for furnishing, as I think, alternative accommodation to the tenant. I think that in these circumstances the landlord has satisfied the condition imposed by s. 4 (1) (d) of the Act of 1923, and that she has shown that the dwelling-house was reasonably required by her for occupation as a residence for herself, or for a person bona fide residing with her. The words of the section do not say that the whole dwelling-house has to be reasonably required by the landlord, but, even, if they did, I think that the plaintiff here has established that she reasonably requires the whole house, and I think too that she has satisfied the condition in regard to alternative accommodation, because she offers and accepts as a condition that the remaining five rooms shall be available for the tenant on the payment of a reasonable rent suitable to the tenant's means, which has been found by the county court judge to be 9s. 6d. per week. I think, therefore, that the landlord has satisfied the conditions imposed by the section, and she is entitled to have an order made in her favour for possession of the whole premises, subject to the condition I have indicated, and that the order made by the county court judge should be varied only as a matter of form. E F G H I

If necessary, I should have been prepared to uphold the order of the county court judge in the form that he has made it, though not exactly upon the grounds on which he based it. My only difficulty is that on the facts as they appear I think it might have been held that the two rooms sub-let furnished by the tenant were a separate dwelling-house within the meaning of s. 12 of the Act of 1920. Being let as furnished rooms, they were outside the protection of the Act and, in these

A circumstances, when the landlord brought her claim for possession, she could have been met with the defence of the Act only as regards the part of the premises other than the part which was sub-let furnished. It is clear from the decision in *Prout v. Hunter* (5) that in cases of this nature the status of the dwelling-house at the time when the action is brought has to be considered. It is also clear from the decision in *Gidden v. Mills* (1) that in the case of a claim for possession of

B entire premises the court may limit its order of possession to that part of the premises to which the provisions of the Rent Restriction Acts do not apply. I think also that the two rooms sub-let in this manner might well have been held to be a separate dwelling-house and that, in view of the dicta in *Leslie & Co., Ltd. v. Cumming* (4) the plaintiff might have succeeded if she had limited her claim for possession to this portion of the premises only. The case, however, was not

C dealt with on that footing, and it may be that the sub-tenant ought to have been added as a party, and in any event this court should have been provided with findings of fact on this question. In particular, the county court judge ought to have made an apportionment of the rent attributable to the portion of the premises other than the two rooms sub-let, though I think that under the provisions of the Act he would have jurisdiction to make that apportionment at the time of the

D order. For these reasons, I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Watkins, Pulleyn & Ellison; Aplin-Nichols, Son & Coutts.*

[*Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.*]

E

F

PEAGRAM v. PEAGRAM

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Shearman, JJ.), April 20, 21, 1926]

[*Reported* [1926] 2 K.B. 165; 95 L.J.K.B. 819; 135 L.T. 48; 90 J.P. 136; 42 T.L.R. 530; 70 Sol. Jo. 670; 28 Cox, C.C., 218]

G *Husband and Wife—Maintenance order—Enforcement—Order made in Dominion—Confirmation—Order for sum in excess of that permissible in England—Appeal by wife against variation of order—Case Stated—Jurisdiction of King's Bench Division—Maintenance Orders (Facilities for Enforcement) Act, 1920 (10 & 11 Geo. 5, c. 33), s. 4 (4), 4 (7).*

H A maintenance order, made by a police court in Australia, directed the husband to pay £5 10s. a week for the maintenance of his wife and child. On an application by the wife to a court of summary jurisdiction in England to confirm the order under s. 4 of the Maintenance Orders (Facilities for Enforcement) Act, 1920, the justices confirmed the order, but, on the ground that the order, when confirmed, must accord with the requirements of English law, varied it by reducing the amount payable by the husband to £2 for the wife and 10s. for the child, the amounts limited by the Summary Jurisdiction (Married Women) Act, 1895, s. 7, and the Married Women (Maintenance) Act, 1920, s. 1.

I

Held: (i) an appeal by the wife by way of Case Stated lay to the King's Bench Division; (ii) an order properly made in a Dominion abroad could be enforced in this country under the Act of 1920 to the amount stated therein, subject, under s. 4 (4) of the Act, to such modifications as to the court might seem just; and, therefore, the appeal must be allowed and the case remitted to the justices.

Notes. Considered: *Hague v. Hague*, [1937] 2 All E.R. 539. Applied: *Harris v. Harris*, [1949] 2 All E.R. 318. Considered: *Pilcher v. Pilcher*, [1955] 2 All E.R. 644. Referred to: *Forsyth v. Forsyth*, [1947] 1 All E.R. 406.

As to the reciprocal enforcement of maintenance orders, see 7 HALSBURY'S LAWS (3rd Edn.) 133 et seq.; and for cases see 27 DIGEST (Repl.) 720, 721. For Maintenance Orders (Facilities for Enforcement) Act, 1920, see 11 HALSBURY'S STATUTES (2nd Edn.) 856.

Cases referred to:

- (1) *Manders v. Manders*, [1897] 1 Q.B. 474; 66 L.J.Q.B. 296; 61 J.P. 105; 45 W.R. 287; 41 Sol. Jo. 226, D.C.; 27 Digest (Repl.) 730, 6969.
- (2) *Ruther v. Ruther*, [1903] 2 K.B. 270; 72 L.J.K.B. 826; 67 J.P. 359; 52 W.R. 154; 47 Sol. Jo. 640, D.C.
- (3) *R. v. Adamson* (1875), 1 Q.B.D. 201; 45 L.J.M.C. 46; 24 W.R. 250; sub nom. *R. v. Tynemouth Justices*, 33 L.T. 840; 40 J.P. 182; 33 Digest 425, 1377.

Case Stated by justices for the county of Devon, sitting at Okehampton.

A complaint was preferred by the appellant, Charlotte Ada Peagram, in pursuance of the Maintenance Orders (Facilities for Enforcement) Act, 1920, against the respondent, Horace Lewis Peagram, and he was summoned to show cause why an order dated July 24, 1925, made by the Police Court, Adelaide, South Australia, whereby he was ordered to pay the sum of £5 10s. each week for the maintenance of the appellant and her child, Horace Herbert Peagram, should not be confirmed either without modification or with such modification as to the court might seem just. The complaint was heard on Nov. 11, 1925, when the justices ordered that the provisional order so made at the Police Court, Adelaide, be confirmed with the modification or variation that the sum of £2 10s. per week be paid by the respondent for the maintenance of the appellant and her child instead of the sum of £5 10s. per week named in the order. The justices formed the opinion that the meaning and intention of s. 4 of the Maintenance Orders (Facilities for Enforcement) Act, 1920, were to enable them to modify or vary such an order by reducing it to the limit prescribed for any such orders made in a summary jurisdiction court in England against a respondent residing in England. The question upon which the opinion of the court was desired was whether the justices came to a correct determination and decision in point of law, and, if not, what should be done in the premises.

St. John G. Micklethwait for the appellant.

J. L. Pratt for the respondent.

When the case came on for hearing the court raised the question whether there was any jurisdiction to hear it, or whether the proper course was to appeal to the Probate, Divorce, and Admiralty Division under s. 11 of the Summary Jurisdiction (Married Women) Act, 1895. This question was argued as a preliminary point, and the following judgments were delivered upon it.

LORD HEWART, C.J.—In this case a preliminary point arises whether this court has the power to entertain the question raised by the justices. It has been urged that the court has no such power for two reasons: first, because in *Manders v. Manders* (1) it was held that there was no power in a court of summary jurisdiction to state a Case for the opinion of the Queen's Bench Division in a case arising under the Summary Jurisdiction (Married Women) Act, 1895, but that the only way in which the decision could be questioned was by appeal to the Probate, Divorce, and Admiralty Division under s. 11 of that Act. Section 8 of the Act provides: "All applications under this Act shall be made in accordance with the Summary Jurisdiction Acts." That is to say, the Summary Jurisdiction Acts define the way in which applications are to be made under that Act, but when it comes to deal with appeal s. 11 provides:

A "... An appeal shall be from any order or the refusal of any order by a court of summary jurisdiction under this Act to the Probate, Divorce, and Admiralty Division of the High Court of Justice."

In other words, therefore, so far as the Summary Jurisdiction (Married Women) Act, 1895, is concerned, a particular mode of appeal from an order or from the refusal of an order is pointed out. In the Act of 1920, too, there are provisions regarding the right of appeal. By s. 4 (7):

B "Where an order has been . . . confirmed, the person bound thereby shall have the same right of appeal, if any, against the confirmation of the order as he would have had against the making of the order had the order been an order made by the court confirming the order."

C It is said that if this court of summary jurisdiction had made an order against which the husband desired to appeal he would have had to go to the Probate, Divorce, and Admiralty Division. It is said with some force: "How can it be right that the husband, if aggrieved, should have to go to that Division, while the wife, if dissatisfied in some such way as in this case, may take the opinion of the King's Bench Division by asking for a Special Case?" It is not necessary to ask whether *Manders v. Manders* (1) was rightly decided. Two things are clear: (a) The judges who decided that case expressed their doubt. WRIGHT, J., said, at the beginning of his judgment:

E "I am of opinion that the only appeal is that under s. 11 of the Act of 1895 to the Probate, Divorce, and Admiralty Division, though it is extremely difficult to know whether that was what the legislature intended, and I give my opinion with no great confidence."

(b) The present question does not appear to me to be the same question as in *Manders v. Manders* (1). By s. 7 of the Act of 1920 the Summary Jurisdiction Acts are applied to "proceedings before courts of summary jurisdiction under this Act.", i.e., the Act of 1920, and the real question is: "Is there anything in the Act or in decided cases which takes away what is otherwise the undoubted right of a person aggrieved to take the opinion of the King's Bench Division by an appeal in the form of a Special Case? Attention has been directed to *Ruther v. Ruther* (2), six years after *Manders v. Manders* (1). In that case LORD ALVERSTONE, C.J., said ([1903] 2 K.B. at p. 274):

G "For the respondent reliance is placed upon the case of *Manders v. Manders* (1), and it was argued that the appeal ought to be to the Probate Division; but *Manders v. Manders* (1) was a case of an appeal from an order on a husband for a weekly payment made under the Act of 1895, whereas in this case the appellant is not appealing against the original order, but from the warrant of the magistrate committing him to prison for non-payment, which is issued under the Bastardy Act, and is not an order such as is referred to in s. 11 of the Act of 1895. It is, moreover, quite clear that if the question involved in this case had been raised by certiorari there could have been no objection to the proceedings."

H Those observations, as it seems to me, apply to the present matter. If the questions raised here had been raised by certiorari or mandamus it would have been proper for this court to deal with them. The underlying principle is that this court has jurisdiction unless it is clearly taken away. We have been told enough of the matters in controversy to know that this is not an appeal simpliciter against an order, but an appeal on a question of law, the appellant alleging that justices have so misdirected themselves as to the law applicable as in effect to decline jurisdiction. It is near those cases in which this court has issued a mandamus, not because justices have declined to entertain a case altogether, but because in entertaining it they have permitted their decision to be controlled by something extraneous and irrelevant, so that the result is really as if they had not entertained

the matter at all. I am not satisfied (I deliberately put it in this way) that anything in this Act or in any decision of the court takes away the jurisdiction of this court to hear this Special Case, and I think we ought to hear it. A

AYORY, J.—I am of the same opinion. The question is whether the Maintenance Orders (Facilities for Enforcement) Act, 1920, or the Summary Jurisdiction (Married Women) Act, 1895, or the decision of this court in *Manders v. Manders* (1) B has taken away the jurisdiction of this court to entertain this Special Case.

There is no question that the court which stated the Case was a court of summary jurisdiction; there is no question that the justices were determining an information or complaint which they had power to determine in a summary way; and there is no doubt that a point of law arose which they in effect determined. *Primâ facie* they had right to state a Case either under s. 2 of the Summary Jurisdiction Act, 1857, or under s. 33 (1) of the Summary Jurisdiction Act, 1879 [see now C Magistrates' Courts Act, 1952, s. 87] which enacts:

"Any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a court of summary jurisdiction, on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to the court to state a Special Case setting forth the facts of the case and the grounds on which the proceeding is questioned, and if the court decline to state the Case, may apply to the High Court of Justice for an order requiring the Case to be stated." D

Primâ facie, therefore, the justices had the right to state this Case. So far as the Maintenance Orders (Facilities for Enforcement) Act, 1920, is concerned, I think s. 7 of that Act confirms the *primâ facie* view that they were entitled to do so, and I have no doubt that the expression "the Summary Jurisdiction Acts" means the Acts which form the code for regulating procedure, beginning with Jervis's Act, including the Summary Jurisdiction Acts, 1857 and 1879, and ending with those of 1884 and 1899. That expression, in my opinion, does not include the Summary Jurisdiction (Married Women) Act, 1895. I do not think it is one of the Acts contemplated in s. 7. Consequently, s. 7 itself, when applied to this Case, would give power to the justices to state a Case on any point of law. E

Apart from the special provisions of the statutes we have here to consider the general jurisdiction of this court, and before we hold that it is ousted there must be clear words to oust it in a statute or decision to that effect. The jurisdiction of this court has been described in this way. Where any tribunal, inferior court, or body of persons charged with the performance of a public duty does not discharge the duty so imposed, *mandamus* will lie to compel it to perform its duty, and if the justices at the outset had said: "We have a circular from the Home Office before us, and, whatever the evidence before us may be, we intend to hold that we have no power to make any order except such as we could make in this country" (in effect that is what they said). I cannot entertain any doubt that the appellant would have been entitled to come to this court for a *mandamus* on the principle laid down in the well-known case of *R. v. Adamson* (3), where SIR ALEXANDER COCKBURN, C.J., said (1 Q.B.D. at p. 205): F

"If I could see my way to the conclusion that the magistrates had considered this evidence and given a decision upon it, I should certainly say that the court could not act upon the matter further, or send the case back to the magistrates; but the Solicitor-General has called our attention to evidence of such a description that I cannot resist the conclusion that the magistrates must have acted upon a consideration of something extraneous and extra-judicial which ought not to have affected their decision, and which, it seems to me, was the same as declining jurisdiction." H

In the present Case I think it is clear that the justices did decline to exercise the jurisdiction expressly conferred upon them by the Act of 1920. It is clear that this defence or answer which is put forward or adopted *mero motu* by the justices was I

A not one open to the husband. Therefore the justices, by acting on some answer not open in law, were in effect declining jurisdiction.

One word only I wish to say on *Manders v. Manders* (1). If the question here were the same as in that case, i.e., under the Summary Jurisdiction (Married Women) Act, 1895, and not under the Maintenance Orders (Facilities for Enforcement) Act, 1920, we might, and probably should, have been obliged to hold ourselves bound by that decision, while, at the same time, it would be open to us to say that we profoundly disagreed with it. To justify that observation I ought to say that it appears that the court there was under the impression that, if they imported the provisions of the Summary Jurisdiction Acts so as to give the right to state a Case, it would follow that there would be a right to appeal to quarter sessions also imported ([1897] 1 Q.B. at p. 478), and WRIGHT, J., said :

C "That cannot be a correct view, for there could not be an appeal to the Probate, Divorce, and Admiralty Division side by side with an appeal to quarter sessions."

D In point of fact the importation of the Summary Jurisdiction Acts, or any of them, would not give a right of appeal to quarter sessions because they do not give a general right of appeal to quarter sessions, but only regulate procedure on such appeals. But whatever the effect of that decision, it has no application to the Act of 1920. It is not here necessary to follow or to differ from that decision. I agree that the justices were entitled to state this Case, and that this court is bound to hear it.

E **SHEARMAN, J.**—I have, after great doubt, arrived at the same decision—that we are entitled to hear this Case. I do not want to use any language which may convey the impression that the general introduction into this statute of a reference to the Summary Jurisdiction Acts gives any right of appeal—I am not deciding one way or the other, but I do not want to use language which gives the impression that an appeal lies to quarter sessions. Neither do I wish to use any language which would convey the impression concerning appeals under s. 3 (6) and s. 4 (7) of the Act of 1920 that when the order is made in favour of a married woman against her husband the appeal does not lie to the Probate, Divorce, and Admiralty Division. This Act is called the Maintenance Orders (Facilities for Enforcement) Act, 1920, and it applies not only to maintenance orders in favour of the wife, but also in favour of a dependant. By s. 10, the interpretation section of the Act, a maintenance order means an order other than an order of affiliation for the periodical payment of sums of money towards the maintenance of the wife or other dependants of the person against whom the order is made. It is pretty clear from the general language of the Act that some reference to the matrimonial courts of England was in the mind of the framers of the Act. When one looks at s. 1, one finds that when an order is registered which has been made abroad it is not in all cases registered in the magistrates' court; if made by a superior court abroad

H it is registered in the Probate, Divorce, and Admiralty Division here; and when one comes to s. 3 (6) it says :

I "The applicant shall have the same right of appeal, if any, against a refusal to make a provisional order as he would have had against a refusal to make the order had a summons been duly served on the person against whom the order is sought to be made."

In my view, the meaning of that is that the jurisdiction is the same as if in the case of a wife a maintenance order had been made under the Act of 1895. That is why I deliver my present judgment with some doubt. It seems to me that an appeal to the Probate, Divorce, and Admiralty Division is imported by reference to that Act. Then one comes to the language to s. 4 (7), which must be read in conjunction with s. 4 (4). It is possible that the meaning of s. 4 (7) is that if it is an appeal by a dependant it would not be to the matrimonial court, but if it was a case of husband and wife the right of appeal should be to the matrimonial court.

Therefore, I think it is an arguable point that, so long as this court is bound by *Manders v. Manders* (1), between husband and wife the appeal goes to the Probate, Divorce, and Admiralty Division, and that, for them, is the sole right of appeal. But when I look at the decision in *Manders v. Manders* (1) I see that the ground of it is that there was not a general incorporation of the Summary Jurisdiction Acts in the Summary Jurisdiction (Married Women) Act, 1895. WRIGHT, J., says that the references in the Act of 1895 to the Summary Jurisdiction Acts are carefully limited. In the Act of 1920 they are not limited. I think this was rather hurried legislation, and I do not think it is at all clear, but I do not think, after looking at *Manders v. Manders* (1) and the views there expressed by the judges, that it was intended to extend the provisions of that Act any further than to applications under the Act of 1895; and it seems to me, following the words of my Lord the Chief Justice, that there is jurisdiction in this court to hear a Case Stated by the justices, who are really stating something in the nature of a consultative Case, and asking to be aided by the King's Bench Division in arriving at the proper view of the law. I think that, although *Manders v. Manders* (1) has held that that cannot apply to the Act of 1895, this Act has a different purview and deals with matters partly the same as, and partly different from, matrimonial matters; and, therefore, I do not think, having regard to the argument and the judgment delivered in *Manders v. Manders* (1), that it was intended to extend the principle of that decision to any other Act except the one to which it was applied, that is, the Summary Jurisdiction (Married Women) Act, 1895. I think, therefore—and I say no more than that—that we are entitled to consider under the Maintenance Orders (Facilities for Enforcement) Act, 1920, a Special Case stated by the justices before they arrive at their decision. Again I do not wish to purport to decide questions which may be argued hereafter elsewhere. I only express the view that I have formed with some doubt—that after they have given their decision an appeal does lie to the Probate, Divorce, and Admiralty Division when it is an application by the wife against the husband. That is the best interpretation I am able to give to this somewhat difficult Act. In effect, I have arrived at the same conclusion as the other members of the court, that we are entitled to hear this Case.

Arguments were then heard on the Special Case.

LORD HEWART, C.J.—This is a Case Stated by justices, and the question to which it gives rise is whether they rightly interpreted some of the provisions of the Maintenance Orders (Facilities for Enforcement) Act, 1920. The scheme of that Act seems reasonably clear; it is to facilitate the enforcement in England and Ireland of maintenance orders made in other parts of His Majesty's Dominions and vice versa. It is a reciprocal scheme entered into by this country and His Majesty's Dominions and Protectorates. The statute draws a perfectly clear distinction between the original task of confirmation and the subsequent task, if it should arise, of variation or rescission. The respondent has the opportunity of showing that the court ought not to confirm the order at all, being limited to the grounds which he might have taken in the original court which made the provisional order [s. 4 (3)]. But if the court is to confirm the order the only limit to the modifications which they may make is that they must be such modifications as to the court, after hearing the evidence, shall seem just [s. 4 (4)]. Then the section goes on to deal with a much later stage, when the order has been confirmed and it is desired to rescind or vary it [s. 4 (6)].

The argument which was based on those provisions and which the justices seem to have accepted seems to have been twofold. It began by mixing up the modification which may be made on the original confirmation of the order with the variation which may subsequently be made, and the argument proceeded, that this figure of £5 10s. must in any event, without regard to any evidence, be reduced to £2 because of the provisions of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895. In this case no evidence was offered by the respondent. What

A was put forward was a universal proposition of law that in no circumstances could the sum of £2 a week be exceeded. The argument that on a variation the justices are limited to making an order for £2 is based on s. 4 (6) of the Maintenance Orders (Facilities for Enforcement) Act, 1920, and s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, which provides :

B “A court of summary jurisdiction acting within the . . . petty sessional or other division or district, in which any order under this Act or the Acts mentioned in the schedule hereto . . . has been made, may, on the application of the married woman or of her husband, and upon cause being shown upon fresh evidence to the satisfaction of the court, at any time alter, vary, or discharge any such order, and may upon any such application from time to time increase or diminish the amount of any weekly payment ordered to be made so that
C the same do not in any case exceed the weekly sum of £2 [now £5: see Married Women (Maintenance) Act, 1920, s. 1] . . .”

To understand the meaning of that section it is necessary to remember that the orders with which it was dealing in 1895 were orders which could not exceed £2, and, therefore, the meaning is that, upon the variation of an order in which the
D sum was less than £2, it could not be increased to more than £2. It is argued that, because by s. 4 (6) of the Act of 1920 the wholly different orders under that Act may be varied or rescinded in like manner as if they had originally been made by the confirming court, it follows that the limit of £2 applies, although the sum named in the provisional order exceeds £2, in this case £5 10s. In other words, the argument is that, because an order under the Summary Jurisdiction
E (Married Women) Act, 1895, for less than £2 must not be increased to more than £2, therefore an order under the Maintenance Orders (Facilities for Enforcement) Act, 1920, for a sum exceeding £2 must be reduced to £2. It is an interesting and ingenious example of the perfect non sequitur. In my opinion, the view which the justices were induced to take is quite contrary to the clear provisions of the statute, and involves, if I may say so, a serious misunderstanding. The
F basis of this Act was a reciprocal agreement between this country and other parts of His Majesty's Dominions to make it easy—not difficult—to enforce here orders of this character made elsewhere. For that purpose our existing machinery is employed, but nowhere is there any provision that an order made elsewhere for more than £2 must be reduced to £2 because of s. 7 in our statute of 1895.

In my opinion, the justices misdirected themselves. Their duty is to confirm
G the order either without modification or with such modifications as may seem just, always subject to the possibility of the respondent's proving that it ought not to be confirmed at all. Later, if the task arises, they may vary the order upon such evidence as shall satisfy the court. No evidence was adduced for the husband. That which was really the stage of confirmation was confounded with the later stage of variation. The view of the principle to be applied, if and when the question of variation should arise, was based on a misunderstanding of the maximum
H prescribed by s. 7 of the Act of 1895. The appeal should, I think, be allowed and the case remitted to the justices, with our direction as to the meaning of this statutory provision.

AYORY, J.—I am of the same opinion.

I **SHEARMAN, J.**—I am of the same opinion. This maintenance order was made in South Australia, where magistrates have unlimited jurisdiction, though justices in this country have not. It is argued that the justices in this country ought to reduce the order made by the court in Adelaide to the limit of their own jurisdiction. I can see no fair warrant for such an argument, either in the purpose and scope of the Act or in the sections which carry out that purpose. The Act is to afford facilities for enforcing in this country by different tribunals orders properly made in a Dominion abroad, and as long as the orders are properly made

in the Dominion abroad they can be enforced in this country to the amount stated therein, if the means of the defendant and the other circumstances justify this being done. A

Appeal allowed.

Solicitors : *Freshfields, Leese & Munns; Sharpe, Pritchard & Co.*, for *S. E. Crosse*, Exeter. B

[*Reported by J. F. WALKER, Esq., Barrister-at-Law.*]

DIGGINS v. DIGGINS C

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P., and Bateson, J.), October 12, 13, 1926] D

[Reported [1927] P. 88; 96 L.J.P. 14; 136 L.T. 224; 90 J.P. 208;
43 T.L.R. 37]

Husband and Wife—Summary proceedings—Maintenance—Separation deed—Payments under deed stopped by husband on ground of molestation by wife—Power of magistrates to make order. E

By a deed of separation made between the husband and the wife it was provided that the husband should pay to the wife 30s. a week towards the maintenance of herself and a child of the marriage, such payment to cease if proceedings for restitution of conjugal rights or for compelling cohabitation should be taken or if the wife should molest the husband, and that the deed should be avoided if the parties resumed cohabitation or were judicially separated or divorced. After making some payments under the deed the husband ceased doing so on the ground that the wife had molested him. F

Held: on construction of the separation deed, it did not contain any provision preventing the wife from exercising her rights under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, and, therefore, magistrates were not precluded from making a separation and maintenance order in her favour under those Acts. G

Notes. Considered: *Morton v. Morton*, [1942] 1 All E.R. 273. Referred to: *McCreanney v. McCreanney*, [1928] All E.R.Rep. 608; *Matthews v. Matthews* (1932), 48 T.L.R. 511; *Markovitch v. Markovitch* (1934), 151 L.T. 139; *Gillmann v. Gillmann* (1946), 174 L.T. 272; *Tulip v. Tulip*, [1951] 2 All E.R. 91. H

As to the power of magistrates to make separation and maintenance orders under the Acts of 1895 and 1925, see 12 HALSBURY'S LAWS (3rd Edn.) 484, 485; and for cases see 27 DIGEST (Repl.) 714. For Summary Jurisdiction (Married Women) Act, 1895, and for Summary Jurisdiction (Separation and Maintenance) Act, 1925, see 11 HALSBURY'S STATUTES (2nd Edn.) 849, 864.

Case referred to: I

(1) *Medway v. Medway*, [1900] P. 141; 69 L.J.P. 56; 82 L.T. 627; 64 J.P. 120; 48 W.R. 622, D.C.; 27 Digest (Repl.) 697, 6669.

Appeal by the husband against an order made by justices under the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1, on the ground that he had wilfully neglected to provide reasonable maintenance for the wife. The order contained a non-cohabitation clause, gave custody of two out of five children to the wife, and ordered the husband to pay £1 a week for the maintenance of the

A wife and 5s. a week for each of the two children in question up to the age of sixteen.

On Sept. 22, 1925, the wife left the husband and on Sept. 23 she summoned him before the justices under the Summary Jurisdiction (Married Women) Act, 1895, s. 4, for persistent cruelty. The summons was adjourned from time to time and on Dec. 1, 1925, the parties entered into a deed of separation. The deed provided inter alia that the husband should pay to the wife 30s. a week, dum casta, towards the maintenance of herself and one child, such payment to cease if proceedings for restitution of conjugal rights or for compelling cohabitation should be taken, or if the wife should molest the husband. The deed also provided for the withdrawal of the summons then before the justices and for total avoidance if the parties should resume cohabitation or be judicially separated or divorced. It contained, however, no provision which precluded the wife from applying to the justices for maintenance under the modified conditions created by s. 1 of the Act of 1925. The husband paid £3 under the deed and then defaulted, alleging molestation by the wife. The wife then again summoned the husband before the justices under the Acts of 1895 and 1925. The latter Act had come into force after the date of the previous summons, and s. 1 (1) provided that the cruelty or neglect complained of by a wife need not have "caused her to leave and live separately and apart" from the husband. The question for the court was whether, by the deed, the wife had contracted herself out of her rights under the joint effect of the two Acts and whether, therefore, the justices had power to make the order of June 15, 1926.

E C. E. Jones, for the husband, referred to *Medway v. Medway* (1).
Melford Stevenson for the wife.

LORD MERRIVALE, P.—The wife proceeded under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, as amended by the Act of 1925, by way of summons before the justices, alleging that her husband had wilfully neglected to provide reasonable maintenance for her. The husband met the wife's allegation of wilful neglect to provide reasonable maintenance by producing a deed into which she had entered in which there were various mutual covenants. One of the covenants was a covenant by the wife against molestation, and the husband said: "My wife has molested me contrary to the terms of this deed, and I claim to be exempt from any liability under the statute by reason that the deed itself provided maintenance subject to a proviso for discontinuance of it if there were molestation."

It is necessary first of all to see what the Act of Parliament says in its amended form. It is perfectly explicit. It says that if a husband shall be guilty of wilful neglect to provide reasonable maintenance for his wife, a court of summary jurisdiction may make an order for maintenance in her favour. Questions of fact arise. Has the husband neglected to provide reasonable maintenance for his wife? Has he wilfully neglected? As to maintenance, the wife gave evidence of the means of the husband which put out of question any contention that the amount of the order that the justices have made could be impeached, but she was entitled also to say: "In the deed upon which my husband relies he covenanted to pay me 30s. a week for myself and one child," so it cannot be said that the sum which is in question is unreasonable. The next question is whether the husband has wilfully neglected. Well, he has purposely neglected. The evidence the justices accepted was that from the second week after the deed was entered into the husband did not pay. The husband said that the wife molested him. His counsel relies upon the fact that the justices have said: "We cannot go into that matter." The real question is whether the justices were entitled to qualify the terms of the Act by incorporating implications derived from a deed between the parties. The justices thought they were not bound to do this.

The case is clear apart from the deed. The husband has wilfully neglected to provide reasonable maintenance for the wife. What remains is to ascertain whether

the deed excludes the jurisdiction of the justices. It must not be supposed that there is an unlimited right in a wife under the amended statute whenever she has entered into a deed at her own volition to proceed to the justices to get the terms of the deed reviewed. That would be contrary to good sense, and I do not doubt that if any case arise where a wife who has entered into a deed proceeds in disregard of it to seek something different from the deed from the justices, she will meet with an answer which will prevent the possibility of further question. If she does not meet with it in the first instance, she may meet with it here. But this is not a case of that kind. The case here is that the parties are in disagreement as to their rights under the deed. There are allegations of molestation. There is some evidence of conduct which might be held to amount to molestation. What we have to determine is whether, the parties having entered into a deed about maintenance, the justices are prevented from dealing with the question under the amended Act of Parliament. In my judgment, they are not. The deed here does not exclude the wife from going to the justices if reasonable maintenance is not provided, or if there is wilful neglect. It does not purport to deal with her rights under the 1925 Act. It does provide against resort to the courts for restitution of conjugal rights, and it does provide cases in which the payment shall be avoided by the conduct of the wife. It does not deal with the present case. The true effect of the facts as they stand is that the legislature has given the wife, by the amendment in the law contained in the Act of 1925, a right to resort to a Bench of justices for an order for maintenance if her husband wilfully neglects to provide reasonable maintenance for her; that this wife has that right, subject only to the proper interpretation of the deed of Dec. 31, 1925; and that that deed does not purport to, and does not, either expressly or by implication deprive her of that right, or effectually limit it. The wife's right, therefore, was intact at the time she applied to the justices in June, 1926. She established the necessary facts to bring it into operation, and, in my judgment, the appeal fails.

BATESON, J.—I agree. Under the Acts of 1895 and 1925 the wife was entitled to her maintenance. It is suggested that the deed is a bar. The deed, in terms, contemplates other proceedings in the last clause. It excludes one form of proceeding earlier. It does not exclude these proceedings. I think this appeal should be dismissed.

Solicitors: *Doyle, Devonshire & Co.*, for *Jones & Son*, Colchester; *Peacock & Goddard*, for *Steed & Steed*, Long Melford.

[Reported by HERBERT ROLFE, Esq., Barrister-at-Law.]

A

IDEAL FILMS, LTD. v. RICHARDS AND OTHERS

[COURT OF APPEAL (Bankes and Scrutton, L.JJ.), October 13, 25, 1926]

[Reported [1927] 1 K.B. 374; 96 L.J.K.B. 161; 136 L.T. 295;

70 Sol. Jo. 1138; 43 T.L.R. 7]

B

Practice—Parties—Defendants—Trustees of unincorporated association—Order for payment by them out of property of association of sum found due to plaintiffs—R.S.C. Ord. 16, r. 9.

In an action for the price of goods supplied against an unincorporated association,

C

Held: the plaintiffs were entitled to join as defendants the trustees of the property of the association and to seek an order directing them to pay to the plaintiffs out of the property and assets of the association in their hands such sum as was found to be due and owing to the plaintiffs from the members of the association together with the costs of the action.

D

Notes. Referred to: *Barker v. Allanson*, [1937] 1 All E.R. 75; *Bradley Egg Farm, Ltd. v. Clifford*, [1943] 2 All E.R. 378.

As to representative parties as defendants, see 26 HALSBURY'S LAWS (2nd Edn.) 17, 18; and for cases see DIGEST, Pleading and Practice, 420, 421.

Cases referred to:

E

(1) *Walker v. Sur*, [1914] 2 K.B. 930, 934; 83 L.J.K.B. 1188, 1190; 109 L.T. 888; 30 T.L.R. 171, C.A.; Digest Practice 420, 1165.

(2) *Taff Vale Rail. Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 424, 445; 70 L.J.K.B. 905; 50 W.R. 44, H.L.; Digest Practice 635, 2677.

(3) *Anglo-Italian Bank v. Davies* (1878), 9 Ch.D. 275; 47 L.J.Ch. 833; 39 L.T. 244; 27 W.R. 3, C.A.; 21 Digest 665, 2454.

F

(4) *Salt v. Cooper* (1880), 16 Ch.D. 554; 50 L.J.Ch. 529; 43 L.T. 682; 29 W.R. 553, C.A.; 21 Digest 671, 2502.

Appeal from an order of HORRIDGE, J., at chambers. The plaintiffs' claim was for £234 7s. 8d. in respect of films and posters supplied to an unregistered association of miners and others in South Wales. The defendants were, as to eleven, members of the association, and as to the remainder, trustees of the association.

G

The statement of claim, as amended by leave of the Court of Appeal under Ord. 28, r. 2, was as follows, the words in italics constituting the amended portion: "(1) The Llanbradach Workmen's Hall and Institute is an unregistered association of miners and other workmen employed at Llanbradach, South Wales. The first eleven defendants are and were at all material times members of the said association, and also are and were members of a committee appointed by the general body

H

of members to conduct the affairs of the association on the members' behalf, *and are sued as representing the general body of the members.* The remaining defendants are and were at all material times the trustees of the said association, and the funds of the association and certain leasehold premises situate at Llanbradach the property of the association are and were vested in them as such trustees. *The said funds and premises are and were at all material times the common*

I

property of the members of the association and vested in trustees upon trust for the members. (2) The said association has for some years carried on upon the said premises a cinematograph theatre for the benefit of the members, and has hired films for the purpose of exhibition at the said theatre. (3) By various contracts in writing made between the plaintiffs and the said committee acting for and on behalf of the members of the said association by one W. T. Jones, the secretary of the said association, the plaintiffs agreed to supply the films therein mentioned for exhibition at the said theatre upon the terms and at the prices specified in the said contracts. The plaintiffs duly supplied the said films together with posters

ordered by the said committee acting as aforesaid, and the sum of £234 7s. 8d. is due and owing to the plaintiffs in respect of the said films and posters and the carriage thereof. The plaintiffs claim: (1) *A declaration that the sum of £234 7s. 8d. is due and owing to the plaintiffs from the members of the association.* (2) An order directing the trustees to pay the sum, *together with the costs of this action*, to the plaintiffs out of the property and assets of the association in the hands of the trustees. (3) An order charging the property and assets with payment of the sum *and costs* to the plaintiffs." HÖRRIDGE, J., made an order, under Ord. 25, r. 4, that the trustees should be dismissed from the action upon the ground that the statement of claim, so far as it concerned them, disclosed no reasonable cause of action and was frivolous and vexatious. The plaintiffs appealed.

W. E. P. Done for the plaintiffs.

A. W. Cockburn for the defendants.

BANKES, L.J.—In my opinion, in the form in which the statement of claim now comes before us, I think it is impossible to say that it should be struck out upon the ground that it is frivolous and vexatious in so far as it refers to persons who are named as trustees of this unregistered association. It is necessary to bear in mind what the statement of claim alleges and the relief claimed. The statement of claim alleges that the plaintiffs supplied films upon the order of persons who represent this association. Then it goes on to say that the first eleven defendants are and were at all material times members of the association and members of a committee appointed to conduct the affairs of the association on the members' behalf. The amended statement of claim goes on to say that they are sued as representing the general body of the members. In the statement of claim as originally framed the judgment claimed was a judgment against the individually named defendants. Objection could reasonably be taken to that on the ground that that is not the proper form in which to ask for judgment in a representative action where leave has been obtained to sue certain defendants on behalf of a class. Now that has been put right. The claim as against those eleven named members is a declaration that the sum of £234 7s. 8d., which is the amount claimed, is due and owing to the plaintiffs from the members of the association. If one looks at *Walker v. Sur* (1) it appears that that is the right form in which to claim judgment in a representative action. The statement of claim goes on: "The remaining defendants are and were at all material times the trustees of the said association, and the funds of the association and certain leasehold premises situate at Llanbradach the property of the association are and were vested in them as such trustees. *The said funds and premises are and were at all material times the common property of the members of the association and vested in the trustees upon trust for the members.*"

That is the allegation, and this matter must be disposed of upon the footing that that allegation is a correct representation of the facts of the case. The original statement of claim offended in that the claim for the amount of the alleged debt was a claim against the trustees individually. Now that has been put right. The declaration is merely a declaration of liability and so far as the trustees are concerned the claim is confined now to "an order directing the said trustees to pay the said sum together with the costs of this action to the plaintiffs out of the property and assets of the said association in the hands of the said trustees." Counsel for the defendants objects to that. He has referred us to a number of authorities, the bulk of which deal with claims either by or against trade unions. In my opinion, those decisions are of no real help to a correct appreciation of the particular form in which this claim is put forward. In the case of a trade union, the rights, liabilities, and obligations are all statutory. In all those cases the question has been whether or not a particular action was or was not maintainable having regard to the provisions of the statute. The present case is quite free from any statutory provision. The only question, as it seems to me, is whether or not the plaintiffs have a right to insert this particular form of claim as against the

- A trustees in this action. A second question might arise, in some cases at any rate, whether there was any inconvenience or any embarrassment in so doing, in which case it might be open to the court to refuse to allow joinder of the particular claim. In this case the right of the plaintiffs is contested. It is said that they have no right to do this. Counsel argues that the proper course is to get your declaratory judgment and then, by independent proceedings, to ask for the very thing which
- B the plaintiffs are asking for in this action. Speaking for myself, I can see no reason why the plaintiffs should not be entitled in a proper case to insert this form of claim against the trustees in a representative action. I am not laying down any rule applicable to all cases. I am simply saying that in the present case I see no objection, either as a matter of right or as a matter of convenience, in joining this claim. I think there is authority for the proposition that this claim is one
- C which the law recognises as one which can be included in a representative action. I think that LORD LINDLEY's language in *Taff Vale Rail. Co. v. Amalgamated Society of Railway Servants* (2) ([1901] A.C. at p. 426) is directly addressed to a case like this, and that counsel's criticism, suggesting that what LORD LINDLEY was referring to were trade union cases, is not justified. It seems to me that LORD LINDLEY is contrasting the case of a trade union with the case of an unregistered
- D society which is not a trade union. In the passage ([1901] A.C. at p. 443) which has been relied on he is treating the matter as though it were one of an unregistered society of persons which is not a trade union. I think the language is plain to indicate that. LORD LINDLEY says:

- E "I have myself no doubt whatever that if the trade union could not be sued in this case in its registered name, some of its members (namely, its executive committee) could be sued on behalf of themselves and the other members of the society, and an injunction and judgment for damages could be obtained in a proper case in an action so framed."

- I think he is there saying: Free this case for the moment of statutory provision in reference to a trade union and treat it merely as a case of an unregistered
- F society and the right of the plaintiff to sue such a society. Then he goes on:

- "Further, it is, in my opinion, equally plain that if the trustees in whom the property of the society is legally vested were added as parties, an order could be made in the same action for the payment by them out of the funds of the society of all damages and costs for which the plaintiff might obtain judgment against the trade union."
- G That seems to me to be a direct authority by the learned judge, who had very great experience of practice in the Chancery Division and of practice applicable to this class of case, that what the plaintiffs are seeking to do in this action they have a right to do. Of course that does not dispose of the question whether persons who have that right ought to be allowed to exercise it in all circumstances.
- H I merely repeat what I said, that my judgment in this case is confined to the facts of this particular case. Upon the statement of claim as amended I think it is impossible to say that it is frivolous and vexatious and ought to be struck out. It seems to me to be a convenient way of enforcing a liability, if liability there be, against what is becoming very common now, an association of individuals who, through their representatives, incur liability, with the result that there is a difficulty in recovering any effective judgment. It seems to me that, speaking generally,
- I this is a convenient procedure, and one which a plaintiff in a proper case is entitled to adopt. I think the appeal must be allowed.

SCRUTTON, L.J.—I agree. I will only add a few words to what my Lord has said, because it is suggested that we are laying down some wide sweeping principle in this case. A film company has let out films which have been used in a hall in which an unregistered society or club of miners has some interest or other, and they have not been paid for their films. They bring an action for the amount of the hire of the films. They bring it, in the first instance, against eleven members

of the committee of this unregistered association, in respect of whom they have obtained a representation order, that they shall represent all the members, and, secondly, they join in the writ certain persons described as the trustees of the Llanbradach Workmen's Hall and Institute, where the films were exhibited. As the statement of claim was first drawn it was not at all clear whether they were asking for a personal judgment for the price against the eleven representative members, or against all the members, or against the trustees. In those circumstances the trustees took out a summons that they might be dismissed from the action on the ground that their joinder was frivolous and vexatious, or that the statement of claim showed no legal cause of action against them. The original statement of claim said that the plaintiffs claimed (i) £234 7s. 8d., which was the rent of the film without saying against whom they claimed it; (ii) an order directing the trustees to pay the said sum to the plaintiffs out of the property and assets of the association in the hands of the trustees, and (iii) an order charging the property and assets with payment of the said sum and costs to the plaintiffs. There is no doubt now that if the plaintiffs obtained a judgment for an amount against the named persons, they might, by a process called equitable execution, get an order against the property of the persons against whom they have obtained judgment, in which property the legal estate was in somebody who was not a party to the action. They could get an order to charge or release for their benefit the equitable interest of the defendants against whom they had got judgment. There was at one time very considerable discussion as to how they were to do that. It was argued that they could not possibly get it in the original action in any way, but that they must institute a separate action against the persons in whom the legal estate of the property was which they wanted to seize.

I need not go into the judgments on the matter, but two very instructive judgments of SIR GEORGE JESSEL, M.R., on the whole process will be found in *Anglo-Italian Bank v. Davies* (3) and *Salt v. Cooper* (4). There SIR GEORGE JESSEL, M.R., pointed out, going fully into the history of the matter, that it was not necessary at all to have a separate action against the persons who owned the legal estate in the property whose beneficial interest you wanted to get at, but that it was quite enough to take interlocutory proceedings in the action against the original defendants, and that you might do it either before or after judgment. I do not want or intend to lay down a general principle as to what should happen from the beginning wherever one is seeking to enforce a money judgment against the property of persons who, it is said, ought to pay, the property being such that they have only an equitable interest in it, not a legal interest. I am not going to lay down any general rule of that sort, but it appears to me that in some cases it obviously may be convenient—I dare say it would not be convenient in all—that (i) instead of dealing with a separate action, which SIR GEORGE JESSEL, M.R., said was not necessary, and issuing a separate writ against the trustees, or (ii) instead of waiting until one has got judgment against the persons one says are primary liable, before endeavouring to get an order by way of equitable execution against the property in which they have only a beneficial interest, one should join the alleged trustees as parties to the original action, making it clear that one is not making any claim against them personally for the money, but that one is only seeking to get at the equitable interest of the other defendants in the property in which the second defendants, the trustees, have a legal interest. This seems to me to be one of those cases. I am not saying that these gentlemen are trustees. The defendants may wish to raise some question at the trial as to what exactly they are and what exactly is their relation to the property of the Workmen's Institute or the people who have exhibited these films. The only thing that I am deciding is that I see no legal objection to the amended statement of claim. I think it would be convenient that these alleged trustees should be there at the trial, in order that the learned judge who deals with the question whether a declaration of liability should be made against the members of the institute through their representatives may also deal with the question whether that declaration can be enforced by an order

A against these defendants. With regard to the *Taff Vale Case* (2) I agree with my Lord that that was a different case from this case, because there the question of trade unions came in, which is not this case. LORD LINDLEY certainly saw no objection to the trustees being parties from the start in order that an order might be made on property which they held as trustees. I think that KENNEDY, L.J., in *Walker v. Sur* (1) would have been and was of the same opinion. The difficulty

B in that case was that the four persons who were representatives had nothing particular to do with the other body of members. They were not picked because they were a committee, or trustees, or anything of that sort. They were apparently picked haphazard from the 1800 members scattered over various parts of the world, who were said to constitute the Brotherhood of St. John. For these reasons, in this particular case, now that the pleading has been amended, I see no objection

C to these trustees remaining as defendants, being present at the trial of the action, and taking such part as they may be advised.

Appeal allowed.

Solicitors: *Hugh V. Harraway; Martyn & Martyn, for Edward Horley & Son, Cardiff.*

D [Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]

E R. v. LINCOLNSHIRE JUSTICES. Ex parte BRETT

[COURT OF APPEAL (Banks, Warrington and Atkin, L.JJ.), February 25, 1926]

[Reported [1926] 2 K.B. 192; 95 L.J.K.B. 827; 135 L.T. 141;
90 J.P. 149; 28 Cox, C.C. 178]

F *Bastardy—Quashing of order—No corroboration of complainant's evidence—Jurisdiction of justices—Bastardy Laws Amendment Act, 1872 (35 & 36 Vict., c. 65), s. 4.*

G The Bastardy Laws Amendment Act, 1872, s. 4, provides that on the hearing of a summons by a woman under the Act "if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the said justices, they may adjudge the man to be the putative father of such bastard child. On an application for a writ of certiorari to quash an order, made against the applicant under s. 4, on the ground that the justices had no jurisdiction to make it, there being no proper corroboration of the evidence of the complainant,

H **Held:** under s. 4 the justices had a duty to determine whether the complainant's evidence was corroborated in some material particular; accordingly, the existence of corroborative evidence could not be said to be a collateral matter, a wrong decision on which could deprive the justices of jurisdiction; and, therefore, even if the justices' decision relating to corroboration was wrong, they had not acted in excess of jurisdiction and certiorari would not lie.

I Per BANKES, L.J.: I desire to reserve the point as to what the position would be if the case were one in which no evidence was tendered in corroboration of the complainant's story.

Notes. Section 4 of the Bastardy Laws Amendment Act, 1872, has been replaced by s. 4 of the Affiliation Proceedings Act, 1957 (see 37 Halsbury's Statutes (2nd Edn.) 40).

As to grounds for certiorari to quash, see 11 HALSBURY'S LAWS (3rd Edn.), 142-145, and as to corroboration in bastardy proceedings see *ibid.*, vol. 3, p. 120. For cases see 16 DIGEST 412 et seq. and 3 DIGEST 394-397.

Case referred to:

- (1) *Bunbury v. Fuller* (1853), 9 Exch. 111; 1 C.L.R. 893; 23 L.J.Ex. 29; 23 L.T.O.S. 131; 17 J.P. 790; 156 E.R. 47, Ex.Ch.; 29 Digest (Repl.) 271, 2741.

Appeal from an order of the Divisional Court made on the hearing of a rule nisi for a writ of certiorari to remove into the King's Bench Division an order, dated Nov. 13, 1925, and made by a court of summary jurisdiction at Long Sutton in the county of Lincoln, by which the applicant, Charles Brett, was adjudged to be the putative father of the bastard child of one Ethel May Franks. The rule was applied for upon the ground that the order of the justices was made without, and in excess of, jurisdiction, there being no evidence as was contended, to corroborate the evidence of the mother in any material particular to the satisfaction of the justices. An appeal by the applicant to quarter sessions was dismissed on a preliminary point not touching the merits. The defendant then obtained a rule nisi for a certiorari to remove into the King's Bench Division the order of Nov. 13, with a view to having it quashed, but the Divisional Court refused his application. The applicant now appealed to the Court of Appeal.

By the Bastardy Laws Amendment Act, 1872, s. 4:

"After the birth of such bastard child, on the appearance of the person so summoned, or on proof that the summons was duly served on such person, or left at his last place of abode six days at least before the petty session, the justices in such petty session shall hear the evidence of such woman and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father, and if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the said justices, they may adjudge the man to be the putative father of such bastard child; and they may also, if they see fit, having regard to all the circumstances of the case, proceed to make an order on the putative father for the payment to the mother of the bastard child . . . of a sum of money weekly for the maintenance and education of the child and of the expenses incidental to the birth of such child . . . and of such costs as may have been incurred in the obtaining of such order. . . ."

Sir Albion Richardson showed cause.

Serjeant Sullivan, K.C. (Maurice F. Healy with him), in support of the rule.

BANKES, L.J.—We granted the rule in this case because it was said to raise a question requiring careful consideration. The point taken was that in the circumstances the justices had no jurisdiction to make the order which was made. An application had been made under s. 4 of the Bastardy Laws Amendment Act, 1872, for an order declaring that the applicant for this rule, Charles Brett, was the father of the complainant's child. The complainant was called before the justices and told her story, and other evidence was called which was relied on by the complainant's advocate as corroborating that story in a material particular. Objection was taken at the end of the complainant's case that there was no corroborative evidence of her story, but the justices directed that the case should proceed. Thereupon the applicant was called and gave his evidence. At the end of the hearing the justices made an order which recites on the face of it that they had heard the evidence of the complainant "and other evidence satisfactorily corroborating in a material particular her evidence."

The question here is not whether the justices were right or wrong in their conclusion that the other evidence amounted to corroboration in a material particular of the complainant's evidence. That question can generally be tested by an appeal to quarter sessions, either on the facts or the law. It is greatly to be regretted here that owing to some informality in entering into the necessary recognisance the applicant was shut out from his right of appeal. The point we have mainly to deal with is whether the justices had jurisdiction to make the order. I desire

- A to reserve the point as to what the position would be if the case were one in which no evidence was tendered in corroboration of a complainant's story. That is not this case. Here evidence was tendered. Objection was taken that it was not sufficient. The justices decided that it was sufficient. In these circumstances it is said that a writ of certiorari will lie because the justices had no jurisdiction to make the order. In my opinion, the answer to that contention is plain. The
- B justices had jurisdiction by statute to inquire into the case made by the complainant, and particularly into the question whether the evidence of the mother was corroborated in some material particular by other evidence to their satisfaction. That matter was properly before them. They were bound to inquire and did inquire into it. It may be that they came to an erroneous conclusion upon it; but the fact that they were bound to come to some conclusion, right or wrong,
- C shows that they had jurisdiction. This matter was not collateral in the sense in which that word is used in the cases which have decided that justices cannot give themselves jurisdiction by an erroneous decision on some collateral matter upon which their jurisdiction depends. No doubt there are cases where the jurisdiction of justices is conditional upon the existence of some collateral matter, and then this court has power to consider the question whether the conditions exist under
- D which jurisdiction has been conferred on the justices; but the question raised here is whether the justices came to a correct conclusion upon a matter which it was for them to consider; such a matter is not collateral, and those cases do not apply. The Divisional Court came to the right conclusion, and rule must be discharged.

- WARRINGTON, L.J.**—I am of the same opinion. The justices clearly had
- E jurisdiction to do that which the Act enjoins, namely, to hear the evidence of the woman and such other evidence as she may produce, and also to hear any evidence tendered by or on behalf of the person alleged to be the father, and, in the words of the section,

- "if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the said justices they may adjudge the
- F man to be the putative father of such bastard child."

- It seems to me plain that one of the things the justices had to determine, and, therefore, had jurisdiction to decide, in hearing the complaint was whether the evidence of the mother was corroborated in some material particular by other evidence to their satisfaction. Therefore, it cannot be said that the existence of corroborative evidence was a collateral matter on which their jurisdiction depended.
- G It was one of the very things upon which the decision is entrusted to them. It follows that upon that ground the application for certiorari must fail.

- ATKIN, L.J.**—I agree. This case is to be decided on a consideration of the terms of s. 4 of the Bastardy Laws Amendment Act, 1872. The order of the justices shows that the evidence of the mother was corroborated in some material
- H particular by other evidence to their satisfaction. The writ of certiorari was applied for on the ground that the order was made without jurisdiction because the evidence of the mother was not corroborated in any material particular by any legal evidence. The first question is whether there was corroborative evidence, and, in my opinion, there was no evidence which could be called corroborative, except that of the applicant. He repudiated the imputation, but it is said he had
- I offered the complainant a bag of sweets. It is not necessary for this court to decide whether that is corroborative evidence or not, for, assuming there was no corroboration, was there, therefore, a lack of jurisdiction on the part of the justices? The principle is laid down by COLERIDGE, J., delivering the judgment of the Exchequer Chamber in *Bunbury v. Fuller* (1) in these words:

"Now it is a general rule that no court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars, making up together that subject-matter which,

if true, is within its jurisdiction, and, however necessary in many cases it may be for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits, yet, upon this preliminary question, its decision must always be open to inquiry in the superior court."

Then the learned judge gives an instance of a court having a limited territorial jurisdiction and a matter of complaint being brought before it which one party asserts and the other denies to have arisen within the territorial limits. Here is a collateral issue independent of the merits; no doubt the inferior court must give a decision upon it, but this decision being upon a point collateral to the main matter of complaint is open to review by the superior courts, and if a superior court decides that the matter of complaint arose outside the territorial limits, the result is that the inferior court had no jurisdiction. But where the inferior court has given a decision upon one of the points involved in the actual matter committed to its decision, it cannot be said that its decision upon that point is without jurisdiction. I think the law is accurately stated in HALSBURY'S LAWS OF ENGLAND, Tit. Crown Practice, vol. X, ss. 374, 375 [see 3rd Edn., vol. 11, p. 142, paras. 268, 270] :

"Under various statutes certain notices are requisite before the commencement of proceedings; and the omission to serve such notices deprives the inferior court of jurisdiction and affords ground for certiorari. . . . The case is more difficult where the jurisdiction of the court below depends, not upon some preliminary proceedings, but upon the existence of some particular fact. If the fact be collateral to the actual matter which the lower court has to try, that court cannot, by a wrong decision with regard to it, give itself jurisdiction which it would not otherwise possess. The lower court must, indeed, decide as to the collateral fact, in the first instance; but the superior court may upon certiorari inquire into the correctness of the decision, and may quash the proceedings in the lower court if such decision is erroneous, or at any rate if there is no evidence to support it. On the other hand, if the fact in question be not collateral, but a part of the very issue which the lower court has to inquire into, certiorari will not be granted, although the lower court may have arrived at an erroneous conclusion with regard to it."

By the very terms of s. 4 of the Act of 1872 one of the questions the justices have to decide is whether the evidence of the mother has been "corroborated in some material particular by other evidence to the satisfaction of the said justices." The justices have found that there was "other evidence satisfactorily corroborating in a material particular her evidence"—that is, the evidence of the mother. That may have been, and I think it was, a wrong conclusion, but it was a conclusion on one of the very matters which is entrusted to their decision. This is not the only branch of the law where corroboration of a witness is necessary in order to establish a charge. It would be a very lamentable proceeding if a conviction based on evidence, which was not as a matter of law corroborated, should be considered as the act of a court having no jurisdiction in the matter before it. For these reasons, I think, the remedy by certiorari is not open to the applicant, and the rule should be discharged.

Rule discharged.

Solicitors: *Smiles & Co.*, for *Mossop & Mossop*, Long Sutton; *Rawle, Johnstone & Co.*, for *Hunt & Williams*, Peterborough.

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

R. v. HOLBORN LICENSING JUSTICES. Ex parte
STRATFORD CATERING CO., LTD.

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Salter, JJ.), July 27, 28, 1926]

[Reported 136 L.T. 278; 90 J.P. 159; 42 T.L.R. 778; 24 L.G.R. 509]

Licensing—Licence—Transfer—Transfer to "fit and proper person"—Security of tenure—Length of notice in service agreement—Licensing (Consolidation) Act, 1910 (10 Edw. 7 and 1 Geo. 5, c. 24), s. 23 (2) (b).

Leaseholders of a public-house applied to the licensing justices for a transfer of the licence from the applicants' secretary and resident manager to the secretary and a proposed new resident manager. The service agreement between the applicants and the proposed new manager provided for its determination by four weeks' notice on either side. At a recent general meeting of the justices they had decided that as a general rule agreements under which proposed transferees of licences were employed should be liable to be terminated by not less than three months' notice, and in an affidavit the chairman of the justices stated that in the present case the justices saw no reason to depart from that general rule because this was the third application for a transfer in respect of the house in question made by the leaseholders in just over 18 months, the proposed transferee had been in six different employments in the last seven years, and the house required special care by a resident manager who could be trusted to look after it. The justices, therefore, refused the application for the transfer. On a rule nisi for mandamus commanding them to hear and determine the application according to law,

Held: in every case of a transfer the justices had to consider whether the proposed transferee had such a real and effective interest in the licensed premises as to be a fit and proper person to hold the licence, and in regard to that matter nothing was more germane than the question of reasonable security of tenure; on the facts, in dealing with the matter the justices had not merely applied a hard and fast pre-determined rule, but had inquired into the merits of the case; and, therefore, the rule would be discharged.

Notes. Section 23 (2) (b) of the Licensing (Consolidation) Act, 1910, has been replaced by s. 21 (6) of the Licensing Act, 1953, which is in substantially the same terms: see 33 HALSBURY'S STATUTES (2nd Edn.) 170.

Considered: *R. v. Newington Licensing Justices, Ex parte Conrad*, [1948] 1 All E.R. 346; *R. v. Torquay Licensing Justices, Ex parte Brockman*, [1951] 2 All E.R. 656. Referred to: *R. v. Rotherham Licensing Justices, Ex parte Chapman*, [1939] 2 All E.R. 710.

As to transfer of licences, see 22 HALSBURY'S LAWS (3rd Edn.) 562 et seq.; and for cases see 30 DIGEST (Repl.) 40-44.

Cases referred to:

(1) *R. v. Hyde Justices*, [1912] 1 K.B. 645; sub nom. *R. v. Cooke, etc., Justices*, 81 L.J.K.B. 363; sub nom. *R. v. Cooke, Ex parte Atherton*, 106 L.T. 152; 76 J.P. 117, D.C.; 30 Digest (Repl.) 41, 315.

(2) *R. v. Underwood, Ex parte Beswick* (1912), 76 J.P. 154, D.C.; 30 Digest (Repl.) 33, 242.

Rule Nisi for a mandamus directed to the Holborn Licensing Justices commanding them to hold a transfer sessions meeting and thereat to hear and determine according to law the matter of an application by the applicants for the rule, the Stratford Catering Co., Ltd., for a transfer of the licence of the "Marlborough Arms" public-house in Huntley Street, Tottenham Court Road, London, from Edward Owen, the secretary of the applicants, and S. V. Henwood, their resident

manager, to their secretary, and G. E. Sheppard, their proposed new resident manager. A

The applicant company were the leaseholders of the "Marlborough Arms," and they engaged Sheppard as their new resident manager under an agreement which provided that it might be determined by four weeks' notice on either side. On the hearing of the application on April 13, 1926, for a transfer of the licence the agreement was produced, and the chairman of the justices pointed out that the justices had, at their general annual licensing meeting in March, 1926, decided that as a general rule at least three months' notice should be required in the case of management agreements, and he said that this agreement could not be accepted. The hearing was then adjourned at the request of the applicants' solicitor. The application was renewed at the transfer sessions on June 1, 1926, and, as the applicants declined to agree to the substitution of three months' notice, the application was refused. B C

The chairman of the justices stated in an affidavit that the facts which influenced the justices' decision were that the "Marlborough Arms" was acquired by the applicant company at Michaelmas, 1924, and on Dec. 2, 1924, the licence was transferred to Owen (the secretary) and one Cox, as resident manager. On Dec. 8, 1925, the licence was transferred to Owen and a new manager, Henwood. In those two cases the agreements provided for only four weeks' notice. After just over four months, on April 13, 1926, there was the present application for a transfer to a new manager. The police reported that Sheppard had been in six different employments in the last seven years, with intervals during which he was not employed; that there were no complaints against the house, but that it required very careful management; that it was the first house coming south from the St. Pancras Division (where the closing hour was ten p.m.) into the Holborn Division (where the closing hour was eleven p.m.); and that a constable had to be sent there at closing time every evening. The justices knew the house to be one requiring special care in the selection of a resident manager who could be trusted to look after it, and who was likely to remain for a prolonged period. They felt that in view of the previous changes at the house and the fact that Sheppard also had had a number of changes, in this case particularly it would not be desirable that the agreement should provide for less than three months' notice, and, although there was no evidence adverse to Sheppard's personal character, they did not regard him as a fit and proper person to hold the licence. If the applicants were satisfied of Sheppard's fitness they would have no reasonable objection to complying with the justices' requirements. The three months' requirement was intended for the future guidance of the justices, not as a hard-and-fast rule, but as one which could be relaxed if the particular circumstances of the case required it. It was the justices' experience that a man of the required character and ability could not readily be found to take up the work unless he had an agreement for at least three months. D E F G

The grounds on which the rule was obtained were: (i) That the justices held Sheppard not to be a fit and proper person to hold the said licence for the sole reason that by his agreement with the leaseholders of the house he was subject to four weeks' notice, and that this provision in his agreement could not either in law or in fact affect his fitness and propriety as a holder of the licence; (ii) that the justices had refused the transfer upon a general rule made by them requiring resident managers to be subject to not less than three months' notice, and not upon the facts or merits of the particular application; (iii) that in so far as the justices had considered the facts of the particular application they had only considered them in relation to the question whether they afforded reasons for making any exception to the general rule aforesaid, and not independently of any such rule or upon the merits. H I

Whiteley, K.C., and *Sidney H. Lamb* showed cause.

Mitchell Banks, K.C., and *Harold L. Murphy* supported the rule.

A **LORD HEWART, C.J.**—This is a rule nisi for a writ of mandamus to the licensing justices for the Holborn division of the county of London, commanding them to hold a transfer sessions meeting, and at that meeting to hear and determine, pursuant to the statutes in that behalf, the matter of an application by the Stratford Catering Co., Ltd., for a transfer of the licence of a particular public-house near Tottenham Court Road to two named persons.

B Attention has been directed and most properly directed in the course of the argument to the well-known case of *R. v. Hyde Justices* (1). It is, perhaps, to be regretted that in that case, important as it was, there was no argument offered on the part of the justices. That case decided, according to the summary statement in the headnote, that in the exercise of their jurisdiction to consider whether a proposed transferee is a fit and proper person to be the holder of a licence, **C** justices have no power to attempt to regulate the terms upon which the applicant for the transfer is to conduct his business if those terms do not in any proper sense affect the transferee's fitness to hold a licence, but they may properly come to the conclusion that the proposed transferee is not a fit and proper person to hold the licence if the terms upon which he intends to carry on his business, either as **D** between himself and his landlord, or as between himself and the public, are such that the only legitimate inference from a consideration of those terms is that he cannot carry on his business without infringing the law. In that case the question of notice did not arise. What was being considered was, for example, a schedule of prices of different kinds of liquor, and the intimate financial scheme of the business itself. **LORD ALVERSTONE, C.J.**, in giving judgment, said :

E "The *primâ facie* meaning of the words 'fit and proper person' in s. 23 (2) (b) of the Licensing (Consolidation) Act, 1910 . . . is that the applicant must be a fit and proper person to hold a licence and carry on the business of the licence-holder. . . . I do not express any opinion that the terms of tenancy may not in some cases be relevant in considering whether a person is a fit and proper **F** person to hold a licence. I can conceive that cases might exist in which the terms of tenancy were such that the licensee would have no proper control—would not really be the effective licence-holder—and therefore might be a person who really ought not to have a licence granted to him."

HAMILTON, J., referring to what was found by the justices in the case, said :

G "This falls very far short of their finding of fact, that he could not properly carry on the business of licensed premises under the terms of the agreement, and that his interest was such as to render him indifferent whether he conducted the premises properly or not."

It is apparent that the learned judge believed that it would be most relevant if it appeared that the interest of the proposed transferee was such as to render him indifferent whether he conducted the premises properly or not, and a little later,

H **HAMILTON, J.**, added :

"I do not say that there may not be circumstances in which the terms of an agreement of tenancy may not be very material on the question of the fitness and propriety of the person applying to be the holder of the licence."

I Similar passages expressing the same underlying thought are to be found elsewhere in the judgments of the judges already referred to, and also in the judgment of **BANKES, J.**, who said in terms :

"I do not agree with the contention that the inquiry into the question whether a particular person is or is not a fit and proper person to hold a licence ought to be confined to an inquiry as to that person's character. It would be unwise to attempt any definition of the matters which may legitimately be inquired into; each case must depend upon its own circumstances. It is, I think, quite clear that the discretion that is given to the justices in the selection of fit and proper persons to hold licences does not include the power

to dictate the terms upon which the applicant is to conduct his business, if those terms do not in any proper sense affect his fitness to hold the licence." A

There again is the clearest recognition that there may be terms in the agreement which do, in the proper sense, affect the fitness of the transferee to hold the licence. In like manner, in *R. v. Underwood* (2), AVORY, J., said :

"I wish to guard myself from its being supposed that I am deciding that the justices may not look at the agreement and say, as a result of their perusal of it, that an applicant is unfit." B

The law provides that in such a case the agreement shall be produced. The justices are not only entitled to peruse it; it is their duty to peruse it. They are entitled to look at the agreement in order to see whether there is anything in it which, in their opinion, tends to prevent the transferee from being or becoming an effective licence-holder. C

One of the grounds which it is natural and proper to take into consideration upon the question whether the proposed transferee is a fit and proper person, is the kind or degree of his interest in the licensed premises and the good conduct of the licensed premises. There was a time, as has been made clear in the course of the argument, and a time not very long ago, when it was thought that managers could not be effective licence-holders, for the reason that it was thought that they could not possibly have such an interest in the licensed premises as to make them in any circumstances fit and proper persons to be licence-holders. That view has, no doubt, disappeared, but the question remains in every case whether the person put forward as manager has such a real and effective interest in the licensed premises as to be a fit and proper person to hold the licence. If that inquiry is permissible, I cannot imagine anything which is more germane to the matter than the question of reasonable security of tenure. The refusal of reasonable security of tenure may tend prejudicially to limit the class of persons from whom the licence-holder is drawn. It may be regarded as indicating the view of his proposed employers themselves; it may actually tend, in practice, to the deterioration of the licence-holder himself. It seems to me to be a most proper and natural topic of inquiry for the justices : "What is the interest of this man in these premises?" and as something tending to throw light upon that matter : "What is his fixity of tenure?" So far, therefore, as the argument proceeded upon the fundamental proposition that the justices have no right to look into this question of security of tenure at all, I am bound to say, with great respect, that I think the argument is totally wrong. The question of security of tenure may be regarded as of crucial importance. E F G

But it is said that, even if it be conceded that security of tenure is a proper matter for consideration, nevertheless it cannot be right for justices to apply a general rule. The phrase, "the application of a general rule," is a formidable phrase always in such cases, but it is a little important to examine these stock phrases and see what exactly they mean in relation to the subject-matter which is under discussion. There may be general rules and general rules. Here the matter which is under discussion is a minimum length of notice in a manager's agreement. I think it would be a strong thing to say that the justices may not entertain a certain minimum period as being in ordinary circumstances desirable, and, if it is the fact that justices have in their mind some normal typical standard period, it is well that they should make that circumstance known rather than apply it without notification, leaving those who appear before them ignorant of their general view about it. But that is quite a different thing from saying that in every case it would be right to apply a hard and fast general rule. No such thing appears, at any rate, to have taken place here. We have before us the affidavit of the chairman of the justices. I need not read the whole of it, but he makes it perfectly clear that the justices brought their minds to bear upon this question of security of tenure with direct reference to this particular licensed house, of which the situation, the circumstances, the difficulties, and the temptations are set out in I

A detail. The whole of the last half-dozen paragraphs of the affidavit consists of a detailed statement of the particular and individual reasons for insisting in this case upon such a notice as three months as distinguished from a month's notice. Counsel who appears in support of the rule has referred us, very properly, to the transcript of the shorthand notes, and, when one looks there, one finds, as in the affidavit, careful statements of particular facts derived from this individual case.

B The chairman says, for example, that this is a house

"which wants very careful management. There are many bars, and there is a great deal of night traffic in the Tottenham Court Road, and it is very urgent that the supervision should be of the best. We think that a man of good experience and standing is necessary as a manager. . . . We know the house as well as the proprietors do. . . . We have visited the house, and we know it and we know the circumstances of it. It is a large and important house, and it is very desirable that it should be in the residential management of somebody of good standing, about whom you have satisfied yourselves sufficiently to give him a three months' engagement."

C In my opinion, the justices approached the consideration of this matter in the right spirit and applied a true criterion. I do not think that there is any ground at all upon which this rule can be supported, and I think, therefore, that it ought to be discharged.

E **AYORY, J.**—I am of the same opinion. I am satisfied, not only from the affidavit of the chairman, but from the shorthand note of the proceedings, that the licensing justices did not refuse this transfer merely because they had laid down, for their own guidance, a general rule requiring three months' notice at least in any agreement with a tenant or manager, but that they did in fact inquire into the merits of this particular case, apart from any such general rule. Next, in my view, *R. v. Hyde Justices* (1) is, by implication, a direct decision that the licensing justices, upon an application for a transfer of a licence, may take into consideration the terms of the agreement with the proposed transferee, and, if they come to the conclusion that those terms are such that the interest of the proposed transferee under that agreement may render him indifferent as to whether he conducts the premises properly or not, they may upon that ground refuse the transfer. Looking at the agreement in the present case and at the fact that the proposed transferee is only to be paid a salary of so much a week, and at the fact that either he or the applicant company can terminate it at one month's notice, I am satisfied that the justices might properly come to the conclusion that such an interest as that might render him indifferent whether he conducts the premises properly or not, and, in view of the particular character of these premises, that was a further reason for the justices coming to the conclusion to which I think they were entitled to come in this case.

H **SALTER, J.**—I agree. It is, I think, plain both from the statute and from the authorities that upon an application for a transfer, the justices are entitled, and, indeed, bound, to examine the terms of the agreement under which the applicant will hold the licence, and counsel supporting the rule does not deny that the question of the degree of fixity of tenure which the applicant would enjoy is a matter which, together with other matters, the justices may properly take into consideration. If that is so, it is impossible to prevent them, in the privacy of their own room, from adopting any standard or practice which seems to them right, and, if they do, I think it is both right and convenient that they should state their practice publicly for the information of all concerned. They must, of course, apply their minds properly to the circumstances of each particular case. If the justices had refused this application because the notice was too short, without considering the facts of the case, they would have been wrong; but it seems to me to be clear from the affidavit of the chairman, and from the shorthand note of the proceedings, that, although they dismissed this application because the notice

was too short and would have granted it if a longer notice had been provided for, they did so after careful consideration of the circumstances of this particular house, which is a difficult house, and of this particular applicant, who appears to be something of a rolling stone. In my opinion, the justices exercised an honest discretion on proper materials, and the rule should be discharged.

Rule discharged.

Solicitors: *Scadding & Bodkin; Stephenson, Harwood & Tatham.*

[Reported by J. F. WALKER, ESQ., Barrister-at-Law.]

NOBLE v. HARRISON

[KING'S BENCH DIVISION (Rowlatt and Wright, JJ.), May 18, 21, 1926]

[Reported [1926] 2 K.B. 332; 95 L.J.K.B. 813; 135 L.T. 325;
90 J.P. 188; 42 T.L.R. 518; 70 Sol. Jo. 691]

Nuisance—Tree—Overhanging highway—Fall of branch through latent defect—Tree not dangerous per se.

The branch of a tree on the defendant's estate, which overhung the highway, fell owing to a latent defect and caused damage to a vehicle belonging to the plaintiff which was passing along the highway. In an action by the plaintiff for damages for nuisance and breach of duty,

Held: the mere overhanging of a highway by a tree did not constitute a nuisance, and, as the defendant neither knew nor ought to have known of the danger, the fact that the tree was dangerous before it fell did not render it a nuisance; the growing of a tree was one of the natural uses of the soil, and a tree was not in itself a dangerous object, like sewage or water artificially accumulated in a reservoir, which the owner of the land was bound at his peril to prevent from escaping; and, therefore, the defendant was not liable.

Rylands v. Fletcher (1) (1868), L.R. 3 H.L. 330, distinguished.

Notes. Considered: *Dollman v. Hillman, Ltd.* (1940), 85 Sol. Jo. 57. Followed: *Cunliffe v. Bankes*, [1945] 1 All E.R. 459. Considered: *Spicer v. Smees*, [1946] 1 All E.R. 489; *Longhurst v. Metropolitan Water Board*, [1948] 2 All E.R. 834. Referred to: *Wringe v. Cohen*, [1939] 4 All E.R. 241; *Cushing v. Walker & Son (Warrington and Burton), Ltd.*, [1941] 2 All E.R. 693; *Brown v. Harrison* (1947), 177 L.T. 281; *Caminer v. Northern and London Investment Trust, Ltd.*, [1949] 1 All E.R. 874.

As to nuisance caused by trees, see 24 HALSBURY'S LAWS (2nd Edn.) 49; and for cases see 26 DIGEST 427, 36 DIGEST (Repl.) 282 et seq.

Cases referred to:

- (1) *Fletcher v. Rylands* (1866), L.R. 1 Exch. 265; 35 L.J.Ex. 154; 14 L.T. 523; affirmed sub nom. *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, 334.
- (2) *Bruce v. Caulfield* (1918), 84 T.L.R. 204, C.A.; 2 Digest (Repl.) 91, 550.
- (3) *Barker v. Herbert*, [1911] 2 K.B. 633; 80 L.J.K.B. 1329; 105 L.T. 349; 75 J.P. 481; 27 T.L.R. 483; 9 L.G.R. 1083, C.A.; 36 Digest (Repl.) 297, 419.
- (4) *Mullan v. Forrester*, [1921] 2 I.R. 412; 26 Digest 434, f.
- (5) *Smith v. Kenrick* (1849), 7 C.B. 515; 18 L.J.C.P. 172; 12 L.T.O.S. 556; 13 Jur. 362; 137 E.R. 205; 36 Digest (Repl.) 248, 8.

- A (6) *Humphries v. Cousins* (1877), 2 C.P. 239; 46 L.J.Q.B. 438; 36 L.T. 180; 41 J.P. 280; 25 W.R. 371; on appeal 46 L.J.Q.B. at p. 442, C.A.; 36 Digest (Repl.) 288, 361.
- (7) *Ilford U.D.C. v. Beal*, [1925] 1 K.B. 671; 94 L.J.K.B. 402; 133 L.T. 303; 89 J.P. 77; 41 T.L.R. 317; 23 L.G.R. 260; 36 Digest (Repl.) 294, 407.
- B (8) *Earl Lonsdale v. Nelson* (1823), 2 B. & C. 302; 3 Dow. & Ry.K.B. 556; 2 L.J.O.S.K.B. 28; 107 E.R. 396; 36 Digest (Repl.) 303, 486.
- (9) *Lemmon v. Webb*, [1894] 3 Ch. 1; 63 L.J.Ch. 570; 70 L.T. 712; 58 J.P. 716; 10 T.L.R. 467, C.A.; affirmed [1895] A.C. 1; 64 L.J.Ch. 205; 71 L.T. 647; 59 J.P. 564; 11 T.L.R. 81; 11 R. 116, H.L.; 36 Digest (Repl.) 305, 519.
- (10) *Smith v. Giddy*, [1904] 2 K.B. 448; 73 L.J.K.B. 894; 91 L.T. 296; 53 W.R. 207; 20 T.L.R. 596; 48 Sol. Jo. 589; 2 Digest (Repl.) 89, 537.
- C (11) *Wilkins v. Day* (1883), 12 Q.B.D. 110; 49 L.T. 399; 48 J.P. 6; 32 W.R. 123, D.C.; 36 Digest (Repl.) 209, 1105.
- (12) *Harrold v. Watney*, [1898] 2 Q.B. 320; 67 L.J.Q.B. 771; 78 L.T. 788; 46 W.R. 642; 14 T.L.R. 486; 42 Sol. Jo. 609, C.A.; 36 Digest (Repl.) 115, 577.
- (13) *Tarry v. Ashton* (1876), 1 Q.B.D. 314; 45 L.J.Q.B. 260; 34 L.T. 97; 40 J.P. 439; sub nom. *Terry v. Ashton*, 24 W.R. 581; 26 Digest 433, 1519.
- D (14) *Wandsworth Board of Works v. United Telephone Co.* (1884), 13 Q.B.D. 904; 53 L.J.Q.B. 449; 51 L.T. 148; 48 J.P. 676; 32 W.R. 776, C.A.; 26 Digest 328, 607.
- (15) *Blake v. Woolf*, [1898] 2 Q.B. 426; 67 L.J.Q.B. 813; 79 L.T. 188; 62 J.P. 659; 47 W.R. 8; 42 Sol. Jo. 688; 36 Digest (Repl.) 296, 414.
- (16) *Rickards v. Lothian*, [1913] A.C. 263; 82 L.J.P.C. 42; 108 L.T. 225; 29 T.L.R. 281; 57 Sol. Jo. 281, P.C.; 36 Digest (Repl.) 293, 396.
- E (17) *Nichols v. Marsland* (1875), L.R. 10 Exch. 255; 44 L.J.Ex. 134; 33 L.T. 265; 23 W.R. 693; affirmed (1876), 2 Ex.D. 1; 46 L.J.Q.B. 174; 35 L.T. 725; 41 J.P. 500; 25 W.R. 173, C.A.; 36 Digest (Repl.) 297, 421.

Appeal from Brighton County Court.

F The plaintiff, a motor-coach owner, brought an action against the defendant, the owner of an estate known as Buckingham Park, Old Shoreham, Sussex, for damages occasioned to one of his motor coaches, which was being driven along the public highway, by the fall of the branch of a beech tree growing on the defendant's estate and overhanging the highway.

G The county court judge found that trees had been grown on the defendant's land adjacent to the highway for the purpose of a screen to afford privacy to the estate and to add attraction to it. The beech tree in question, which was eighty years old, was one of those trees. One of its branches, twenty feet to twenty-five feet long and ten inches in diameter, overhung the highway in an oblique and upward direction rather than horizontally. On July 12, 1925, while the plaintiff's motor coach was proceeding along the highway, the branch, without warning or apparent cause, broke off at a distance of fifteen feet from the trunk of the tree, and fell upon the motor coach and caused damage. The weather was fine and calm. The trees on the estate had been carefully inspected in the preceding October, and nothing wrong had been noticed in regard to the tree or the branch. A competent woodsman was instructed between October, 1924, and March, 1925, to report on any tree which required to be trimmed, cut or marked. No report was made about this particular tree. The bough was not dead, the sap was running, and leaves were growing at the extremity of the bough at the time of the accident. The judge was satisfied that the bough had become cracked at the point where it broke; that water had penetrated; that slight decay had set in; that owing to these defects the bough had for some time been liable to break and fall, and had been and was on the day of the accident a menace and danger to all persons using the highway; and that the time had at last arrived when the defective part of the bough was too weak to support the strain on it and snapped. Having regard to the height of the bough from the ground, to the place where the defect was, and

to all the relevant circumstances, he came to the conclusion that knowledge of the defect could not be imputed to the defendant as it was latent and not discoverable by any reasonably careful inspection. He, accordingly, held that the defendant was not liable on the ground of negligence, but he further held that he was liable in damages for nuisance, and on the principle of absolute liability for allowing the escape of a dangerous article from his land, as laid down in *Rylands v. Fletcher* (1). He gave judgment for the plaintiff for £48 11s. and costs. The defendant appealed. A
B

Roland Oliver, K.C., and Tristram Beresford, for the defendant, referred to *Bruce v. Caulfield* (2), *Barker v. Herbert* (3), *Mullan v. Forrester* (4), *Rylands v. Fletcher* (1), *Smith v. Kenrick* (5), *Humphries v. Cousins* (6), and *Ilford U.D.C. v. Beal* (7). C

N. A. Beechman (T. Gates with him), for the plaintiff, referred to *Earl Lonsdale v. Nelson* (8), *Lemmon v. Webb* (9), *Smith v. Giddy* (10), *Wilkins v. Day* (11), *Harrold v. Watney* (12), and *Tarry v. Ashton* (13). D

Cur. adv. vult.

May 21. The following judgments were read E

ROWLATT, J.—In this case the defendant was possessed of land on which there was growing a beech tree, a limb of which overhung a highway. This bough suddenly broke in fine weather, fell upon the plaintiff's vehicle then passing, and caused damage. The county court judge has found not only that neither the defendant nor his servants knew that the bough was dangerous, but that the fracture was due to a latent defect not discoverable by any reasonably careful inspection. In these circumstances—and it is not necessary to refer to the facts in any greater detail—the county court judge gave judgment for the plaintiff for the amount of the damage. F

A claim based on negligence is, of course, out of the question, and the county court judge so held, but he found the defendant liable (i) as for a nuisance, and (ii) upon the principle of *Rylands v. Fletcher* (1) and *Humphries v. Cousins* (6). In my opinion, this last-named principle has no application to the present case. A tree is not like the artificial reservoir in the first case or the sewage in the second case, which the persons on whose land they were were held bound to keep from escaping at their peril. To grow a tree is one of the natural uses of the soil, and it makes no difference, in my judgment, whether the tree is planted or self-sown, or with what object—whether for ornament, or for shelter, or for the sake of the timber—it is planted or maintained. Further, a tree is not in itself a dangerous object, though in decay it may become so. I neglect as immaterial for the present purpose trees with poisonous fruit or foliage. I conclude, therefore, that the judgment of the county court judge cannot be supported on this ground, and from this view I gather that the learned counsel for the plaintiff does not dissent. G

It remains to consider the question of nuisance. In regard to that it was in the first place contended for the plaintiff that the mere fact that the tree overhung the highway made it a nuisance. This is indeed a far-reaching proposition, especially as it would apply not only to roadways, but to footpaths. If it is sound it would seem that, a fortiori, every lamp so overhanging, every signboard, every clock (including that of the Law Courts), every awning outside a shop are in themselves illegal erections, not to mention the upper stories corbelled out over the roadway which were common in every town in the country for centuries. I should have thought it clear that the right of the public in a highway was merely to pass and re-pass, and that so long as that right was not interfered with they could not complain of what was in the air above or on the earth beneath. Incidentally, it may be observed that, if the law is as contended for, the difficult questions discussed in *Wandsworth Board of Works v. United Telephone Co.* (14) need never have been invoked. We were pressed, however, with a few words in the H
I

A judgment of BEST, J., in *Earl Lonsdale v. Nelson* (8) as the only authority on the subject. In that case the question was in regard to the right of a party aggrieved to abate a nuisance, and the learned judge was pointing out the necessity of allowing such a right in cases of immediate peril. I think it is clear that the learned judge was speaking of an overhanging tree de facto dangerous or obstructive.

B It was next contended that, as the tree in fact fell, it was, before it fell, dangerous, and was, therefore, a nuisance. This way of putting it is independent of the circumstance that the bough overhung the highway. The argument, as we admitted by the learned counsel who employed it, would be equally applicable to a tree standing clear of the road, but which fell across it. The point is, however, whether the defendant can be made liable when he neither knew nor ought to have known of the actual danger. That the answer to this must be in the negative is clear, I think, though the circumstances were very different from the judgment in *Barker v. Herbert* (3). The result of that and the other cases cited to us is that a person is liable for a nuisance constituted by the state of his property (i) if he causes it; (ii) if by the neglect of some duty he allows it to arise, and (iii) if, when it has arisen without his own act or default, he omits to remedy it within a reasonable time after he did or ought to have become aware of it.

D There remains one other question, namely, whether, inasmuch as the tree in fact overhung the road, the defendant was not under an absolute obligation to support it. The point is suggested by the judgments of LUSH, J., and QUAIN, J., in *Tarry v. Ashton* (13). In that case a lamp attached to the defendant's premises overhung the highway, and it was held by the two learned judges referred to that he was bound to prevent it from falling at his peril. The reasoning proceeded really upon the same lines as that in *Rylands v. Fletcher* (1), and fails to apply to this case on the same grounds. It may be that where a heavy object is suspended over a highway, and must fall into it unless supported by artificial means which can only be kept in order by the person in possession of the premises, such person is bound absolutely to maintain the attachments. But a branch of a tree is not kept from falling by artificial attachments to be maintained by man, but by the natural processes which develop the tree, and it is only when accident or decay interferes that human intervention is required. I see no ground for holding that the owner is to become an insurer of nature, or that default is to be imputed to him until it appears, or would appear upon proper inspection, that nature can no longer be relied upon. For these reasons I am of opinion that this appeal must be allowed, with costs.

G **WRIGHT, J.**—This is an appeal from a judgment of the county court judge at Brighton, who has held the defendant liable for damages suffered by the plaintiff's motor coach, caused by the falling upon it of a branch of a beech tree, growing in Buckingham Park, Old Shoreham, of which the defendant is owner and occupier. This branch, which overhung the highway, suddenly broke off and fell upon the motor coach as it was passing along the highway and damaged it. The judge has found that the branch, which grew out at a height of 30 ft. from the ground and was 20 ft. to 25 ft. long and 10 in. in diameter, had, at some time, developed a crack at the place, about 15 ft. from the trunk, where it broke off, but that the defect was not observable by any reasonably careful inspection, and that the tree was about eighty years old, presented every appearance of health, and had been the subject of careful inspection not long previously. The judge found that the defect was latent, that the defendant had no knowledge of it, and that knowledge could not be imputed to him. The claim, so far as it was based on negligence, therefore, failed, as no want of care was proved.

I The judge, however, decided in favour of the plaintiff on the grounds of (i) nuisance, (ii) on the principle of *Rylands v. Fletcher* (1). In my opinion, the judgment cannot be supported on either ground. The bough, by reason of its height from the ground, was clearly not a nuisance in the sense that it obstructed the highway to members of the public lawfully passing and re-passing. I think

the judge does not decide that it was a nuisance merely because it overhung the road, though it was in argument sought to support his judgment on that ground. Counsel in his able argument for the plaintiff cited for this contention a passage from POLLOCK ON TORTS (12th Edn.), p. 411: "It is an actionable nuisance if a tree growing on my land overhangs the public road or my neighbour's land." The authority quoted by the learned author for the former branch of this proposition is the following dictum of BEST, J., in *Earl Lonsdale v. Nelson* (8) (2 B. & C. at p. 311):

"There is no decided case which sanctions the abatement by an individual of nuisances from omission, except that of cutting the branches of trees which overhang a public road or the private property of the person who cuts them. The permitting of these branches to extend so far beyond the soil of the owner of the trees is a most unequivocal act of negligence, which distinguishes this case from most of the other cases that have occurred. The security of lives and property may sometimes require so speedy a remedy as not to allow the person on whose property the mischief has arisen to remedy it."

So far as concerns branches overhanging the private land of an adjoining owner the law is quite clear and has been fully discussed in *Lemmon v. Webb* (9), where the dictum of BEST, J., was applied, but only to the case of branches overhanging a neighbour's land. Such a case is obviously quite different in principle from that of a highway, because there is, in the former case, an interference with the neighbour's absolute right to the uninterrupted enjoyment of his own land. But if the overhanging branch is at such a height above the highway as not to obstruct free passage, there is no interference with any right. I have not been able to find the decided cases to which BEST, J., seems to refer, but I note a quotation in the judgment of KAY, L.J., ([1894] 3 Ch. at p. 19) from BROOKE'S ABR. "Nusans," per Keble:

"that a man is not bound to lop a tree which encumbers a roadway 'chemin' and, therefore, it should seem that another (that is, I suppose, someone not the owner of the tree) may do it."

I think both Keble (the counsel) and BEST, J., must be contemplating branches which obstructed the highway, or were an obvious source of danger. On the other hand, I find the great authority of BLACKBURN, J., who, in *Tarry v. Ashton* (13), a case to which I shall later refer, said in reference to a lamp suspended over the highway (1 Q.B.D. at p. 318):

"It appears that the defendant came into occupation of a house with a lamp projecting from it over the public thoroughfare, which would do no harm so long as it was in good repair, but would become dangerous if allowed to get out of repair. It is therefore not a nuisance by itself."

This is certainly good sense when it is remembered how many articles are suspended from buildings in our streets, and if it is true of artificial objects, it must be a fortiori true of natural growing things like branches of trees. If the overhanging branch was, in itself, a nuisance from the mere fact that it overhung the public highway, it was a public nuisance which might be subject of an indictment. On this assumption it is startling to contemplate how many such public nuisances add amenity and beauty to our roads. In my opinion, the overhanging branch was not per se a nuisance.

Then it is contended that it became a nuisance when, at some unknown time, some years ago, the latent defect began and gradually developed, by natural causes and without any human agency or any indication to human eyes. In that case, I think, the defendant is not liable, because of the principles laid down in *Barker v. Herbert* (3). The nuisance in that case was caused by the act of a trespasser, but, I think, the same principle applies to a nuisance—in this case, the latent crack in the branch, with the resulting risk that some day it would fall—caused by a secret and unobservable operation of nature. FLETCHER MOULTON, L.J., thus states the law ([1911] 2 K.B. at p. 642):

A "In my opinion, the law in such a case as the present is that the possessor of land adjoining a highway may not cause his premises to be a nuisance to the highway, and he will be responsible in the respect for the acts of his servants or agents. . . . In a case where the nuisance is created by the act of a trespasser, it is done without permission of the owner and against his will, and he cannot, in any sense, be said to have caused the nuisance; but the law recognises there may be a continuance of the nuisance. In that case the gravamen is the continuance of the nuisance and not the original causing of it. . . . He cannot be said to have permitted the continuance of that which was not caused by him and of which he had no knowledge."

B

The lord justice explains that by knowledge he means actual or imputed knowledge. If the above principles are, as I think they should be, applied to the present case, it follows that the defendant cannot be held liable in the facts found by the judge, on the ground of nuisance.

C

Nor can the defendant be held liable, in my opinion, on the principle of *Rylands v. Fletcher* (1). That principle has often been discussed, applied and distinguished, and I need not refer to the many authorities. I may apply to the facts of this case the language of FLETCHER MOULTON, L.J., in the judgment first referred to ([1911] 2 K.B. at p. 642):

D

"This is not a case where a landowner has erected or brought upon his land something of an unusual nature, which is essentially dangerous in itself."

I think this re-expresses the true principle of *Rylands v. Fletcher* (1). I do not think it material to consider whether the beech was originally planted—as most boundary trees would be—or whether it grew casually. Such a tree is a usual and normal incident of the English country; it develops by slow natural growth; its branches are not likely to cause danger even if permitted to expand outwards over the highway. Such a tree cannot be compared to a tiger, a spreading fire, or a reservoir in which a huge weight of water is artificially accumulated to be kept in by dams, or noxious fumes or sewage. I see no reason whatever to apply the principle of *Rylands v. Fletcher* (1) to the case now under consideration. No doubt, under that principle, the landowner becomes an insurer and absolutely responsible for the safe keeping of the dangerous thing. The principle is as stated by BLACKBURN, J. (L.R. 1 Ex. at p. 279):

E

"We think that the true rule of law is that the person who, for his own purposes, brings on his land and collects there and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* responsible for all the damage which is the natural consequence of its escape."

F

A qualification of that general rule is expressed in the words of WRIGHT, J., in *Blake v. Woolf* (15), cited with approval by the Privy Council in *Richards v. Lothian* (16), where the principle is fully discussed ([1913] A.C. at p. 280):

G

"That general rule is, however, qualified by some exceptions, one of which is that where a person is using his land in the ordinary way and damage happens to the adjoining property without any default or negligence on his part, no liability attaches to him."

H

I think these words are applicable to the present case. If it were necessary to consider further, I should also be inclined to think that, having regard to the nature and origin of the latent defect in the bough which caused it to break off and fall, the case could also be deemed to fall within the principle of *vis major* which was recognised in *Nichols v. Marsland* (17).

I

I ought, in conclusion, to refer to a contention on behalf of the plaintiff based on the judgments of LUSH, J., and QUAIN, J., in *Tarry v. Ashton* (13). In that case a large lamp, weighing forty to fifty pounds, suspended in front of the defendant's house in the Strand, suddenly fell and injured a passer-by. It fell owing to a defect which was not observed because of the negligence of the defendant's servant

employed to inspect it. On that ground of negligence the plaintiff was entitled to judgment, but LUSH, J., and QUAIN, J., appear to have held that there was an absolute duty of the defendant to keep the lamp in a safe state of repair. That case is clearly distinguishable from the present case, because the defect in the lamp was not latent, and the lamp was a heavy artificial object which necessarily required and was capable of inspection. But BLACKBURN, J., was inclined to be of opinion that for a latent defect or something done to the premises without the knowledge of the occupier, the occupier would not be liable. The same view was expressed in the dissenting judgment of MOORE, J., in the Irish case of *Mullan v. Forrester* (4) whose view was that liability of the occupier depended on knowledge, where a wall blew down through defects and killed certain passers-by. I do not think either of these cases afford any assistance to the decision of the present case, but, if I may respectfully say so, I prefer the reasoning of BLACKBURN, J., and MOORE, J. For the above reason, I think, the appeal should be allowed.

Appeal allowed.

Solicitors: *Adkin & Son*, for *F. H. Nye*, Brighton; *F. H. Carpenter*, Brighton.

[*Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.*]

LOWTHER v. CLIFFORD

[COURT OF APPEAL (Lord Hanworth, M.R., Scrutton and Sargant, L.J.J.), March 10, 11, 26, 1926]

[Reported [1927] 1 K.B. 130; 95 L.J.K.B. 576; 135 L.T. 200; 90 J.P. 113; 42 T.L.R. 432; 70 Sol. Jo. 544; 24 L.G.R. 231]

Agriculture—Arbitration—Ouster of jurisdiction of court—Claim by landlord to enforce covenant in lease—"Market garden"—Orchard with vegetables and flowering plants beneath trees—Agricultural Holdings Act, 1923 (13 & 14 Geo. 5, c. 9), s. 16 (1), s. 54, s. 57 (1).

Landlord and Tenant—Yearly tenancy—Holding over—Consistency of covenant in original lease—Covenant by tenant to pay "all impositions and outgoing"—Expense of making up highway.

By a lease dated May 14, 1885, the plaintiff's predecessors in title granted to the defendant certain land, nine acres in extent, for a term of seven years from Sept. 29, 1884. The lease contained a covenant on the part of the defendant "during the said term to pay all taxes, rates, tithes, assessments, impositions and outgoing now payable or hereafter to become payable by, or be imposed upon either landlord or tenant in respect of the premises except the landlord's property tax." On the expiration of the lease the defendant continued in occupation, paying the rent reserved under the lease as tenant from year to year. The defendant used the land as an orchard, planting under the trees vegetables and flower-bearing plants. By a notice dated Oct. 24, 1924, the local authority required payment by the plaintiff of the sum of £188 2s. 9d. and interest thereon at £4 per cent. per annum, assessed upon the land in respect of the making up of a lane upon which the land fronted, and on Dec. 24, 1924, the plaintiff paid that sum and the interest due thereon to the local authority. In an action by the plaintiff to recover from the defendant the amount so paid as being an imposition or outgoing within the meaning of the covenant in the lease,

A **Held:** (i) the covenant would clearly have been enforceable by the plaintiff during the original term; when the defendant held over he did so on the terms of the lease **save** in so far as they were inconsistent with a tenancy from year to year; there was no such inconsistency in the covenant in question: *Stockdale v. Ascherberg* (1), [1904] 1 K.B. 447, applied; *Valpy v. St. Leonard's Wharf Co., Ltd.* (2), (1903), 67 J.P. 402, and *Harris v. Hickman* (3), [1904] 1 K.B. 13, overruled; (ii) the land, being used to grow fruit, vegetables and flowers for the market, was within the definition of a "market garden" in s. 57 of the Agricultural Holdings Act, 1923, and, consequently, within the definition of an agricultural "holding" within that section, and so came within the scope of the Act; but (iii) s. 16 of the Act, which provided for the reference to arbitration of any question or difference arising out of any claim by the landlord against the tenant for any breach of contract or otherwise in respect of an agricultural holding must be read in conjunction with s. 54 by which: "Except as in the Act expressed, nothing in this Act shall prejudicially affect any power, right, or remedy of a landlord . . . vested in or exercisable by him by virtue of any other Act or law . . . or otherwise, in respect of a contract of tenancy . . .", no clear words were to be found in the Act to affect a landlord's ordinary rights regarding a contract of tenancy; and, therefore, the jurisdiction of the court was not ousted by s. 16, and the plaintiff was entitled to succeed: *R. v. Powell, Ex parte Marquis of Camden* (4), [1925] 1 K.B. 641, disapproved.

C Decision of McCARDIE, J., [1926] 1 K.B. 185, affirmed.

D **Notes.** The Agricultural Holdings Act, 1923, was repealed by the Agricultural Holdings Act, 1948 (see 28 HALSBURY'S STATUTES (2nd Edn.) 25). See now s. 70, s. 94 (1).

Followed: *Olive v. Paynter*, [1932] 2 K.B. 666. Considered: *Farrow v. Orte- well*, [1933] All E.R. Rep. 132; *Smith v. Smith*, [1939] 4 All E.R. 312. Followed: *Preston v. Norfolk County Council*, [1947] 2 All E.R. 124. Applied: *Gulliver v. Catt*, [1952] 1 All E.R. 97. Referred to: *Mansfield v. Robinson*, [1928] All E.R. Rep. 69; *R. & W. Paul, Ltd. v. Wheat Commission* (1935), 152 L.T. 352; *Wembley Corpn. v. Sherren*, [1938] 4 All E.R. 255; *R. v. Judge Longson, Ex parte Wilson* (1941), 85 Sol. Jo. 22; *Syed Omar Bin Shaikh Alkaff v. Syed Abdulrahman Bin Shaikh Alkaff*, [1941] 2 All E.R. 346.

F As to what are "market gardens" and as to arbitration under the Agricultural Holdings Act, 1948, see 1 HALSBURY'S LAWS (3rd Edn.) 253, 325-329; as to yearly tenancies and as to covenants to pay "impositions" and "outgoings," see *ibid.*, vol. 23, p. 510 et seq., pp. 613, 617. For cases see 2 DIGEST (Repl.) 75, 76, 45-49; 31 DIGEST (Repl.) 58-61, 330-332.

G Cases referred to:

- (1) *Stockdale v. Ascherberg*, [1903] 1 K.B. 873; 72 L.J.K.B. 492; 88 L.T. 767; 67 J.P. 435; 52 W.R. 13; 19 T.L.R. 457; affirmed, [1904] 1 K.B. 447; 73 L.J.K.B. 206; 90 L.T. 111; 68 J.P. 241; 52 W.R. 289; 20 T.L.R. 235; 48 Sol. Jo. 244; 2 L.G.R. 529, C.A.; 31 Digest (Repl.) 333, 4667.
- (2) *Valpy v. St. Leonards Wharf Co., Ltd.* (1903), 67 J.P. 402; 1 L.G.R. 305; 31 Digest (Repl.) 331, 4654.
- (3) *Harris v. Hickman*, [1904] 1 K.B. 13; 73 L.J.K.B. 31; 89 L.T. 722; 68 J.P. 65; 20 T.L.R. 18; 48 Sol. Jo. 69; 2 L.G.R. 1; 31 Digest (Repl.) 331, 4652.
- (4) *R. v. Powell, Ex parte Marquis of Camden*, [1925] 1 K.B. 641; 94 L.J.K.B. 433; 132 L.T. 766; 89 J.P. 64; 41 T.L.R. 277; 23 L.G.R. 391, D.C.; 2 Digest (Repl.) 45, 236.
- (5) *Foulger v. Arding*, [1902] 1 K.B. 700; 71 L.J.K.B. 499; 86 L.T. 488; 50 W.R. 417; 18 T.L.R. 422; 46 Sol. Jo. 356, C.A.; 31 Digest (Repl.) 330, 4644.
- (6) *Re Warriner, Brayshaw v. Ninnis*, [1903] 2 Ch. 367; 72 L.J.Ch. 701; 88 L.T. 766; 67 J.P. 351; 19 T.L.R. 543; 1 L.G.R. 765; 31 Digest (Repl.) 330, 4645.

- (7) *George v. Coates* (1908), 88 L.T. 48, C.A.; 31 Digest (Repl.) 329, 4642. A
- (8) *Batchelor v. Bigger* (1889), 60 L.T. 416; 31 Digest (Repl.) 332, 4656.
- (9) *Tidswell v. Whitworth* (1867), L.R. 2 C.P. 326; 36 L.J.C.P. 103; 15 L.T. 574; 15 W.R. 427; 31 Digest (Repl.) 337, 4708.
- (10) *Thompson v. Lapworth* (1868), L.R. 3 C.P. 149; 37 L.J.C.P. 74; 17 L.T. 507; 32 J.P. 184; 16 W.R. 312; 31 Digest (Repl.) 328, 4635.
- (11) *Wilkinson v. Collyer* (1884), 13 Q.B.D. 1; 53 L.J.Q.B. 278; 51 L.T. 299; 48 J.P. 791; 32 W.R. 614, D.C.; 31 Digest (Repl.) 335, 4687. B
- (12) *Harrison v. Ridgway* (1925), 133 L.T. 238; 23 L.G.R. 434, D.C.; 2 Digest (Repl.) 46, 237.
- (13) *Smith v. Robinson*, [1893] 2 Q.B. 53; 62 L.J.Q.B. 509; 69 L.T. 434; 58 J.P. 73; 41 W.R. 588; 9 T.L.R. 493; 37 Sol. Jo. 585; 5 R. 469, D.C.; 31 Digest (Repl.) 329, 4641. C
- (14) *Hyatt v. Griffiths* (1851), 17 Q.B.D. 505; 18 L.T.O.S. 74; 117 E.R. 1375; 31 Digest (Repl.) 59, 1258.
- (15) *Dougal v. McCarthy*, [1893] 1 Q.B. 736; 62 L.J.Q.B. 462; 68 L.T. 699; 57 J.P. 597; 41 W.R. 484; 9 T.L.R. 419; 4 R. 402, C.A.; 31 Digest (Repl.) 59, 2155.
- (16) *Simpson v. Batey*, [1924] 2 K.B. 666; 93 L.J.K.B. 919; 131 L.T. 724; 68 Sol. Jo. 754, C.A.; 2 Digest (Repl.) 45, 234. D
- (17) *Re Arden and Rutter*, [1923] 2 K.B. 865; 130 L.T. 51; sub nom. *Arden v. Rutter*, 92 L.J.K.B. 894, C.A.; 2 Digest (Repl.) 83, 464.
- (18) *Westwood v. Barnett*, 1925 S.C. 624; 2 Digest (Repl.) 63, 319.
- (19) *Abbott v. Middleton, Ricketts v. Carpenter* (1858), 7 H.L.Cas. 68; 28 L.J.Ch. 110; 33 L.T.O.S. 66; 5 Jur.N.S. 717; 11 E.R. 28, H.L.; 17 Digest (Repl.) 297, 1019. E
- (20) *Morgan v. William Harrison, Ltd.*, [1907] 2 Ch. 137; 76 L.J.Ch. 548; 97 L.T. 445, C.A.; 31 Digest (Repl.) 35, 1914.
- (21) *Re Leeds and Batley Breweries and Bradbury's Lease, Bradbury v. Grimble & Co.*, [1920] 2 Ch. 548; 89 L.J.Ch. 645; 124 L.T. 189; 65 Sol. Jo. 61; 30 Digest (Repl.) 495, 1393. F

Appeal from an order made by McCARDIE, J., in an action tried by him without a jury.

By a lease dated May 14, 1885, the plaintiff's predecessors in title demised to the defendant a plot of land known as Lord's Close fronting Ferry Road (then known as Ferry Lane), Barnes, in the county of Surrey, at an annual rent of £46 for seven years from Sept. 19, 1884. At the expiration of this lease the defendant held over, and had since that time remained in occupation as tenant from year to year. The defendant used the land as an orchard with an undergrowth of rhubarb and plants, of which he sold the produce. The estate was suitable for building, and in 1908 a sewer was laid by the Barnes Urban District Council upon part of the plot, compensation for this, amounting to £56, being then paid to the defendant. In 1913 it was necessary to widen Ferry Road at the side of the defendant's plot, and part of the plot was then cut off and thrown into the highway. Further alterations were carried out to the defendant's frontage in 1914, for which £70 compensation was paid to him. The paving of Ferry Road, the payment for which formed the subject of the present action, was carried out by the district council in 1923 under powers contained in the Private Street Works Act, 1892. The total frontage abutting on the Ferry road was 800 feet, the road being paved and made up to a distance of about 150 feet. The defendants' lease contained a covenant by him that he would

"pay during the said term all taxes, rates, tithes, assessments, impositions and outgoings now payable or hereafter to become payable by or be imposed upon either landlord or tenant in respect of the premises except the landlord's property tax."

By notice dated Oct. 24, 1924, the Barnes Urban District Council required the

A plaintiff to pay £188 in respect of expenses incurred for paving and making up Ferry Road under the Private Street Works Act, 1892, and the plaintiff in December, 1924, paid that sum to the council. By specially endorsed writ dated Dec. 31, 1924, the plaintiff claimed payment of this £188 from the defendant as being an "imposition" or "outgoing" within the meaning of the aforementioned covenant in the lease. The defendant pleaded in his defence: (i) that the above covenant in
 B the lease was not a covenant applicable to a yearly tenancy, or, in the alternative, was not an assessment, outgoing, or imposition, within the contemplation of the parties to the lease; and (ii) that the claim was not maintainable in an action at law by reason of the Agricultural Holdings Act, 1923, s. 16.

McCARDIE, J., in giving judgment, said that it appeared from the decisions that the meaning to be given to the word "impositions" was as wide as that given to
 C "outgoings": *Foulger v. Arding* (5), *Re Warriner* (6), and *George v. Coates* (7). It was true that in documents like leases regard must be had to the context in order to see whether it cut down the *prima facie* meaning in the words in question, but there was nothing in the context here which would cut down the meaning of the covenant. The words of the lease were adequate and the liability of the tenant was not destroyed by the mere circumstance that he was in occupation upon a
 D tenancy of short duration. That view was supported by the decisions in *Batchelor v. Bigger* (8), *Foulger v. Arding* (5), *Re Warriner* (6), and *Stockdale v. Ascherberg* (1). The question whether the court had jurisdiction to try the action or whether it should have gone to arbitration under the Agricultural Holdings Act, 1923, s. 16, depended on whether this was an agricultural "holding" within the definition within s. 57. That provided that the term "holding" should not include:

E "an allotment garden or include any land cultivated as a garden unless it is cultivated wholly or mainly for the purpose of the trade or business of market gardening, but, except as aforesaid, means any parcel of land held by a tenant, which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden. . . ."

F The present holding did not fall within that definition. It was an orchard, and not a market garden in the ordinary sense. Accordingly, his Lordship gave judgment for the plaintiff, and the defendant appealed.

Eustace Hills, K.C., and *Elliot Gorst*, for the defendant, cited the following cases: *Stockdale v. Ascherberg* (1), *Harris v. Hickman* (3), *Tidswell v. Whitworth* (9), *Thompson v. Lapworth* (10), *Batchelor v. Bigger* (8), *Wilkinson v. Collyer* (11), *Valpy v. St. Leonard's Wharf Co., Ltd.* (2).

G *Holman Gregory, K.C.*, and *Wynn Werninck*, for the plaintiff, relied upon the following cases: *R. v. Powell, Ex parte Marquis of Camden* (4), *Harrison v. Ridgway* (12).

Cur. adv. vult.

H Mar. 26. The following judgments were read.

LORD HANWORTH, M.R.—This is an appeal from a judgment of McCARDIE, J., given on Nov. 4, 1925, whereby he determined that the plaintiff was entitled to succeed on his claim in the action. The defendant's counsel did not seriously contend that if the covenant in the lease which provides for the payment by the defendant of, *inter alia*, "all impositions and outgoing" is binding upon the defendant
 I the sum sued for is not within its wide words. The words "impositions" and "outgoings" have been held in cases brought to our notice to be embracing terms, more particularly where the subsequent words [set out above] are added to them: see the summary of the effect of the cases given by WRIGHT, J., in his judgment in *Smith v. Robinson* (13). The points that were insisted upon before this court on behalf of the defendant were, first, that this covenant does not apply to a tenancy from year to year created by holding over and paying rent for premises, because (a) it is not suitable to or conformable with such a tenancy, and (b) it cannot have been in the contemplation of the parties at the time when the defendant originally

took the lease of the land in 1885, or in 1891 when the tenancy from year to year began, for the land has no house upon it, the lane or road as it then was fulfilled the requirements of the defendant, and the sum now claimed is disproportionate to the rent paid for, and the character of, the holding of which the defendant has remained tenant. A

This argument, in my judgment, fails. As to (a) it is clear that when a tenant holds over, he holds upon the terms of the agreement or lease which are not inconsistent with a tenancy from year to year. This has been definitely decided in this court: see *Hyatt v. Griffiths* (14) and *Dougal v. McCarthy* (15), and see *Batchelor v. Bigger* (8). There is no inconsistency in attaching such a covenant to a tenancy from year to year. As to (b), it is true that the test whether such a liability or result could have been contemplated by the parties at the time when the contract was entered into, has been laid down in several cases, as in *Thompson v. Lapworth* (10), *Foulger v. Arding* (5), and *Harris v. Hickman* (3), but in *Foulger v. Arding* (5) the court held the tenant liable in respect of an abatement of a nuisance upon the premises where the covenant was less inclusive than it is in the present case, and in *Stockdale v. Ascherberg* (1), LORD COLLINS, M.R., said: B C

"If a tenant makes an agreement in perfectly clear, unambiguous terms that he will bear all outgoing, I do not see how we can throw aside the plain meaning of the language and introduce some limitation of that meaning which it would be very difficult, if not impossible, to define." D

That reasoning applies with great force to the present case, where the covenant clearly states that the tenant undertakes liability for impositions and outgoing "now payable or hereafter to become payable by, or be imposed upon, either landlord or tenant in respect of the premises." Such words seem aptly drawn to include the unknown, and uncertain, as well as such payments as experience has led the tenant to expect. *Valpy v. St. Leonards Wharf Co., Ltd.* (2) was not followed by WRIGHT, J., in *Stockdale v. Ascherberg* (1), and I prefer the decision of WRIGHT, J., in this later case. His decision in it was confirmed by the Court of Appeal and led to the observations made by the Master of the Rolls which I have already quoted. E F

The defendant's second point was that the land held by the defendant was a market garden, that s. 16 of the Agricultural Holdings Act, 1923, applied, and that the effect of that section was to refer such a question as that at issue between the parties to arbitration and to exclude the plaintiffs from enforcing their rights by an action at law. Logically, this point ought to have been argued first, and it was said that the defendant had taken his chance in the action before McCARDIE, J., and could not now insist upon the point. It appears also that the defendant did take out a summons to stay proceedings before the master, but rested content with the decision allowing the action to proceed. In spite of these criticisms, I do not think that the defendant has lost his right to take the point. He pleaded it in his defence, and I proceed to deal with it. The land is, in my judgment, within the definition of a market garden in s. 57. It was cultivated "wholly or mainly" in order that all the crops upon it might be sold in the course of trade or business in Covent Garden Market, and the crops included fruit and some of those specified in Sched. III to the Act—rhubarb particularly forming a large part of the plants grown. It is necessary, therefore, to determine the effect of s. 16. In doing so, it is important to remember the terms of s. 54: G H

"Except as in this Act expressed, nothing in this Act shall prejudicially affect any power, right, or remedy of a landlord, tenant, or other person vested in or exercisable by him by virtue of any other Act or law, or under any custom of the country, or otherwise, in respect of a contract of tenancy or other contract. . . ." I

This latter section clearly reserves the landlord's right to resort to the courts for his remedy by an injunction to restrain the tenant who exercises his freedom of cropping under s. 30 (1) to the injury or deterioration of the holding: see s. 30 (2).

A Section 36 provides that the tenant's remedies for wrongful distress are to be sought in the county court or in a court of summary jurisdiction, although it is possible that the rights of the landlord and tenant may depend upon the construction of the contract of tenancy. Thus the words in s. 16:

B "any other question or difference of any kind whatsoever between the landlord and the tenant of the holding arising . . . whether during the tenancy or on the termination thereof, as to the construction of the contract of tenancy,"

must be limited in some way. Furthermore, by sub-s. (2) any claim that is within s. 16 ceases to be enforceable after the expiration of two months from the termination of the tenancy unless the requirements of the section as to the delivery of particulars have been complied with—a provision that appears inconsistent with, C and inappropriate to, the rights and remedies of a landlord and tenant, *inter se*, generally.

The section presents many and obvious difficulties. In *R. v. Powell* (4) it was decided that the questions which the section referred to were those which arose out of the termination of the tenancy. This case was followed as binding upon them by BANKES and SCRUTTON, L.JJ., sitting as a Divisional Court, in *Harrison v. Ridgway* (12), but the report makes it clear that both learned judges doubted its authority. It does not appear to me that all the matters covered by the earlier part of the section can be restricted by the words "arising out of the termination of the tenancy of the holding," for the provisions of s. 12 (3), (4), (5) as to the demand for arbitration as to the rent to be thereafter paid as from a date at which the tenancy could have been terminated are matters to which s. 16 applies, but do not arise except hypothetically out of the termination of the tenancy. Section 11 E gives a right to compensation for damage by game to be determined by arbitration, and clearly during the continuance of the tenancy. Section 27 gives the landlord power to resume possession of a part of his tenant's holding upon paying compensation—it may well be upon the continuance of the tenancy as to the balance of the acreage left—and yet by sub-s. (2) the amount of the compensation payable F to the tenant is to be determined by an arbitrator, within s. 16. In my judgment, s. 16 is not to be read with an unrestricted meaning. Section 54 justifies the view that express words must be found if the ordinary right of a landlord or tenant to the courts is to be held to have been taken away. The section applies to matters which are by the Act referred to arbitration—to matters which fall within the contract of tenancy, that is, as interpreted by s. 57, matters within the letting of, G or agreement for letting the land—matters relating to the cultivation of soil, the rotation of crops, the making of improvements, or in respect of the holding. But there may be, and often are, matters dealt with, and contained in, a contract of tenancy which are collateral to the demise created under it and lie outside the purpose of the Acts which were consolidated in the Act of 1923. The covenant in question in the present case deals with a demand falling from outside upon the H landlord or tenant who may both be united in their objection or resistance to it, and is remote from those matters for which the Agricultural Holdings Acts successively have provided compensation to the tenant, while to some extent limiting the matters on which the tenant was given a free hand as against his landlord. So, too, when a question arose whether a new tenancy had been created, as in *Simpson v. Batey* (16), a point not germane to the existing tenancy. On such a matter and I the like the rights of all persons are preserved by the opening words of s. 54; and unless clear words are used, the landlord's ordinary rights as to the contract of tenancy or other contract have not been affected. It certainly lies upon the defendant to show that the plaintiff's right of action has been taken away.

For the reasons given, the defendant has not, in my judgment, done this, and his appeal fails on this point. I will add that I am disposed to assent to the view expressed by SCRUTTON, L.J., in *Simpson v. Batey* (16), that s. 16 deals with procedure. It gives an alternative system in several particulars to that of the Arbitration Act which it declares shall not apply to any arbitration under this Act. It is

however, not essential to rely upon this ground for the reasons that I have stated in dealing with the effect of the section. The appeal must be dismissed with costs. A

SCRUTTON, L.J.—In this case a landlord claims from a tenant a sum of £188 apportioned or assessed on the land in proportion to its frontage, in respect of the expenses of the local authority in making up a road bordering the land. The tenant originally held the land on a seven years' lease, and on its expiration held on as tenant from year to year for some thirty years without any written agreement, but paying the rent (£46) reserved in the lease. That document contained a clause that the tenant should B

"pay all taxes, rates, assessments, impositions, and outgoings now payable or hereafter to become payable by, or be imposed upon, either landlord or tenant in respect of the premises." C

The tenant replied to the claim: (i) that the clause quoted, if it covered the claim during the period of the lease, was not applicable to a yearly tenancy by holding over; (ii) that the King's courts had no jurisdiction to deal with the matter, except by way of appeal on Special Case stated by an arbitrator, a course which had not been pursued. The course taken by the plaintiff and the course suggested by the tenant would both result in the matter coming for decision to the Court of Appeal. D Logically, the first contention of the tenant, though his counsel gave it the second place in his argument, was that the High Court of Justice had no jurisdiction to determine this dispute, as under the provisions of s. 16 of the Agricultural Holdings Act, 1923, it must be determined by arbitration.

To deal with this point, it is first necessary that the land the subject of the tenancy should be a "holding" within the Act of 1923. It will be such a holding, if it is "in whole or in part cultivated as a market garden." The judge below has found it not such a holding, as it is really a "plum orchard." I am unable to take this view. The produce of the trees and the crops of vegetables grown under them are sent regularly to Covent Garden Market for sale, and the land seems used substantially for no other purpose. The use of the land is to grow fruit, vegetables, and flowers for market; it seems to be essentially a market garden. E I cannot take this way out of the difficulty. The court is thus driven to face the difficult and important question of the meaning of s. 16 of the Act of 1923. That section uses words capable of a very wide meaning. Certain "matters" shall be determined by a single arbitrator in accordance with the provisions in Sched. II. Those matters are defined in general words, which include F

"Any question or difference arising out of any claim . . . for any sums claimed to be due to the tenant from the landlord for any breach of contract or otherwise in respect of the holding, or out of any claim by the landlord against the tenant . . . for any breach of contract or otherwise in respect of the holding. . . ." G

These words could be made to cover almost any dispute between a landlord and tenant. But do they really include a claim for rent, or ejection, or a dispute whether distress is wrongful or rightful, or an application by a tenant for relief from forfeiture, or by a landlord for an injunction to enforce the contract of tenancy—in short, for the common law and statutory rights which existed before, and independent of, the Agricultural Holdings Acts, and were cognisable by the King's courts? Can arbitrators grant injunctions or relieve from forfeiture? Are the King's courts prevented from trying an action of ejection or a claim for rent in respect of an agricultural holding? Section 54 of the Act provides that, except as in this Act expressed, nothing in this Act shall prejudicially affect any power, right, or remedy of a landlord in respect of a contract of tenancy. We have, therefore, to look for express destruction of the right of the King's subjects to enforce lawful contracts in the King's courts. We find that s. 30 (2) recognises the landlord's right to obtain at any time an injunction and damages for cultivation deteriorating the holding. An arbitrator cannot grant an injunction; it would be curious if the landlord had to claim damages before one tribunal and an injunction before another. H I

A Section 36 contemplates that disputes as to distress "may" (not "shall") be determined before a county court or a court of summary jurisdiction, though it is not clear whether the latter court can give damages.

When one considers the rest of the Act, one finds a series of rights given to the landlord or tenant to recover sums which are to be fixed by arbitration. Thus s. 1 gives the tenant who has made on his holding an improvement within Sched. I to the Act a right on the termination of the tenancy to receive compensation, and s. 5 provides that any difference as to this compensation "shall be settled by arbitration." Section 9 gives a tenant who has improved a holding by "high farming" beyond the obligations of his contract of tenancy a right to receive from an arbitrator appointed under this Act compensation. Similarly, by s. 10, where a landlord proves to the satisfaction of such an arbitrator that the tenant has deteriorated the holding by failing to cultivate it according to the rules of good husbandry in the contract of tenancy, the landlord may recover from the arbitrator compensation for such deterioration, but this is not to prevent the landlord from claiming compensation for dilapidations or the deterioration of the holding under the contract of tenancy. How he is to claim this compensation is not expressly stated, but the court, in *Arden v. Rutter* (17) held that the claim, if under the contract of tenancy, would not be under s. 16, as the Act was to be construed, if possible, so as not to deprive any person of his existing common law rights. The claims under both ss. 9 and 10 arise on the termination of the tenancy. Under s. 11 the tenant in certain cases of damage by game is entitled during the tenancy to compensation from his landlord, and such compensation is to be determined by arbitration. Under s. 12, a tenant ejected from his holding by his landlord for other than specified reasons, one of which is the tenant's refusal to arbitrate as to future rent, that is, rent payable after a day on which the existing tenancy would be terminated, is entitled to compensation. The section does not seem expressly to provide that the compensation is to be fixed by arbitration, but refers incidentally (sub-s. (6)) to "the costs of an arbitration to determine the amount of the compensation," and (sub-s. (8)) to the arbitrator reducing compensation, and does, oddly enough, expressly require arbitration as to future rent where an agreement has been made to arbitrate (sub-s. 5 (a)) and provides for arbitration as to cultivation according to the rules of good husbandry. Section 10 of the Act of 1920, which this long section replaces, did by s. 12 expressly provide that the compensation should be recoverable in the same manner as compensation for improvements, but this provision is omitted in sub-s. (11) of s. 12 of the Act of 1923. Section 13 enlarges the compensation given by s. 12. Section 14, *inter alia*, enables a court of summary jurisdiction to determine compensations to workmen occupying cottages by service.

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So far as the Act has been establishing a series of rights to compensation which did not exist at common law, and the amount of which, with matters incidental thereto, has already been expressly directed to be referred to arbitration. One does not see, therefore, why it was necessary to refer them again to arbitration by s. 16; but one can see why, if it was not intended to proceed under the Arbitration Act, s. 16 was wanted to provide the method of arbitration, and of appeal, if any, therefrom. Section 16 does refer the matters it deals with to the arbitration of a single arbitrator according to the provisions of Sched. II, and does exclude the operation of the Arbitration Act, 1889, and does provide an appeal by way of Special Case to the county court, and thence to the Court of Appeal. This forces on one's attention the possible construction that the questions and differences dealt with are only those on rights created by the Act and already by the Act referred to arbitration, and that the section is a procedure section providing how questions by other sections of the Act referred to arbitration are to be decided, namely by a single arbitrator according to Sched. II. The framework of the section would then be "Any question or difference (as described in detail) which under this Act is referred to arbitration shall be determined by a single arbitrator," and so on. The statutory history of the matter is as follows. By s. 8 and following sections of the Agricultural Holdings Act, 1883, compensation claimed under s. 1 of the Act was

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to be settled by agreement or by a reference either to one arbitrator if agreed, or two if not so agreed. There was a general saving clause, s. 40, of all legal rights. In the Agricultural Holdings Act, 1900, there was a similar provision that compensation was to be settled in accordance with the agreement of the parties, or if there was no agreement, by arbitration under Sched. II to the Act, which provided that the reference should be to a single arbitrator. The provision as to a single arbitrator was also in the Act: s. 2 (5). But a provision was added that where a tenant claimed compensation if either party claimed any sum in respect of matters described in general words, "and any sum is claimed to be due to the tenant from the landlord in respect of any breach of contract or otherwise in respect of the holding," such party might by notice require such claim to be brought into the arbitration. The claim in each case must be for "a sum." Only the claimant could bring the question into arbitration, and he need not. The saving clause in the Act of 1883 was incorporated. The Act of 1908 repeats the provision of the Act of 1900 (s. 2), and the saving clause (s. 46), and provides (s. 10) that compensation for damage by game, and (s. 11) compensation for disturbance shall be settled by arbitration. It then, for the first time (s. 13), contains a clause that all questions which either under the Act or the contract of tenancy are referred to arbitration, shall be settled by a single arbitrator in accordance with the second schedule. Under this clause obviously only what had previously in the Act or the contract of tenancy referred to arbitration is dealt with. In the Act of 1920 a very elaborate provision for compensation for disturbance appears (s. 10), and sub-s. (12) provides it is to be recovered in the same manner as compensation for improvements. But in s. 18 the draftsman, while leaving ss. 6 (1) and 13 (1) of the Act of 1908 unrepealed, has repeated s. 6 (2) of that Act, and repeated its language with modifications. The claims by the landlord are no longer limited to "sums," but are "questions arising out of any claim," and the words are added which afterwards appear in the Act of 1923, "and any other question or difference of any kind whatsoever between the landlord and the tenant of the holding arising out of the termination of the tenancy of the holding or arising, whether during the tenancy or on the termination thereof . . ."; and finally these questions are to be determined by arbitration under the Act of 1908, which sends one back to the unrepealed s. 13 of that Act, which is limited to questions under the Act referred to arbitration. The saving clause of the Act of 1908 is incorporated. Lastly, s. 16 of the Act of 1923 repeats the language of s. 18 of the Act of 1920, adding at the end of the list of subject-matters "and any other question which under this Act is referred to arbitration," and refers these matters to a single arbitrator. It is not surprising that it is difficult to find one's way through this maze of statutory provisions. The reported cases so far agree only in this, that the courts have not yet stayed any proceedings in the courts because of s. 16 of the Act of 1923, or its predecessors, though they have used various reasons to achieve this result.

In *Simpson v. Batey* (16) this court declined to stay under s. 16 an action of ejectment against tenants under an expired notice to quit, who alleged that the notice to quit had been waived. All the members of the court held that it was not a question arising out of the termination of the tenancy, one of them on the ground that the question was whether a new tenancy had or had not been created. The same lord justice suggested that the true construction might be that the section was only a procedure section prescribing the method of arbitration. In *R. v. Powell* (4) the Divisional Court prohibited an arbitrator from deciding whether a tenancy had been determined, and, if so, what compensation was payable to the tenant. The facts were odd. The landlord gave a notice to quit, and then said it was waived by consent. The tenant denied that the notice was waived, but yet (i) stayed on in the tenancy, and (ii) claimed compensation for its determination. The Divisional Court held that the question whether the tenancy was determined was not a question for arbitration, and that the words "on the determination of the tenancy" applied to all words before it, and, therefore, no claim for compensation could be determined by arbitration when the tenant had not terminated his

A tenancy. In *Harrison v. Ridgway* (12), BANKES, L.J., and myself, sitting as additional judges of the King's Bench Division, had a case before us where the tenant sued in the county court for damages for breach of a covenant by the landlord to put gates in order at the commencement of the tenancy, and the landlord replied that the court, by reason of s. 16, had no jurisdiction. As judges of the King's Bench Division, we felt ourselves bound to follow the decision in *R. v. Powell* (4),
B as the matter clearly did not arise on the termination of the tenancy, but we reserved our liberty as lords justices if the question then came before us. I thought then, and still think, that the reasoning in *R. v. Powell* (4) could not be sustained. I saw no more reason to apply the words "arising out of the termination of the tenancy" to all the preceding classes of cases than to apply the following words, "arising as to the construction of the contract of tenancy." In fact, claims for
C damage by game, under s. 11 of the Act of 1923, which clearly come within the words of s. 16, "sums due to the tenant from the landlord . . . otherwise in respect of the holding," are by s. 11 made recoverable at the end of each calendar year, and before the termination of the tenancy. The Scottish court came to the same decision as that in *R. v. Powell* (4), *Westwood v. Barnett* (18), in which *Harrison v. Ridgway* (12) was not referred to. The claim was for miscropping under s. 35
D of the Scottish Act, which corresponds to s. 30 of the English Act, and in view of sub-s. (2) of these sections it is not easy to see how s. 16 could be relevant. But the Scottish court excluded it by holding that the word "other" carried the condition of termination of the holding back to all the preceding cases. If "other" has this carrying force, it must, I suppose, also carry back the term about "construction of the contract of tenancy," and the term, "which by this Act is referred to arbitration." The Scottish judgments are, if I may respectfully say so, admirable expositions of the difficulties of construction of s. 16, but for the reasons I have given I do not think their solution is the best way out of the difficulty. If it is correct, the defendant's argument fails, for this claim for road expenses certainly does not arise out of the termination of the tenancy. If it is not correct, I approach
E the matter in this way. The landlord's claim is for sums payable under a tenancy contract, and has *prima facie* nothing to do with the Agricultural Holdings Act. I am told by that Act (s. 54) not to interfere with such a right "except as expressed in that Act." I am entitled, in my view, to require a clear expression of an intention to deprive one of the King's subjects of his right to sue in the King's courts; and I do not find such a clear expression in s. 16, which I think can be
F satisfied, though I recognise, as the Scottish judges do, the difficulties of construction, by limiting its operation to questions referred to arbitration in other sections of the Agricultural Holdings Act. For these reasons, in my opinion, the objection to the jurisdiction fails.
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There remains the question whether the tenant is liable to make this payment under the terms of his tenancy. I cannot entertain any doubt that if the question
H arose during the seven years' lease the wide words of the covenant are strong enough to impose a liability to pay the sum claimed on the tenant. It is either an imposition or an outgoing or both; I incline to think that "assessment" is also a very suitable word to express it, and I do not see any difficulty when a tenant who has occupied the premises on terms of incurring this liability for seven years stays on for another year, or, indeed, for thirty other years, in implying that he
I stays on on the terms on which he previously held. I sympathise very much with the views of LORD COLLINS, M.R., in *Stockdale v. Ascherberg* (1), where he declined to free a tenant for three years at a rent of £55 a year who had contracted to pay all outgoings, from a claim of £83 for expenses of abating a drainage nuisance, on the ground of its disproportion to the rent. LORD COLLINS said:

"I do not see how we can throw aside the plain meaning of the language used and introduce some limitation of that meaning which it would be very difficult, if not impossible, to define."

It seems to me that a tenant holding under a lease under which he contracted to pay rates and outgoings imposed on the premises if he held over as a yearly tenant would be clearly liable to pay rates, and I do not see how to relieve him of outgoings because of their amount. In my view, the decision of FARWELL, J., in *Valpy v. St. Leonards Wharf Co., Ltd.* (2), followed in *Harris v. Hickman* (3) to the contrary effect, was erroneous. A

For these reasons, the appeal should be dismissed with costs. The defendant has the consolation that, if he had succeeded in driving the plaintiff to claim by arbitration under the Agricultural Holdings Act, the Court of Appeal would ultimately have come to the same decision under the covenant. B

SARGANT, L.J.—The first question here is the construction of the covenant in the lease, and on this question I have no hesitation in agreeing with the judgment of McCARDIE, J. The covenant is couched in the widest possible terms, is quite free from ambiguity, and obviously includes an imposition or outgoing of the kind in question. This being so, there is not, in my judgment, any room for modifying the clear words of the covenant by any considerations based on the length of the term granted by the lease, the condition of the property, or the disproportion between the rent reserved and the amount of the imposition in question. The case is one to which the "fundamental principle" or "golden rule" applies which was repeated by LORD WENSLEYDALE in *Abbott v. Middleton* (19). But if more specific authority as to the construction of a covenant of this kind is required, it can be found in the judgment of LORD COLLINS, M.R., in *Stockdale v. Ascherberg* (1). If, then, this was so during the term of the original lease, is any difference caused by the fact that this lease has long since expired, and that since its expiration the lessee has continued to hold over as an annual tenant and at the old rent, but without express new bargain? The answer to this question must, in my judgment, be in the negative. The rule of law in such cases is well settled, and is that the tenant is deemed to hold on the terms of the original letting, so far as these terms are not inconsistent with an annual tenancy: see *Dougal v. McCarthy* (15). It is clear that the two somewhat different phrases used by LORD COZENS-HARDY in *Morgan v. William Harrison Ltd.* (20) are not intended to modify this well-known rule. Now, the covenant as to payment of outgoings was obviously as much one of the terms of the tenancy regulating the relations of landlord and tenant as a covenant to pay rent or to do repairs, and was not a contract outside and independent of that relationship, such as an option to purchase: *Re Leeds and Batley Breweries, Ltd.*, and *Bradbury's Lease*, *Bradbury v. Grimble & Co.* (21). And, however wide and sweeping the words of such a covenant may be, they are not, in my view, inconsistent with an annual tenancy. I may add that I agree with the learned judge in his view that *Valpy v. St. Leonards Wharf Co., Ltd.* (2) and the case which followed it of *Harris v. Hickman* (3) are contrary to the general current of authority and cannot be relied on. C D E F G

It has, however, been argued that any original jurisdiction of the court here has been excluded by s. 16 of the Agricultural Holding Act, 1923. As to this, McCARDIE, J., has held that the tenancy does not form a holding within the Act at all, by reason of its not having, within s. 57 of the Act, been cultivated wholly or mainly for the purpose of the trade or business of market gardening. But I cannot agree with this view. The notes of the evidence of the defendant satisfy me that the cultivation was such as to satisfy the definition in s. 57. This ground, therefore, fails for holding that s. 16 does not apply. Then, if so, is the application of s. 16 excluded on the ground taken in *R. v. Powell* (4), namely, that the question is not one arising on the termination of the tenancy? After a very careful consideration of that case, I cannot agree with the reasoning in it, even if the decision is to be taken as limited only to that part of s. 16 (1), which precedes the words "or arising whether during the tenancy or on the termination thereof as to the construction of the contract of tenancy." I would point out, as an addition to the criticisms on *R. v. Powell* (4), which were formulated by BANKES and SCRUTTON, H I

- A** L.JJ., in *Harrison v. Ridgway* (12), the fact that there can hardly be excluded from the compensation dealt with by the first words of s. 16 the compensation for damage by game given by s. 11 of the Act, and that claims for compensation of this kind would ordinarily arise during the currency of a tenancy. It seems that s. 11 cannot have been brought to the attention of the court in *R. v. Powell* (4), and, indeed, it appears from the judgment that the counsel showing cause had
- B** actually conceded that "the class of question or difference mentioned in the opening words of the (first) sub-section" was a "question or difference arising out of the termination of the tenancy of the holding." But there are other and broader grounds for holding that such questions as the present are not within the ambit of s. 16. For determining this ambit great importance is to be attached to the words
- C** "and any other question which under this Act is referred to arbitration." When due weight is given to these words and to the express provisions of s. 54 the result is, in my judgment, that the section must be read, not as imposing arbitration afresh, but merely as providing that any arbitration which has otherwise to take place shall be regulated by the special statutory provisions contained in Sched. II to the Act. In this respect I felt prepared during the argument to adopt the suggestion to this effect thrown out by SCRUTTON, L.J., in *Simpson v. Batey* (16)
- D** and again in *Harrison v. Ridgway* (12), and I am confirmed in that view by the conclusive reasoning contained in the present judgment of the lord justice, which I have had an opportunity of perusing. Further, even if on its true construction s. 16 is not merely limited to procedure but has the effect of prescribing arbitration in certain cases, its scope must, I think, at least be limited to the determination of the class of cases with which the legislation in question is concerned, and cannot
- E** include questions as to the general rights or liabilities of landlord or tenant in respect of subject-matter entirely outside the provisions of the Act. It was conceded in argument by the defendant's counsel that if there were a provision in a lease of a holding under the Act that the rent should be increased after an interval, and a doubt arose as to the exact period when, on the construction of the lease, the increase should take place, that question would not be removed initially from the courts and referred to arbitration. I can find no distinction between a question as to the construction of such a clause and the present question as to the construction of a covenant to pay outgoing. Here again the terms of s. 54 of that Act are most material and are strongly indicative of an intention to limit the operation of the Act to its particular subject-matter, namely, the cultivation of agricultural holdings, and as to everything outside to leave the legal position of landlords and tenants
- G** unaffected.

For these reasons I agree that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors : *Howard & Shelton* for *Garner & Son*, Hounslow; *Foyer, White, Borrett & Black*.

[*Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.*]

PREGER v. PREGER

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hill, J.), January 21, 22, February 2, 1926]

[Reported 134 L.T. 670; 42 T.L.R. 281]

Divorce—Connivance—Conduct conducing—Onus of proof—Petitioner agreeing to go through Jewish religious ceremony of divorce.

On April 3, 1919, the parties, who were of the Jewish religion, executed a deed of separation, after which they went through a ceremony of Jewish divorce before a Rabbi. The wife knew the character of the ceremony, but the differences between her and the husband leading up to the separation and the ceremony had no reference to another woman and there was no evidence that the husband then contemplated re-marriage. In 1921 the husband, while abroad, went through a form of marriage according to the laws of Moses and Israel. To a petition by the wife for divorce on the ground of the husband's adultery with the other party to this marriage the husband pleaded that by consenting to the "divorce" in 1919 the wife had connived at, and her conduct had conduced to, the husband's adultery.

Held: on the evidence, the effect of the "divorce" of 1919 was that the parties agreed to live separate and cease to be husband and wife so far as the rules of their religion were concerned, but the wife did not assent to any legal re-marriage by the husband, and, therefore, the husband had not discharged the onus, which was on him, of proving the pleas in his answer, and the wife would be granted a decree nisi.

Notes. Referred to: *Har-Shefi (Otherwise Cohen-Lask) v. Har-Shefi*, [1953] 2 All E.R. 373; *Joseph v. Joseph*, [1953] 2 All E.R. 710.

As to connivance and conduct conducing, see 12 HALSBURY'S LAWS (3rd Edn.) 297-300 and 309-311 respectively; and for cases see 27 DIGEST (Repl.) 378 et seq., 422 et seq.

Cases referred to:

- (1) *Palmer v. Palmer* (1859), 1 Sw. & Tr. 551; 29 L.J.P. & M. 26; 2 L.T. 88; 23 J.P. 535; 164 E.R. 855; 27 Digest 382, 3144.
- (2) *Ross v. Ross* (1869), L.R. 1 P. & D. 734; 38 L.J.P. & M. 49; 20 L.T. 853; 27 Digest (Repl.) 386, 3175.
- (3) *Lankester v. Lankester and Cooper*, [1925] P. 114; 94 L.J.P. 71; 133 L.T. 349; 41 T.L.R. 594; 69 Sol. Jo. 663; 27 Digest (Repl.) 382, 3145.
- (4) *Moorsom v. Moorsom* (1792), 3 Hag. Ecc. 87; 162 E.R. 1090; 27 Digest (Repl.) 384, 3161.
- (5) *Gipps v. Gipps and Hume* (1864), 11 H.L.Cas. 1; 4 New Rep. 303; 33 L.J.P. & A. 161; 10 L.T. 735; 10 Jur.N.S. 641; 12 W.R. 937; 11 E.R. 1230, H.L.; 27 Digest (Repl.) 381, 3139.
- (6) *Thomas v. Thomas* (1860), 2 Sw. & Tr. 113; 3 L.T. 180; 164 E.R. 935; 27 Digest (Repl.) 386, 3174.
- (7) *Marris v. Marris and Burke* (1862), 2 Sw. & Tr. 530; 31 L.J.P.M. & A. 69; 5 L.T. 768; 164 E.R. 1102; 27 Digest (Repl.) 382, 3141.

Petition by the wife for divorce.

The petitioner, Annie Preger, otherwise Prager, prayed for the dissolution of her marriage with Jacob Preger, otherwise Prager, alleging adultery by him with one Minnie Vecher. By his answer, the husband denied the allegation, but pleaded, in the alternative, that the adultery (if any) was committed with the wife's connivance, and she had been guilty of conduct conducing thereto, since she had been a consenting party to a Jewish ceremony of divorce by a Rabbi, had received in consideration thereof a sum of £100, and had consented, when the Jewish divorce was pronounced, to the re-marriage of the husband, in Berlin, according

A to the laws of Moses and Israel, with a Roumanian woman, Minnie Vecher, after which the husband and Minnie Vecher lived together as husband and wife. The wife, in her reply, alleged that the Jewish form of divorce pronounced between herself and the respondent was only a religious ceremony, to the knowledge of both of them.

B *Willis, K.C.* (Noel Middleton with him), for the husband, on the husband's pleas of connivance and conduct conducing, submitted that the principle of connivance was contained in the maxim "Volenti non fit injuria," and referred to *Palmer v. Palmer* (1), *Ross v. Ross* (2) (L.R. 1 P. & D. at p. 788), *Lankester v. Lankester* and *Cooper* (3), and *Moorsom v. Moorsom* (4) (3 Hag. Ecc. at p. 107).

Bayford, K.C., for the wife, cited *Gipps v. Gipps* and *Hume* (5).

Cur. adv. vult.

C Feb. 2. **HILL, J.**, read the following judgment. This is a wife's petition for divorce. The petitioner and respondent, who were of the Jewish religion, were married on Mar. 4, 1917, in the synagogue at Southport. The respondent was already naturalised in this country. That marriage is still subsisting. On April 3, 1919, they agreed to separate and have not since cohabited. In 1921 the respondent, being in Berlin, went through what is said to be a form of marriage according to the laws of Moses and Israel with a Roumanian woman named Minnie Vecher. The respondent returned to England with Minnie Vecher and they have since lived together as man and wife. According to the law of England, the respondent is, and has since 1921, been living in adultery with Minnie Vecher. That is not disputed. The respondent says that the petitioner has connived at the adultery and been guilty of conduct conducing thereto. Those are the questions in controversy. There was also some suggestion of delay, for the petitioner knew of the adultery in 1921 and the petition was filed on May 11, 1925. There is nothing in this. In 1921 the petitioner could not obtain a divorce for adultery alone; she took advice, and it would obviously have been difficult to prove desertion. She now petitions on the ground of adultery since 1923, and she is entitled to a decree unless the facts establish connivance; or unless her conduct conduced to the adultery in such a way that I ought to refuse a decree.

F The agreement to separate, which was by deed, was, of course, neither a connivance at, nor conduct conducing to, the respondent's subsequent adultery. But the respondent sets out to prove that, in addition to executing the deed, he and the petitioner attended before a Rabbi and went through a ceremony which is the ceremony by which a husband divorces a wife according to the law of Moses and Israel, as recognised by persons of the Jewish religion, and that, by what was said and assented to in that ceremony, and by what she said before the actual ceremony, the petitioner gave her assent to the respondent marrying again, according to the law of Moses and Israel, and, therefore, assented to his living with any woman he should so marry, and that that in law amounts to connivance at adultery.

H with any woman with whom the respondent might at any subsequent time go through the Jewish ceremony of marriage. The petitioner says that she did not understand what was said at the ceremony and did not assent to anything except a separation. On April 3, 1919, after the deed of separation had been executed, the petitioner and respondent did go through a ceremony before a Rabbi at the Rabbi's house. The best evidence of the purport and effect of that ceremony

I would be the writing which was drawn up by the scribe and witnessed by two witnesses, one of whom gave evidence before me. This document, after being ceremonially placed by the respondent in the hands of the petitioner, was left in the custody of the Rabbi. Neither side procured its production before me, and I am, therefore, ignorant of its contents. Moreover, neither side called before me any person who was competent to speak as an expert upon the effect, according to the law of Moses and Israel, of the ceremony. No Rabbi was called, nor any lawyer skilled in Jewish jurisprudence. It was not, however, disputed that it was the ceremony by which a husband divorces a wife according to the law of Moses

and Israel. Both the husband and wife knew that such a ceremony had no effect to dissolve the marriage according to law. It was in dispute whether the wife knew that the ceremony was a ceremony of Jewish divorce, but, upon the evidence, I find that she did know. Whether she herself wished that a Jewish divorce should be pronounced, or only consented to it because the husband refused to sign the deed of separation unless there was also the ceremony, seems to me to be immaterial. She did consent to the ceremony. But these findings carry me a very little way towards finding that the wife assented to the husband marrying again according to the Jewish law, and living in adultery with any woman he should so marry. Had there been another woman in question at the time there might perhaps be some ground for drawing such an inference. But at the time of the deed of separation and the ceremony there was no other woman. The differences which led to the separation had no reference to any other woman. No other marriage, according to Jewish law, was contemplated either by the husband or the wife. The husband was forty-eight years old, and there is no evidence that he knew Minnie Vecher before 1921.

So far, the facts of this case are very different from all the cases which were cited. In *Palmer v. Palmer* (1) the wife obtained the American divorce on the ground of her husband's adultery with a Miss Grubb, and after the divorce the husband married Miss Grubb and the adultery complained of in the wife's petition was adultery with Miss Grubb. In *Thomas v. Thomas* (6) a deed of separation in 1854 recited that the husband was living with a Miss H., and the wife's petition was for adultery with Miss H. in 1858. In *Marris v. Marris and Burke* (7) connivance was not found. In *Gipps v. Gipps and Hume* (5), in June, 1861, a suit was based upon adultery with a woman, was abandoned on payment of a sum of money, and a subsequent suit was based on a continuance of adultery with the same woman in and since August, 1861. In *Ross v. Ross* (2) connivance was not found. It was the opposite case to *Thomas v. Thomas* (6), a deed of separation without knowledge of the adultery. In *Lankester v. Lankester and Cooper* (8) the President's finding was that the "petitioner (the husband) knew that upon obtaining a decree in the American court, she (the wife) would re-marry, and I think he knew she would re-marry the co-respondent," and, later in his judgment the President added that "the petitioner was accessory in the strict sense of the word to all the relations of his wife with the co-respondent."

Here, if I take merely the fact of the deed of separation and the fact of a Jewish divorce, I can find no assent to anything except that the parties agree to live separate, and, so far as the rules of their religion are concerned, to cease to be husband and wife. If the wife assented to the husband re-marrying according to Jewish law it must be based upon something beyond the mere fact of the ceremony. The husband relies for such assent (i) upon words used by the Rabbi in the course of the ceremony; and (ii) upon things said by the wife before the ceremony. As to (i), the proceedings, according to the evidence, were partly in Hebrew (which neither husband nor wife understood) and partly in Yiddish. I cannot accept the wife's evidence that she understood Yiddish so imperfectly as not to understand what was said in that language. But the only words she was called upon to speak during the ceremony were to say "yes" or "no," as directed, to questions put to her in Hebrew as to whether she was a willing party to the divorce. The evidence was that the Rabbi, at some stage of the proceedings, declared in Yiddish, in substance, that each of them, the husband and the wife, would be free to marry again according to the law of Moses and Israel. But the wife expressed no assent to that and was not asked to. I cannot infer assent from her silence. As to (ii) there is a controversy as to what the wife said before the ceremony, and the conversations took place nearly seven years ago. I am not entirely satisfied with the evidence on either side, I do not mean in point of truthfulness but in point of recollection. It may be that the liberty to marry again according to Jewish law was talked about, but if it was the wife was also saying that she knew that there could be no legal re-marriage. Is it, therefore,

A to be inferred that the wife assented to a Jewish re-marriage taking place? Is it not equally likely that she supposed such a ceremony could not take place? They were in England, domiciled here, and there is no evidence that either, at the time, contemplated leaving England. Could the husband ever go through a Jewish ceremony of re-marriage in England, while the legal marriage was subsisting? The husband, on whom the burden of proving connivance rests, has left me without any assistance on the Jewish law and the Jewish practice in this matter. The husband could not go through a ceremony of marriage in any way which the law recognises as constituting a legal marriage without committing bigamy. Is it, in England, possible that a Jew should go through a ceremony of marriage according to Jewish law which is not at the same time a ceremony of marriage according to English law? Are Jews in England married by a Jewish ceremony, elsewhere

C than in a synagogue? Are they married otherwise than before a Rabbi or someone having authority in the Jewish Church? Am I to suppose that, in England, a Rabbi, or other person having authority, would take part in a ceremony of marriage which according to the law of England is no marriage? Is it the practice in England to have a mere ceremony of marriage before witnesses, as was done, according to the husband's evidence, in an hotel in Berlin? Is such a thing

D ever done? I cannot assume that it is. I cannot assume that there was any manner in which the husband could in England go through a Jewish ceremony of marriage while the legal marriage subsisted.

In the absence of evidence, I decline to think that a religious people like the Jews would countenance such a proceeding. Put the husband's case at the very highest, and it is no more than this. The wife assented to my committing adultery

E with a woman with whom I had previously gone through a Jewish ceremony of marriage. If he could not marry according to law, and could not go through a ceremony according to Jewish practice, the wife is assenting to nothing which could take place in England. Nor can I think that it is a probable result of what was said, or one within the contemplation of the parties, that the husband should go abroad and go through a ceremony of marriage with a woman in a foreign

F country. It is certain that, on the husband's return with Minnie Veher, the wife protested. I should add, further, that in the absence of any evidence by anyone skilled in Jewish jurisprudence, I am left in some doubt whether the ceremony in Berlin was a ceremony of marriage according to Jewish law. The husband has failed to prove connivance, and equally failed to prove conduct conducing. Decree nisi, with costs.

G Solicitors: *A. M. Lord; Ayrton, Biscoe & Knight, for Cobbett, Wheeler & Cobbett.*

[*Reported by HERBERT ROLFE, ESQ., Barrister-at-Law.*]

A

Re MATHIESON. Ex parte THE TRUSTEE

[COURT OF APPEAL (Lord Hanworth, M.R., Atkin and Sargant, L.JJ.), November 19, December 3, 1926]

[Reported [1927] 1 Ch. 283; 96 L.J.Ch. 104; 136 L.T. 828;
71 Sol. Jo. 18; [1927] B. & C.R. 30]

B

Bankruptcy—Property available for distribution—Settlement within two years of bankruptcy—Exercise of power of appointment—Power conferred by settlement made in pursuance of ante-nuptial agreement—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), ss. 38 and 42.

In pursuance of an ante-nuptial agreement a settlement of funds belonging to a husband was executed under which the husband took a general power of appointment. In January, 1925, the husband by deed appointed that the "husband's fund" under the settlement, in which he had a life interest, should after his death be held in trust for his wife absolutely. In August, 1925, he was adjudicated bankrupt. The trustee in bankruptcy claimed that the appointment was void against the bankrupt's creditors.

C

Held: a distinction must be drawn between the exercise of a power of appointment over property and property itself, and so the appointment in the present case was not a "settlement" within s. 42 (1) of the Bankruptcy Act, 1914, but was valid against the trustee in bankruptcy.

D

Re Armstrong, Ex parte Gilchrist (1) (1886), 17 Q.B.D. 521, applied.

Notes. Referred to: *Re Schebsman, Ex parte Official Receiver, Trustee v. Cargo Superintendents (London), Ltd. and Schebsman*, [1943] 2 All E.R. 768.

E

As to avoidance of settlements, see 2 HALSBURY'S LAWS (3rd Edn.) 548 et seq.; and for cases see 5 DIGEST 837 et seq. For Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Cases referred to:

- (1) *Re Armstrong, Ex parte Gilchrist* (1886), 17 Q.B.D. 167, D.C.; reversed 17 Q.B.D. 521; 55 L.J.Q.B. 578; 55 L.T. 538; 34 W.R. 709; 2 T.L.R. 745; sub nom. *Ex parte Gilchrist*, 51 J.P. 292; sub nom. *Re Armstrong, Ex parte Armstrong*, 3 Morr. 193, C.A.; 5 Digest 740, 6395.
- (2) *Re Vansittart, Ex parte Brown*, [1893] 2 Q.B. 377; 62 L.J.Q.B. 279; 68 L.T. 233; 41 W.R. 286; 9 T.L.R. 277; 37 Sol. Jo. 271; 10 Morr. 44; 5 R. 280; 5 Digest 847, 7129.
- (3) *Re Player, Ex parte Harvey* (1885), 15 Q.B.D. 682; 54 L.J.Q.B. 554; 2 Morr. 265, D.C.; 5 Digest 840, 7091.
- (4) *Re Plummer*, [1900] 2 Q.B. 790; 83 L.T. 387; sub nom. *Re Plummer, Ex parte Trustee*, 69 L.J.Q.B. 936; 48 W.R. 634; 44 Sol. Jo. 572; 7 Mans. 367, C.A.; 5 Digest 840, 7094.
- (5) *Re Tankard, Ex parte Official Receiver*, [1899] 2 Q.B. 57; 68 L.J.Q.B. 670; 80 L.T. 500; 47 W.R. 624; 15 T.L.R. 332; 43 Sol. Jo. 440; 6 Mans. 188; 5 Digest 838, 7085.
- (6) *Shrager v. March*, [1908] A.C. 402; 77 L.J.P.C. 105; 99 L.T. 33; 24 T.L.R. 641; 52 Sol. Jo. 580; 15 Mans. 310, P.C.; 5 Digest 852, 7159.

F

G

H

Appeal from an order of ASTBURY, J., sitting as judge in bankruptcy.

I

The facts are stated in the judgments.

By the Bankruptcy Act, 1914:

"Section 38. The property of the bankrupt divisible amongst his creditors . . . shall comprise the following particulars . . . (b) The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy, or before his discharge. . . ."

- A** "Section 42. (1) Any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in bankruptcy, unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property passed to trustee of such settlement on the execution thereof. . . . (4) 'Settlement' shall, for the purposes of this section, include any conveyance or transfer of property."
- B**
- C**

Clayton, K.C., and E. W. Hansell, for the wife of the bankrupt, referred to Re Armstrong, Ex parte Gilchrist (1).

F. K. Archer, K.C., and W. F. Waite for the trustee.

- D** *Cur. adv. vult.*
Dec. 3, 1926. The following opinions were read.

LORD HANWORTH, M.R.—This is an appeal from a judgment of *ASTBURY, J.*, given on Oct. 18, 1926, and raises an important question upon the construction of s. 42 of the Bankruptcy Act, 1914—the section which provides for the avoidance of certain settlements as against the trustee in bankruptcy.

- E** The facts are as follows. On Aug. 8, 1918, the bankrupt entered into an ante-nuptial agreement with his future wife, the present appellant, and on April 9, 1919, he married her. On July 13, 1923, an order was made in the Chancery Division at the instance of the wife for the specific performance of the ante-nuptial agreement, and on Dec. 12, 1924, the bankrupt executed the settlement which had been prepared and approved to comply with the order for specific performance.
- F** Under that settlement the trustees appointed by it were to stand possessed of certain funds upon trust during the joint lives of the husband and the wife—that is, the bankrupt and the appellant—to pay the annual income of certain specified investments to the wife for her separate use without power of anticipation, and upon trust to hold the capital and income of certain funds, therein described as the second moiety of the "husband's fund",
- G** "upon trust for such person or persons, for such purposes, and in such manner as the husband shall from time to time by any deed or deeds revocable or irrevocable or by will or codicil appoint."

- H** On Jan. 15, 1925, the bankrupt, under this power so reserved to him, executed a deed of appointment of this "husband's fund" from and after his own decease in favour of the wife absolutely. On May 7, 1925, the bankrupt committed an act of bankruptcy, and on Aug. 5, 1925, a receiving order was made against him. On Aug. 26 he was adjudicated bankrupt, and on Aug. 28 a trustee of his estate was appointed.

- I** Section 42 of the Bankruptcy Act, 1914, makes void against the trustee—that is to say, voidable at the instance of the trustee: see *Re Vansittart* (2)—voluntary settlements made within two years of the commencement of the bankruptcy. The trustee claims that the appointment made on Jan. 15, 1925, was void as against him, and *ASTBURY, J.*, has decided in his favour. The wife appeals to this court. It is contended on her behalf that this exercise of a power is not within the terms of s. 42, that her husband has not voluntarily disposed of any property within the section, but merely in pursuance of a power reserved to him, appointed the destination of a fund held, not by him, but by the trustees of the settlement of Dec. 12, 1924. No question is raised as to the interest of the bankrupt in the income of

the funds over which the appointment is exercised. It is the appointment to his wife after that interest is determined that is called in question. A

[His LORDSHIP read s. 38 and s. 42 (1) and (4) of the Bankruptcy Act, 1914, and continued:] It is not contested that the appointment is a conveyance or transfer within the words of s. 42 (4), but it is claimed that it is not a conveyance or transfer of property within the section. A forcible argument is made in the wife's favour upon s. 38. It is pointed out that an express enactment was necessary to bring the capacity to exercise a power within the meaning of the bankrupt's property, which, without it, would not be comprised within the property of the bankrupt "divisible amongst his creditors." It did not fall within: "(a) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge," and so (b) was necessary to embrace it. The history of the sections in the previous Bankruptcy Acts of 1869 and 1883, similar in effect to s. 42 of the present Act, is given by CAVE, J., in his judgment in *Re Player* (3). The conclusion that he reaches is that B

"the transaction struck at must be in the nature of a settlement, though it may be effected by a conveyance or transfer. The end and purpose of the thing must be a settlement, that is, a disposition of the property to be held for the enjoyment of some other person," C

and in applying the definition of property he says that one must look at the whole of the language of the section and consider what is meant by "settlement", and that, although that term includes any conveyance or transfer of property, it is a settlement in the ordinary sense of the word that is intended. That decision was approved by the Court of Appeal in *Re Plummer* (4) and see also *Re Tankard* (5) ([1899] 2 Q.B. at p. 59, per WRIGHT, J.). At this point it is to be observed that the latter part of sub-s. (1) of s. 42 is difficult to apply to the exercise of a power as in the present case. The settlement that is made voidable may be contested by the trustee in bankruptcy within ten years after its date. But the parties claiming under it are given the opportunity of proving in defence of it that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof. The property over which the power of appointment was exercised in the present case was not available to the settlor at the time of its execution for the purpose of paying his debts, and the interest of the bankrupt did not pass to the trustee of the settlement on the execution of the power. The meaning of these last words was held by LORD MACNAGHTEN in *Shrager v. March* (6) ([1908] A.C. at p. 406) to be that the settlor must on the execution of the settlement divest himself of all interest in the property settled. If the whole language of the section is to be considered in parity of reasoning with that of CAVE, J., in *Re Player* (3), it would appear plain that the power of appointment in the present case does not accord with the attributes of a settlement which s. 42 strikes at. D

Lastly, I come to *Re Armstrong* (1). In that case real property was by a marriage settlement vested in a trustee in trust for the married woman for life for her separate use without restriction on anticipation, with remainder to such persons for such estates as she might, whether covert or sole, by deed or will appoint, and in default of appointment to her children in fee. The settlement also contained a provision under which the property should be sold or mortgaged by her direction and the proceeds paid to her. When the case was before the Divisional Court, CAVE, J., considering the nature of the interest in the property created in favour of the married woman by the settlement, said: "A more complete case of all that substantially constitutes ownership it is impossible to conceive." Yet the Court of Appeal, reversing the decision of the Divisional Court, held that the property, in respect of which a married woman carrying on a trade separately from her husband was subjected to the Bankruptcy laws, under s. 1 (5) of Married Women Property E

A Act, 1882, did not include such a general power of appointment as she held under the settlement above recited. LORD ESHER, M.R., said that the distinction between a power of appointment over property and property has always been recognised, and that it has always been held that an unexercised power is not the "property" of the donee of the power. The power exercises an effect upon property, but per se it is not property. FRY, L.J., said :

B "A 'power' is an individual personal capacity of the donee of the power to do something. That it may result in property becoming vested in him is immaterial; the general nature of the power does not make it property, the power of a person to appoint an estate to himself is, in my judgment, no more his 'property' than the power to write a book or to sing a song. The exercise of any one of those three powers may result in property, but in no sense which the law recognises are they 'property.' In one sense, no doubt, they may be called the 'property' of the person in whom they are vested, because every special capacity of a person may be said to be his property; but they are not 'property' within the meaning of that word as used in law."

C With these cases before me, it is not, in my judgment, the true interpretation of s. 42 to include such a power as is questioned in the present case within its terms. I agree with CAVE, J., that the section is intended to deal with settlements in a more ordinary meaning of that term—some disposition whereby the bankrupt has divested himself of property available at the date of the disposition for the payment of his debts; some disposition whereby at this date his interest is passed over to the trustee of it, and his estate, available in case of stringency and ultimate bankruptcy, rendered smaller. This view does not prevent the utility and effect of s. 38. There is a great difference between avoiding a settlement already made, and rendering available to the bankrupt's estate sources to which he might have had recourse "for his own benefit," and from which the estate may be supplemented. I am, therefore, of opinion that ASTBURY, J., has placed too wide an interpretation upon the section, and that the appeal must be allowed, with costs.

D The usual order as to the trustees' costs will be made.

E **ATKIN, L.J.**—The question here is whether the exercise of the power of appointment by the husband in favour of his wife was in the circumstances of this case a settlement of property within the meaning of s. 42 of the Bankruptcy Act, 1914. The section reproduces s. 47 of the Bankruptcy Act, 1883. Two points are taken by the appellant, the bankrupt's wife: (i) That the Act only applies to a settlement of property of the debtor, i.e., property in which the debtor has some existing beneficial interest. (ii) That the exercise of a power of appointment is not a settlement which by sub-s. (4) of s. 42 is defined to include any conveyance or transfer of property. I think that the wife succeeds on the first point. I appreciate the construction of the section from the point of view that, while bound to give full effect to the plain meaning of words in their natural sense, I am entitled to expect clear words to be used if it is intended to divert to the benefit of the debtor's creditors property which bona fide before the bankruptcy had passed beneficially to other persons. Voluntary profits by the bankrupt made before bankruptcy have been the subject of statutory provision since the Bankruptcy Act of 1 Jac. 1 (c. 15). Section 5 of that Act provided that if a person who thereafter became a bankrupt conveyed to any of his children or other persons except for valuable consideration any lands, tenements, hereditaments, goods or chattels, or transferred his debts into other men's names, the commissioners should have power to grant, sell and convey them as if the bankrupt had been actually seised thereof, or the debts were in his own name, of the like estate or interest to his or their own use at such time as he or she became bankrupt. The Bankruptcy Act, 1825, s. 73, re-enacted this proviso, and similar provisions are found in the Bankrupt Law Consolidation Act, 1849, s. 126, in an extended form. It appears plain that in these sections what was contemplated was a dealing with hereditaments and chattels which had

belonged to the debtor, and a resumption of the commissioners of his power of dis- A
position over them. The statutes do not in terms avoid any conveyance or transfer,
but grant a statutory power of sale. The Bankruptcy Act, 1869, s. 91, initiated
the present form which avoids as against the trustee any voluntary settlement of
property absolutely if made within two years of the bankruptcy conditional on
failure to prove solvency if made within ten years of the bankruptcy. The section
is substantially to the effect of s. 47 of the Act of 1883 except that it does not B
contain the condition at the end of sub-s. (1) of s. 47 that the interest of the settlor
in such property passed to the trustees of such settlement in the execution thereof.
There is nothing in the Acts of 1869 or 1882 to suggest that there was any intention
to depart from the provisions of the former Bankruptcy Acts whereby only volun-
tary dispositions of the debtor's own property were defeated. On the other hand,
the addition of the words I have mentioned in s. 47 of the Act of 1883, re-enacted C
in s. 42 of the present Act, appear to me to place beyond question the intention of
the legislature. The Act is only dealing with transfer by the debtor of property
in which he has an interest. If it were otherwise, the section would avoid such a
transaction as this made after two years but within ten years from the commence-
ment of the bankruptcy notwithstanding the solvency of the debtor at the time,
for the appointee would be unable to show that any interest of the debtor in such D
property passed to her, for he had none.

It is, perhaps, advisable to develop the proposition that the debtor had no
interest in this property. Property is defined in s. 167 in one of those illogical
statutory definitions which include in the definition the term to be defined. We
are, therefore, driven to some other source of definition. Happily the matter is
authoritatively settled by the decision of the Court of Appeal in *Re Armstrong* (1), E
where LORD ESHER, M.R., BOWEN and FRY, L.JJ., make it quite clear that in the
ordinary use of language "property" does not include a general power of appoint-
ment. An argument, however, is based upon s. 38 of the Act of 1914, re-enacting
s. 44 of the Act of 1883. It is there provided that the property of the bankrupt
divisible among his creditors shall not include certain particulars, but shall include
(b) the capacity to exercise all such powers over or in respect of property as might F
have been exercised by the bankrupt for his own benefit at the commencement of
his bankruptcy; (c) all goods of which he is the reputed owner. The section is
awkwardly framed for it meant, no doubt, to vest in the trustee the powers over
property, so that the property acquired by the exercise of the power might become
the bankrupt's and so be divisible among the creditors. But, in my view, neither
the debtor nor the trustee nor the creditors acquire or could acquire any interest G
in the property the subject of the power until the power is exercised.

The argument of the trustee, however, is that the policy of s. 42 is to defeat
any voluntary dispositions of property which would prevent property otherwise
divisible among the creditors from passing to the trustee, and this exercise of the
power is such a voluntary disposition, and, therefore, should be held to be covered
by the section. I can only say that I can only find the policy of the Act from the H
words used, and the words used, for the reasons given, do not appear to me to
reach the disposition in question. If I had to discuss the question of policy at all,
I find that goods in the reputed ownership of the debtor at the date of the bank-
ruptcy are property divisible among the creditors, but there is no provision for
defeating a voluntary disposition of them by the debtor so as to make them cease
to be his reputed property. I should also have grave doubts whether the legislature I
ever intended to avoid the exercise of powers of the debtor by words which, if
given the wide construction contended for by the trustee, would have to cover the
voluntary exercise of the debtor of powers of appointment which he could not
exercise in favour of himself. I think, therefore, that on the first point taken on
behalf of the wife of the bankrupt the appeal succeeds, and I need not consider
the second point whether the exercise of a general power can be a conveyance or
transfer of property. The appeal should be allowed with costs and the order below
discharged with costs. The trustee to have his costs out of the estate.

- A** **SARGANT, L.J.**—I am of the same opinion. The neat question here is whether the “property,” the settlement of which is avoided by s. 42 (1) of the Bankruptcy Act, 1914, includes property over which the bankrupt had a general power of appointment. If it does, it is scarcely disputed that the exercise in the deed poll of June 15, 1925, of the general power given to the bankrupt by the prior deed of Dec. 12, 1924, was a settlement within the section. It is, I think, clear from the
- B** language of s. 42 (1) that the “property” there referred to must be property which, apart from the settlement, would be available for the payment of the bankrupt’s debts. But this consideration alone does not exclude property over which the bankrupt had a general power of appointment only. For by other sections of the Act such property is made available for payment of his debts by the transfer to the trustee in bankruptcy of the right to exercise the power and the duty cast on
- C** the trustee to exercise it in fact. On the other hand, however, the concluding words of s. 42 (1) as to “the interest of the settlor in such property” having passed do seem to me to imply that the property in question is property in which the bankrupt had an estate or interest in the ordinary sense, and does not include property over which he merely had a power, however extensive. I can see no
- D** logical reason why property over which a bankrupt has had a general power which he has exercised by way of settlement should not have been put on the same footing as property which he owned in the ordinary way. But cases in which voluntary settlements have been effected under such powers are, I should think, extremely rare: and it may be that this is a *casus omissus*. As matters stand, however, a trustee who seeks to displace and avoid existing interests must bring his case within the words of the statute taken in their ordinary sense, and cannot rely
- E** merely on the supposed general intention of the legislature. In my judgment the trustee here had failed to discharge this burden.

Appeal allowed.

Solicitors: *Cohen & Cohen; Raleigh J. Smallman.*

[*Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law.*]

COHEN v. SELLAR

[KING'S BENCH DIVISION (McCardie, J.), February 11, 12, 13, March 18, 1926]

[Reported [1926] 1 K.B. 536; 95 L.J.K.B. 629; 135 L.T. 21;
42 T.L.R. 409; 70 Sol. Jo. 505]

Breach of Promise—Gift given in contemplation of marriage—Engagement ring—Obligation to return to donor.

If a woman refuses to marry a man whom she has promised to marry, she must return the engagement ring and other gifts given to her in contemplation of the marriage.

Per McCARDIE, J. : So, also, if a man, without a recognised legal justification, refuses to carry out his promise of marriage, he cannot demand the return of the engagement ring. It matters not in law that the repudiation of the promise may turn out to be to the ultimate advantage of both parties. If the engagement to marry be dissolved by mutual consent, then, in the absence of agreement to the contrary, the engagement ring and like gifts must be returned by each party to the other. If the marriage does not take place either through the death of, or through a disability recognised by law on the part of, the person giving the ring or other conditional gift, the condition is to be implied that the gift should be returned. If the marriage actually takes place, the engagement ring or like gift will, in the absence of express agreement to the contrary, become the absolute property of the recipient, and that property will not be diverted by subsequent divorce.

Notes. As to gifts to intended spouses, see 18 HALSBURY'S LAWS (3rd Edn.) 390, 391, and for breach of promise generally, see *ibid.*, vol. 19, p. 769. For cases, see 25 DIGEST 523-526 and 27 DIGEST (Repl.) 25 et seq.

Cases referred to :

- (1) *Young v. Burrell* (1576), Cary, 54; 21 E.R. 29; 25 Digest 525, 172.
- (2) *Oldenburgh's Case* (1676), Freem.K.B. 213; 89 E.R. 151; sub nom. *Beaumont v. —*, 2 Mod. Rep. 140; 25 Digest 525, 173.
- (3) *Finlay v. Chirney* (1888), 20 Q.B.D. 494; 57 L.J.Q.B. 247; 58 L.T. 664; 52 J.P. 324; 36 W.R. 534; 4 T.L.R. 322, C.A.; 27 Digest (Repl.) 26, 39.
- (4) *Baker v. Smith* (1651), Sty. 295, 303; 82 E.R. 722; 27 Digest (Repl.) 32, 88.
- (5) *Rutter v. Hebden* (1664), 1 Lev. 147; 83 E.R. 341; sub nom. *Hebden v. Rutter*, 1 Sid. 180; 27 Digest (Repl.) 25, 30.
- (6) *Harrison v. Cage* (1698), Carth 467; Holt, K.B. 456; 1 Ld. Raym. 386; 5 Mod. Rep. 411; 12 Mod. Rep. 214; 1 Salk. 24; 91 E.R. 1156; 27 Digest (Repl.) 25, 26.
- (7) *Smith v. Woodfine* (1857), 1 C.B.N.S. 660; 140 E.R. 272; 27 Digest (Repl.) 34, 116.
- (8) *Jefferson v. Paskell*, [1916] 1 K.B. 57; 85 L.J.K.B. 398; 113 L.T. 1189; 32 T.L.R. 69, C.A.; 27 Digest (Repl.) 31, 82.
- (9) *Lockyer v. Simpson* (1730), Mos. 298; 25 E.R. 404.
- (10) *Robinson v. Cumming* (1742), 2 Atk. 409; 26 E.R. 646, L.C.; 25 Digest 525, 174.
- (11) *Jacobs v. Davis*, [1917] 2 K.B. 532; 86 L.J.K.B. 1497; 117 L.T. 569; 33 T.L.R. 488; 61 Sol. Jo. 613; 25 Digest 525, 175.
- (12) *Jeffreys v. Luck* (1922), 57 L.Jo. 84; 153 L.T.Jo. 139; 25 Digest 525, 176.
- (13) *Bank Line, Ltd. v. A. Capel & Co.*, [1919] A.C. 435; 88 L.J.K.B. 211; 120 L.T. 129; 35 T.L.R. 150; 63 Sol. Jo. 177; 14 Asp.M.L.C. 370, H.L.; 12 Digest (Repl.) 443, 3365.
- (14) *New Zealand Shipping Co. v. Société des Ateliers et Chantiers de France*, [1919] A.C. 1; 87 L.J.K.B. 746; 118 L.T. 731; 34 T.L.R. 400; 62 Sol. Jo. 519; 14 Asp.M.L.C. 291, H.L.; 39 Digest 667, 2560.

- A** (15) *Mackay v. Dick* (1881), 6 App. Cas. 251; 29 W.R. 541, H.L.; 12 Digest (Repl.) 489, 3676.
- (16) *Re Parnell, Ex parte Barrell* (1875), 10 Ch. App. 512; 44 L.J.Bey. 138; 33 L.T. 115; 23 W.R. 846, L.J.J.; 40 Digest (Repl.) 245, 2055.
- (17) *Howe v. Smith* (1884), 27 Ch.D. 89; 53 L.J.Ch. 1055; 50 L.T. 573; 48 J.P. 773; 32 W.R. 802, C.A.; 40 Digest (Repl.) 241, 2027.
- B** (18) *Krell v. Henry*, [1903] 2 K.B. 740; 72 L.J.K.B. 794; 89 L.T. 328; 52 W.R. 246; 19 T.L.R. 711, C.A.; 12 Digest (Repl.) 435, 3327.
- (19) *Chandler v. Webster*, [1904] 1 K.B. 498; 73 L.J.K.B. 401; 90 L.T. 217; 52 W.R. 290; 20 T.L.R. 222; 48 Sol. Jo. 245, C.A.; 12 Digest (Repl.) 463, 3461.
- C** **Action** tried before McCARDIE, J., with a jury.
The facts are fully stated in the judgment.
Charlotte M. Young for the plaintiff.
S. Lincoln for the defendant.

Cur. adv. vult.

- D** Mar. 18. **McCARDIE, J.**, read the following judgment.—The questions for my decision emerge from a breach of promise action tried before me with the aid of a common jury. The plaintiff was Miss Cissie Cohen, of the age of twenty-four; she had been engaged in business and was a young woman of obvious ability. The defendant was Nathan Sellar, of the age of twenty-seven, who occupied a clerical post at a moderate weekly salary. Each belonged to the Jewish faith. In August, 1923, they agreed to marry, and in December, 1923, the defendant handed to the plaintiff a single stone diamond ring worth £30. No express condition accompanied the delivery of the ring. It was, however, admittedly given and received as an engagement ring in contemplation of marriage. Unhappy differences soon arose between the two. Each had a quick temper. Quarrels were frequent. So acute became the state of affairs that in June, 1924, the parties went before a Jewish tribunal in order to secure, if possible, an adjustment of the strife. No reconciliation was achieved. Matters reached a climax in December, 1924. The mutual asperities were then most pronounced. The two did not meet after December, 1924. The plaintiff asserted that in that month the defendant refused to marry her. The defendant on the contrary asserted that it was the plaintiff herself who, with emphatic words, broke off the engagement. Apart from the damages the substantial question for the jury was which of the two had refused to marry. The jury found that it was the defendant and not the plaintiff who had refused to carry out the promise. They awarded the plaintiff £34 10s. as special damages in respect of certain items claimed by her. Few will doubt that the act of the defendant in ending the engagement saved both parties from an unhappy married life. The jury awarded the plaintiff £40 as general damages for loss of the marriage. There was no suggestion of any breach of morality between the two. The defence contained no plea of legal justification for breaking off the engagement.
- E**
- F**
- G**
- H**

- I** In the course of the trial the question arose as to which of the two litigants was entitled to the engagement ring. An action had been brought in the county court by the defendant to recover the engagement ring from the plaintiff. The learned county court judge adjourned the hearing to await the decision of the High Court action before me. Then the county court action was removed to the High Court and was made a counterclaim in the proceedings before the jury and myself. Both counsel requested that I should, after the jury had given their verdict on the other questions in the case, determine the points of law with respect to the ring. Hence their arguments on a later day before me. The contentions raised on behalf of the defendant are of legal interest on ever-recurring and practical questions to those who embark on the currents of matrimonial stipulations. In substance he contends that inasmuch as the ring was given solely in contemplation of marriage

it was an implied condition that if the marriage, through whatsoever cause, did not take place, the ring should be handed back to the defendant. Hence, he submitted that it was immaterial that it was the defendant himself who broke the engagement. Counsel for the plaintiff submitted that there could be no implied condition which would allow a person to take advantage of his, or her, own default. Each counsel admitted that the ring was given subject to some implied conditions. The question is: What are the conditions to be implied?

It is curious that after the centuries in which so many engagements to marry have been made in hope but dissolved in illusion that the questions now before me have not been long ago determined by direct decision. The matter must be considered, I feel, in at least three aspects—viz., (i) the old authorities, (ii) the recent cases which indirectly bear on the matter, and (iii) the general principles of modern law. I take the old authorities first. To give them a just appreciation it will, I think, be desirable to mention briefly in the course of my judgment the difference between the law of promise of marriage as it was in former times and the law as it seems to be to-day. I will first refer to the two old cases which counsel for the defendant found mentioned in vol. 25 of that excellent publication the ENGLISH AND EMPIRE DIGEST. The first of the two cases is *Young v. Burrell* (1) (25 Digest 525, 172). There the plaintiff, Young, sued for the return of a gold pomander "left" (as the report says) with the female defendant "as a token at such time as he was a suitor for marriage with her." Apparently, the lady defendant, after receiving the pomander from the plaintiff, had married another man. The court ordered that the pomander be returned to the plaintiff. It is not clear that there had been an actual promise to marry, but at all events the court did not consider whether it was the plaintiff or the lady defendant who broke off the engagement. The defendant apparently confessed her liability to hand back the pomander, and I assume it was she who desired to escape marriage with the plaintiff. The case is of interest as showing that in 1576 gifts other than engagement rings might be implied conditional on marriage. I may say that in 1576 SIR NICHOLAS BACON was the Lord Keeper, and SIR WILLIAM CORDELL was the Master of the Rolls. The second of the two old decisions is *Oldenburgh's Case* (2) (25 Digest 525, 173). The action was for debt. The actual decision appears to have been that the court would not allow the defendant in the case "to wage his law" without bringing sufficient compurgators to swear that they believed he swore truth. In the course of the argument, however, NORTH, C.J., made several observations which bear on the point now before me. There are two reports of the case. They are not indetical in language. The statement of NORTH, C.J., as given in 2 MODERN REPORTS 141 is that

"he knew of a case where a person of quality intending a marriage with a lady, presented her with a jewel, and, the marriage not taking effect, he brought an action of detinue against her, and she taking it to be a gift, offered to wage her law, but the court was of opinion that the property was not changed by this gift—being to a specified intent—and therefore did not allow her to do it."

Counsel for the present defendant, however, naturally invoked the language of the report as given in 2 FREEMAN K.B. 213, which is as follows:

"NORTH, C.J., cited a case in the King's Bench where a man courted a lady and had presented her with several jewels and, after, the match breaking off, he brought in detinue for the jewels, and she offered to wage her law, but the court did admonish her that if she had not restored them she ought not to wage her law; for she ought to restore them, though it were on the man's side because it was *causa matrimonii praelocuti*."

See notes, 89 E.R., p. 152. The last quoted words of NORTH, C.J., certainly seem to favour counsel's contention. They suggest that a gift presented solely in contemplation of marriage is to be deemed subject to the broad and overriding condition that, should marriage not take place, whether through the refusal of the man or not, his gift is to be returned.

A Before, however, deciding the weight now to be given to the apparent views of NORTH, C.J., in the time of Charles II, it is well to make reference to the law of promise of marriage as it stood in former days. In *Finlay v. Chirney* (3), LORD BOWEN said (20 Q.B.D. at pp. 504–505):

B “Before the Reformation no action for breach of promise could be maintained—for marriage was a matter of spiritual jurisdiction. It was not till the middle of the seventeenth century that marriage was recognised by our law as a temporal benefit and a breach of promise of marriage as cognisable by the temporal courts: *Baker v. Smith* (4); see Rolles Abridgement, Tit. Action on the Case, fol. 22, para. 20; *Hebden v. Rutter* (5); *Harrison v. Cage* (6)—a case erroneously supposed by WILLES, J., in *Smith v. Woodfine* (7), 1 C.B.N.S. at p. 667, to be the earliest recorded case of an action for breach of promise of marriage. No authorities of a very early date can, accordingly, be expected to throw light upon the question before us (i.e., whether an action for breach of promise of marriage will lie against the personal representatives of the promisor) and it must be decided on principle.”

D Those words of LORD BOWEN illustrate the manner in which law may develop. It is a striking circumstance of the past, that until Lord Hardwicke’s Act (26 Geo. 2, c. 33) was passed in 1753, the Church had the power to order specific performance of a promise to marry. The ecclesiastical judgment was rigorous and significant. The words used were these:

E “Sentence for matrimony commanding solemnisation, cohabitation, consummation and tractation such as becometh man and wife to have”; see 2 & 3 Edw. 6, s. 2 (1548).

The promise to marry might also be enforced by the process of ecclesiastical excommunication. But though the ecclesiastical power was great, yet it was tempered by a more liberal view than exists to-day with respect to the wider purposes of a legal union between man and woman. In the seventeenth century the law recognised that married happiness depended in large measure on compatibility of temper, and on the possession by each party of qualifications for a beneficent union of lives. In the period of which I speak, a formal marriage contract was described as “spousals” (*sponsalia*) and a vivid light is thrown on the matter by a TREATISE ON SPOUSALS (published in 1686) by the famous and learned MR. HENRY SWINBURNE. On p. 1 of the treatise he refers to the “signification of love gifts and tokens” of the parties betrothed “as bracelets, charms, jewels and rings” which, he says, “are often used for the very arrabo or assured pledge of a perfect promise.” In s. 18 of the work he sets out sixteen grounds on which promises to marry might properly be dissolved. Among them (No. 8) is this, viz.: “When some deadly enmity and unquenchable hatred is sprung up between the parties affianced.” Also, ground No. 11 is this: “When the one party is so severe and cruel as the other dare not proceed in the match.” Ground No. 13 is: “Generally whensoever there is just and reasonable cause.” It is obvious, therefore, that in the seventeenth and eighteenth centuries it was legally permissible for a man or woman to break off engagements to marry for reasons which, unhappily, would not constitute a valid legal excuse to-day. The dicta in *Oldenburgh’s Case* (2) must be considered in the light of what I have just ventured to state. The general state of the law as it is to-day may be inferred if I extract a few lines from

I 16 HALSBURY’S LAWS, p. 276 [see now 3rd Edn., vol. 19, p. 772]. They are these:

“It is no defence to an action for breach of promise that, previously to the promise, the plaintiff, without the defendant being aware of it, had been insane and confined in a lunatic asylum. No disease or infirmity, short of absolute incapacity on the part of the defendant, will avail him or her, even if it is proved that the performance of conjugal duties would endanger his or her life.”

The decisions are there collected and are modified but little (if at all) by *Jefferson v. Paskell* (8). The law of breach of promise grew at a period when the principles of

eugenics were scarcely known, and when the lamps of sociological science had not been lit. A striking illustration of the views of marriage which exist to-day among a section of the community is afforded by the facts of the present case. The plaintiff herself expressly stated in her evidence that the defendant was "very bad tempered, a person of no principles, and not a man of his word," and yet she added: "I was anxious to marry him." Apart from the difference between the social conception of 250 years ago and those of to-day, it must be recalled that the law of contract has only been fully developed within comparatively recent times, and that actions for breach of promise have been clothed with the more obvious features of commercial disputes. A

I now desire to mention another old decision not cited by counsel to me. It is *Lockyer v. Simpson* (9). The case is one of interest because of the lucid arguments of the Attorney-General (Sir Phillip Yorke, Kt.) and the Solicitor-General (Charles Talbot, Esq.), with respect to gifts made in contemplation of marriage. There a Mr. Tolson had given several valuable articles (including a diamond necklace) to a lady to whom he was affianced. Unhappily Mr. Tolson died on the morning of the day for which the wedding was fixed. The point for decision by the Master of the Rolls (SIR JOSEPH JEKYLL) was whether the gifts were absolute or conditional. In the exceptional circumstances disclosed he held them to be absolute. Mr. Tolson had been a close friend of the family of the lady for many years, and had apparently also formed an admiration for her from the time she was an infant. I mention that case later. B

So matters stood in 1730. The influence of Roman law on English common law doctrine was still great, and it is worth while to refer briefly to the law of Rome on the questions before me. Actions for breach of promise of marriage were not allowed by Roman law, and that has been adopted in substance by modern continental nations. The obligation imposed by the Roman betrothal (*sponsalia*) was a moral and not a legal one. It might, of course, be mutually dissolved, but it might also be repudiated by either party. If mutually dissolved the betrothal gifts (*arrhæ sponsalitæ*) were to be returned by each party. (This, I may add, is at present the law provided by the Civil Code of Germany, cl. 1301, and the Code of Switzerland, cl. 94.) If a Roman betrothal was repudiated without cause, the party at fault forfeited the betrothal gifts or any present of money. If the woman was the offending party she had ordinarily to return, not only the betrothal gifts, but also their value in money: see PROFESSOR SHERMAN'S *ROMAN LAW IN THE MODERN WORLD*, vol. 2, pp. 45-46, and BUCKLAND'S *TEXT-BOOK OF ROMAN LAW* (1st Edn.), p. 112. C

I ought, perhaps, ere I refer to the two modern decisions, to mention *Robinson v. Cumming* (10). The gifts there in question were not betrothal gifts in the ordinary sense. The judgment of LORD HARDWICKE, however, is relevant to the matter now before me. He said: D

"If a person has made his addresses to a lady for some time upon a view of marriage and upon reasonable expectation of success makes presents to a considerable value and *she* thinks proper to deceive him afterwards it is very right that the presents themselves should be returned or the value of them allowed to him, but, when presents are made only to introduce a person to a woman's acquaintance and by means thereof to gain her favour, I look upon such person only in the light of an adventurer, especially where there is a disproportion between the lady's fortune and his, and therefore like all other adventurers if he will run risks and loses by the attempt he must take it for his pains." E

It is not necessary that I should seek to analyse LORD HARDWICKE's judgment. I need say only that it shows the extent to which the law will imply conditions so that justice may be done. F

I now turn to the two recent cases which bear on betrothal gifts. In neither of them was any reference made to *Young v. Burrell* (1), *Oldenburgh's Case* (2), or G

A *Lockyer v. Simpson* (9), and first I take *Jacobs v. Davis* (11). The headnote in the LAW REPORTS is as follows:

"When an engagement ring is given by a man to a woman there is an implied condition that the ring shall be returned if the engagement is broken off."

B This broad statement seems to favour the argument submitted to me on behalf of the defendant here. But the headnote must, of course, be read with the actual judgment of SHEARMAN, J. He was dealing with a case where the lady broke off the engagement, and the man thereupon sued for the return of the engagement ring. In the course of his decision SHEARMAN, J., said:

C "Though the origin of the engagement ring has been forgotten it still retains the character of a pledge or something to bind the bargain or contract to marry, and it is given on the understanding that a party who breaks the contract must return it. Whether the ring is a pledge or conditional gift, the result is the same. The engagement ring given by the plaintiff to the defendant was given upon the implied condition that it should be returned if the defendant (i.e., the lady) broke off the engagement. She did break the contract and therefore must return the ring."

D It seems reasonably clear that SHEARMAN, J., impliedly held that, if the plaintiff himself had broken off the promise, he could not have got back the ring. This, too, I infer, would have been the opinion of BRAY, J.: see the words of his decision with respect to wedding-gifts in *Jeffreys v. Luck* (12).

E Such are the decisions. The principles involved are illuminated by the arguments in the already cited case of *Lockyer v. Simpson* (9). It was conceded by the Attorney-General in that case that if the lady had refused to marry the man she must return the gifts delivered to her in contemplation of marriage. This I hold to be the correct legal view. If a lady who has received a ring refuses to fulfil the conditions of the gift she must return it. So, on the other hand, I think that if the man has, without a recognised legal justification, refused to carry out his promise of marriage he cannot demand the return of the engagement ring. It matters not
F in law that the repudiation of the promise may turn out to the ultimate advantage of both parties. A judge must apply the existing law on the limits of justification for breach. The conclusions I have stated are, I think, borne out by the general body of opinion. The apparent dictum to the contrary in *Oldenburgh's Case* (2) cannot be relied on at the present day. By the slow growth of decisions the promise of marriage is to-day fixed with many of the legal characteristics of a commercial bargain. It is governed largely by the principles of law applicable to ordinary contracts. The conditions which attach to a gift made in contemplation of marriage must be viewed in relation to the incidents which flow from the engagement itself. It is, therefore, appropriate, to quote the words of LORD SUMNER in *Bank Line, Ltd. v. Capel & Co.* (13) ([1919] A.C. at p. 453), when, speaking of a commercial adventure, he said: "Reliance cannot be placed on a self-induced frustration." The
H like rule will, I think, apply to a matrimonial adventure also. So, too, LORD FINLAY said in the *New Zealand Shipping Co. v. Société des Ateliers et Chantiers de France* (14) ([1919] A.C. at p. 6):

"It is a principle of law that no one in such a case can take advantage of the existence of a state of things which he himself produced."

I And see *Mackay v. Dick* (15) (6 App. Cas. at p. 264). A like result to that I have already stated will follow if an engagement ring be regarded as a pledge or deposit for the fulfilment of a contract. A person who wrongly refuses to carry out a bargain will lose his deposit: see *Ex parte Burrell* (16); *Howe v. Smith* (17).

I have thought it best to deal with the matter somewhat amply and fully as it was so adequately argued before me. I may, therefore, venture to add a few words on other aspects of the matter which may arise and which were referred to by counsel. If the engagement to marry be dissolved by mutual consent, then in the absence of agreement to the contrary the engagement ring and like gifts must, I

think, be returned by each party to the other. This seems clear on principle. If the marriage do not take place either through the death of or through a disability recognised by law on the part of the person giving the ring or other conditional gift, then I take the view that in such a case the condition is to be implied that the gift shall be returned. For although, as I have said, such a gift cannot be dissociated from the engagement to marry, yet I think that in the circumstances of betrothal gifts there should be no application of the operation of such decisions as *Krell v. Henry* (18) and *Chandler v. Webster* (19). If the marriage actually takes place then the engagement ring or like gift will, in the absence of express agreement to the contrary, become, I infer, the absolute property of the recipient, and that property will not, I presume, be diverted by subsequent divorce. The judgment I have given does not touch gifts which (as in *Lockyer v. Simpson* (9)) are absolute and free from conditions. It touches conditional gifts only. I add just a word on another point. The jury, after giving their verdict, expressed a view that the plaintiff, Miss Cohen, should return the ring to the defendant. But the matter was not left to them for decision and their view was only a suggestion. They were not cognisant of the points involved in the dispute as to the ring. In any event, it would have been right that the plaintiff should keep possession of the ring so that she might be able to take it in execution for the damages and costs awarded in her favour against the defendant. For the reasons given there must be judgment for the plaintiff with costs on claim and counter-claim.

Solicitors: *H. Meyler; S. W. Digby.*

[Reported by R. A. YULE, Esq., Barrister-at-Law.]

Re GLYNCORRWG COLLIERY CO. LTD. RAILWAY DEBENTURE AND GENERAL TRUST CO. LTD. *v.* THE CO.

[CHANCERY DIVISION (Tomlin, J.), June 3, 1926]

[Reported [1926] Ch. 951; 96 L.J.Ch. 43; 136 L.T. 159;
70 Sol. Jo. 857]

Company—Debenture holders' action—Insufficient assets—Order of administration of assets—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 107 and 209.

In a debenture holder's action where there is a deficiency the assets must be applied in the following order: 1. Costs of realisation. 2. Costs including remuneration of receiver. 3. Costs, charges, and expenses of debenture trust deed, including the trustee's remuneration. 4. Plaintiff's costs of action. 5. Preferential creditors. 6. Debenture holders.

Woods v. Winskill (1), [1913] 2 Ch. 303, explained

Batten v. Wedgwood Coal and Iron Co. (2) (1884), 28 Ch.D. 317, distinguished.

Notes. Sections 107 and 109 of the Companies (Consolidation) Act, 1908, have been replaced by s. 94 (1) and s. 319 of the Companies Act, 1948.

As to the order of administration of the amount realised in a debenture holders' action, see 6 HALSBURY'S LAWS (3rd Edn.) 524; and for cases see 10 DIGEST (Repl.) 841. For the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Cases referred to:

(1) *Woods v. Winskill*, [1913] 2 Ch. 303; 82 L.J.Ch. 447; 109 L.T. 399; 57 Sol. Jo. 740; 6 B.W.C.C. 934; 20 Mans. 261; 10 Digest (Repl.) 827, 5402.

- A (2) *Batten v. Wedgwood Coal and Iron Co.* (1884), 28 Ch.D. 317; 54 L.J.Ch. 686; 52 L.T. 212; 33 W.R. 803; 10 Digest (Repl.) 842, 5553.
- (3) *Richards v. Kidderminster Overseers*, *Richards v. Kidderminster Corpn.*, [1896] 2 Ch. 212; 65 L.J.Ch. 502; 74 L.T. 483; 44 W.R. 505; 12 T.L.R. 340; 4 Mans. 169; 10 Digest (Repl.) 994, 6833.
- B (4) *Westminster Corpn. v. Chapman*, [1916] 1 Ch. 161; 85 L.J.Ch. 334; 114 L.T. 63; 80 J.P. 74; [1916] H.B.R. 12; 10 Digest (Repl.) 994, 6834.
- (5) *Re Brooker and Goss, Ltd.*, unreported.
- (6) *Re Meaby & Co., Ltd., Clarke v. Meaby & Co., Ltd.*, [1899] W.N. 58; 6 Mans. 303; 10 Digest (Repl.) 841, 5533.
- (7) *Re Wolverhampton District Brewery, Ltd., Downes v. Wolverhampton District Brewery, Ltd.* (1899), 44 Sol. Jo. 74; 7 Mans. 50; 10 Digest (Repl.) 841, 5530.
- C (8) *Re Debenture-Holders' Actions* (1900), 16 T.L.R. 256; 10 Digest (Repl.) 841, 5535.
- (9) *Re Piccadilly Hotel, Ltd., Paul v. Piccadilly Hotel, Ltd.*, [1911] 2 Ch. 534; 81 L.J.Ch. 89; 105 L.T. 775; 56 Sol. Jo. 52; 19 Mans. 85; 10 Digest (Repl.) 768, 4997.
- D (10) *Debenture Corpn., Ltd. v. Uttoxeter Brewery, Ltd.* (1895), cited in Palmer's Company Precedents (12th Edn.) Part III, p. 94.
- (11) *Re Healy, Healy v. Oliver*, [1918] 1 I.R. 366; 24 Digest (Repl.) 665, *1627.

Summons in a debenture holder's action taken out to ascertain the order in which assets ought to be applied where there was a deficiency.

- E The plaintiffs, as first debenture holders of the company, brought an action on behalf of themselves and all other debenture holders of the company, and obtained the appointment of a receiver and manager on April 7, 1925. The receiver and manager carried on the company's colliery under the direction of the court until July 31, 1925, when it was closed down. In November, 1925, the usual order was made in the debenture holders' action, and on the assets being got in it was found that they were not sufficient to pay the plaintiff's costs and remuneration of the trustees under the debenture trust deed, the receiver's remuneration, and the preferential creditors, who consisted chiefly of injured workmen having claims for compensation under the Workmen's Compensation Acts.
- F The facts are fully stated in the judgment.

- G *Wilfred M. Hunt*, for the summons, referred to *Batten v. Wedgwood Coal and Iron Co.* (2). [TOMLIN, J.—Is not the real question as to the claims of the preferential creditors?] Hunt referred to *Woods v. Winskill* (1).

Gordon Brown, for the receiver and manager, referred to *Richards v. Kidderminster Overseers* (3), *Westminster Corpn. v. Chapman* (4).

- L. W. Byrne*, for the injured workmen, the preferential creditors, referred to *Woods v. Winskill* (1), [TOMLIN, J., said the master's note in *Re Brooker and Goss, Ltd.* (5), referred to in the note in the Annual Practice 1926, had been found and afforded support for that note] *Re Meaby & Co., Ltd.* (6), *Re Wolverhampton District Brewery, Ltd.* (7), *Re Debenture-Holders Actions* (8).
- H

Brough, for the trustees under the debenture trust deed, referred to *Re Piccadilly Hotel, Ltd.* (9), *Debenture Corpn., Ltd. v. Uttoxeter Brewery, Ltd.* (10).

- I **TOMLIN, J.**—The question which arises in this case is as to the order in which the assets have been realised by means of the action are applicable in discharging the costs in the action of the plaintiff, of the defendants, the trustees of the trust deed, the receiver's remuneration and costs, and the claims of preferential creditors, having regard to the fact that the amount realised is insufficient to pay the total of all those claims, and necessarily, therefore, insufficient to provide anything for the debenture holders at all.

The plaintiff in the action is suing on behalf of himself and the holders of first debentures issued by a company and secured by a deed which is dated in November,

1908, and under cl. 13 and 23 of which provision is made for payment to trustees of remuneration. Clause 13 provides that the first trust and realisation shall be to pay and retain the costs and expenses of the trustees, including their own remuneration. The trust deed contains a floating charge, but no specific charge. There is a subsequent issue of debentures, the trustees of the trust deed securing which are also defendants to the action. In that trust deed, which is subject in all respects to the floating charge created by the trust deed securing the first debentures, there is a specific charge in favour of the second debentures upon the goodwill and certain other assets of the business, with a general floating charge in addition. The company carries on the business of a colliery company, and after the commencement of the action a receiver and manager was appointed. That was in April, 1925, and the order appointing him was in the usual form, containing a direction to pay preferential claims out of assets received. Under the direction of the court the receiver and manager carried on the colliery until July 31, 1925, when it was closed down, and on Nov. 24, 1925, there was the usual judgment under which the accounts have been proceeded with. The assets have been realised, and, as I say, the result of the realisation is that there is not sufficient to pay the total of those expenses and costs, to which I have referred, and the preferential claims. The preferential claims are the claims of workmen in respect of injury, and they amount to a very considerable sum—something like £25,000—and it is the magnitude of those claims which give rise to the question that I have to decide.

The point arises under s. 107 (1) of the Companies (Consolidation) Act, 1908, which provides :

“Where, in the case of a company registered in England or Ireland, either a receiver is appointed on behalf of the holders of any debentures of the company secured by a floating charge, or possession is taken by or on behalf of those debenture holders of any property comprised in or subject to the charge, then, if the company is not at the time [—that means at the time when the receiver is appointed or possession is taken—] in course of being wound-up, the debts which in every winding-up are under the provisions of Part IV of this Act relating to preferential payments to be paid in priority to all other debts, shall be paid forthwith out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures.”

Under Part IV of the Act, s. 209 (1), it is provided : “In a winding-up there shall be paid in priority to all other debts”—and then follows a list of things which include (sub-cl. (d)) claims of the kind with which we are concerned in this action, namely, compensation for injury. Subsection (2) of the section is as follows :

“The foregoing debts shall—(a) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions; and (b) in the case of a company registered in England or Ireland, so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.”

Taking that section alone, it seems to be reasonably plain that in a case when there had been no debenture holder's action and the company was being wound-up, the effect of this section would be that the preferential claimants, where the fund available for payment of general creditors was insufficient to provide for them in full, would be entitled to have their claims paid out of the fund which would otherwise be available for debenture holders whose debentures were secured by a floating charge. So far then as a winding-up is concerned, there is by virtue of this section no alteration in the order in which the assets are applicable, except that preferential creditors are to be satisfied before any fund subject to a floating charge can be utilised for payment of those who have the benefit of the floating charge.

- A It remains to consider the meaning of s. 107. It is to be observed that the section is only applicable if, when the receiver is appointed or possession is taken, the company is not being wound-up. Therefore if the company is being wound-up, when the receiver is appointed or action taken, s. 209 will apply; if, on the other hand, there is no pending winding-up, s. 107 will apply. *Primâ facie* one would not expect the two sections to have a different operation seeing that the application of
- B the one or the other is dependent on the fortuitous circumstance whether the winding-up or the institution of a debenture holder's action was the first event. There seems no logical reason why the happening of one of those events in front of the other should alter the distribution of the assets, and I think one would approach the construction of s. 107 with that measure of prejudice, that one would expect to find that the scheme of distribution under the two sections was in accord.
- C This is still more the case when one examines the history of this legislation. Originally the principle involved applied only to bankruptcy, and in the Bankruptcy Act, 1883, which contains I think the earliest section in regard to it. Section 40 provides: "In the distribution of the property of a bankrupt there shall be paid in priority to all other debts" certain preferential claims. Again in s. 1 (1) of the Preferential Payments in Bankruptcy Act, 1888, the phrasing is:
- D "In the distribution of the property of a bankrupt, and in the distribution of the assets of any company being wound-up under the Companies Act, 1862"
- that brings in the winding-up of a company for the first time—"there shall be paid in priority to all other debts" certain preferential claims. Up to that point, then, it is quite plain that the legislature is only altering the priority of debts.
- E Next comes the Preferential Payments in Bankruptcy Amendment Act, 1897, when the matter is dealt with in two successive sections, the second and the third. Section 2 is in these terms:
- "In the winding-up of any company . . . the debts mentioned in s. 1 of the Preferential Payments in Bankruptcy Act, 1888, shall, so far as the assets of the company available for payment of general creditors may be insufficient to meet them, have priority over the claims of holders of debentures or debenture stock under any floating charge created by such company, and shall be paid accordingly out of any property comprised in or subject to such charge."
- F That is substantially s. 209 of the Act of 1908. Then s. 3 provides:
- "In case a receiver is appointed on behalf of the holders of any debentures or debenture stock of a company secured by a floating charge, or in case possession is taken," then "in either of such cases, if the company is not at the time in course of being wound-up, the debts mentioned in s. 1 of the said Preferential Payments Act shall be paid forthwith out of any assets coming to the hands of the receiver, or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of such debentures or debenture stock. . . . But any payments made under this section shall be recouped as far as may be out of the assets of the company available for payment of general creditors."
- G
- H The word "forthwith" appears in that section, and it is suggested that the section really means more than that the preferential debts are to be paid "forthwith out of any assets . . . in priority to any claim on behalf of the debenture holders," and
- I that it really means that they are to be paid out of every asset which comes to the hand of the receiver quite irrespective of any other claims which are in existence against the assets of the company. Now, either that must give preferential debts an absolute priority over everything else in respect of assets of every kind that come into the receiver's hands or it must only mean that the preferential claimants are given priority over that which is expressly referred to, namely, the principal and interest of the debenture holders. I think that looking at that Act of 1897 and the position of the two sections, it is easy to see that the legislature there is contemplating two alternatives and desiring to produce the same result in each case.

And reading those two sections together I have no hesitation in coming to the conclusion that on their true construction the effect is the same whether the first event be a winding-up or the appointment of a receiver and that s. 3 only contemplates payment of preferential claims "forthwith out of any assets coming to the hands of the receiver . . . in priority to any claim for principal or interest." What it means is that out of assets available for the payments of principal and interest of the debenture holders, the claims of preferential creditors are to be paid forthwith irrespective of the claims of debenture holders. A
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Holding as I do that view in regard to ss. 2 and 3 of the Preferential Payments in Bankruptcy Amendment Act, 1897, I feel unable to come to any different conclusion upon ss. 107 and 209 of the Act of 1908, even though they are separated by about a hundred sections in the latter Act. I come then to the conclusion that they are two different sections which are intended in two different sets of circumstances to produce substantially the same result, and that on the true construction of s. 107 the only direction to the receiver or person taking possession is that he shall at the earliest possible moment pay, out of the assets which would otherwise go to the debenture holders in discharge of their principal and interest, the claims of preferential creditors. When this has been done, then under sub-s. (3) the debenture holders will have a right to recoupment out of any assets of the company available for payment of general creditors. C
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It has been said that this section was construed in a different sense by ASTBURY, J., in *Woods v. Winskill* (1), but I do not think that that case has anything to do with the question with which I am concerned. In that case a receiver and manager had been appointed under the terms of a trust deed by the debenture holders themselves and such receiver and manager having carried on the company's business as its agent, either by himself doing so or by allowing the company's managing director to do so, claims arose against the company in respect of that carrying on of the business. The question then arose whether the receiver was liable to preferential creditors for having applied the assets in satisfaction of creditors whose claims had arisen in the carrying on of the business. I confess I find it a little difficult to see upon what ground he was to escape liability. As I understand the learned judge, it had been argued before him that the statutory duty which would give rise to the claim for liability was only to avoid paying the assets in discharge of the principal and interest of the debenture holders in front of the preferential claims, and that the ambit of the receiver's statutory duty did not extend to preclude him from misapplying the assets in some other direction. That seems to have been the nature of the argument. Perhaps it is hardly necessary to say that the argument failed, and that the receiver was held to be liable. He was held to be liable not by reason of any question such as that which I am considering here to-day, but because he had in fact, on any meaning of the section, plainly misapplied the assets. I think, therefore, that that case affords no assistance in determining the present question. I do, however, derive a measure of comfort and support from a passage in the Annual Practice 1926 where it is stated at p. 2339 "Distribution of assets" in debenture holders' actions. E
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"Where the assets are deficient the order in which the funds ought to be distributed has been held to be as follows: 1. Costs of realisation, including costs of an abortive attempt to sell. . . . 2. Costs due to solicitors of debenture trustees before action brought and for which they had a lien on the title deeds. 3. Balance due to receiver and manager including his remuneration and costs. 4. Costs, charges and expenses of trustees of debenture deed. 5. Plaintiff's costs of action. 6. Preferential debts. 7. Debenture holders." I

There is cited for that three authorities: *Batten v. Wedgwood Coal and Iron Co.* (2), which I do not think really goes to this point at all, *Re Healy* (11), an Irish case which I have not seen, but which I am told by counsel does not really assist matters, and *Re Brooker and Goss, Ltd.* (5), which came before SWINFEN EADY, J., in Chambers on Mar. 19, 1906. I have caused search to be made in Chambers and I

A have now before me the Masters' Minute Book and it appears under date of Mar. 19, 1906, that the action referred to in that note came before SWINFEN EADY, J., in Chambers. The masters' note is this :

B "In a debenture holder's action when there is a deficiency the following is the order in which assets should be applied: (1) Costs of realisation. (2) Remuneration of receiver. (3) Plaintiff's costs of action. (4) Preferential creditors. (5) Debenture holders' principal and interest,"

C and then there follow these words: "So stated to me by SWINFEN EADY, J., in this case." As to what the particular force of that note may be, I express no opinion, but I am justified in feeling that I derive some support from the fact that it contains an expression by SWINFEN EADY, J., of an opinion which accords with the conclusion at which I arrive to-day.

D I ought perhaps to add that so far as the debenture holders' trustees are concerned, their remuneration is in the same position as their assets, charges and expenses having regard to the terms of the trust deed. I must, therefore, hold that the order in which the assets are applicable are: first, costs of realisation; secondly, the costs including remuneration of receiver; thirdly, the costs, charges and expenses of the debenture trust deed including the trustees' remuneration; fourthly, the plaintiffs' costs of action; fifthly, preferential creditors; and sixthly, the debenture holders, but I understand that there will be no balance for them.

Solicitors: Norton, Rose & Co.; Ingledew, Brown & Co.; Smith, Rundell, Dods & Bockett, for Morgan, Bruce & Nicholas, Pontypridd.

E [Reported by L. MORGAN MAY, Esq., Barrister-at-Law.]

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PARKER AND COOPER, LTD. v. READING AND ANOTHER

[CHANCERY DIVISION (Astbury, J.), July 11, 1926]

G [Reported [1926] Ch. 975; 96 L.J.Ch. 23; 136 L.T. 117]

Company—Director—Authority—Transaction ultra vires the directors but intra vires the company—Assent given by all the shareholders informally—No meeting of shareholders.

H A transaction by the directors of a company which is ultra vires the directors, but intra vires the company and is honest, is valid, especially if it is for the benefit of the company, if all the shareholders assent to it, even though they do so, not in general meeting, but informally, individually and at different times.

Re George Newman & Co. (1), [1895] 1 Ch. 674, and *Re Express Engineering Works, Ltd.* (2), [1920] 1 Ch. 466, discussed, explained and applied.

I **Notes.** The principle laid down in this case is now recognised by the requirement, by the Companies Act, 1948, s. 143 (1), (4), that a printed copy of resolutions or agreements which have been agreed to by all the members of some class of shareholders, but which, if not so agreed to, would not have been effective unless passed in some particular manner, must be sent to and recorded by the registrar of companies.

Referred to: *E.B.M. Co. v. Dominion Bank*, [1937] 3 All E.R. 555.

As to ratification of acts ultra vires the directors, see 6 HALSBURY'S LAWS (3rd Edn.) 299; and for cases see 9 DIGEST (Repl.) 506-507.

Cases referred to :

- (1) *Re George Newman & Co.*, [1895] 1 Ch. 674; 64 L.J.Ch. 407; 72 L.T. 697; 43 W.R. 483; 11 T.L.R. 292; 39 Sol. Jo. 346; 2 Mans. 267; 12 R. 228, C.A. 9 Digest (Repl.) 520, 3431. A
- (2) *Re Express Engineering Works, Ltd.*, [1920] 1 Ch. 466; 89 L.J.Ch. 379; 122 L.T. 790; 36 T.L.R. 275, C.A.; 9 Digest (Repl.) 548, 3608.
- (3) *Re Oxted Motor Co.*, [1921] 3 K.B. 32; 90 L.J.K.B. 1145; 126 L.T. 56; 37 T.L.R. 757; [1921] B. & C.R. 155, D.C.; 9 Digest (Repl.) 601, 3991. B
- (4) *Salomon v. Salomon & Co.*, *Salomon & Co. v. Salomon*, [1897] A.C. 22; 66 L.J.Ch. 35; 75 L.T. 426; 45 W.R. 193; 13 T.L.R. 46; 41 Sol. Jo. 63; 4 Mans. 89, H.L.; 9 Digest (Repl.) 30, 11.
- (5) *Re British Seamless Paper Box Co.* (1881), 17 Ch.D. 467; 50 L.J.Ch. 497; 44 L.T. 498; 29 W.R. 690, C.A.; 9 Digest (Repl.) 515, 3390. C

Witness Action by Parker and Cooper, Ltd. (in liquidation), and Palmer its liquidator against Reading, the holder of a debenture in the company, and James, the receiver appointed by him, for a declaration that the debenture and the appointment of the receiver were both invalid.

The company, which carried on the business of boot and shoe manufacturers and dealers, was incorporated on Feb. 20, 1918, with a capital of £5,000 in 5,000 shares of £1 each, all issued as fully paid up shares. The memorandum of association authorised the borrowing of money by the issue of debentures. The company was regulated partly by special articles and partly by Table A. By special art. 13, the number of directors was to be not less than three or more than five. The first directors were Arthur Parker, Elizabeth Parker, and Benjamin Ward. By special art. 17 the qualification of a director was the holding of 500 shares. By special art. 18 a director might contract with and be interested in any contract with the company and should not be liable to account for any profit made thereby, provided that the precise nature of his interest was declared to the board when the contract was entered into; but no director was to vote in respect of any contract or arrangement in which he was interested. By cl. 76 of Table A, the company's seal was not to be affixed to any instrument, except by the authority of a resolution of the board and in the presence of at least two directors and the secretary, all of whom were to sign the instrument so sealed. Clauses 78, 79, 81, and 84 of Table A contain the usual provisions for the retirement of directors by rotation and for the filling up of ordinary and casual vacancies. The shares were held and the business carried on by the three directors until Mar. 6, 1920, when Ward retired, and after that date the only shareholders and directors were Arthur Parker, who held 4,500 shares, and Elizabeth Parker, who held 500 shares. D
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Shortly before Oct. 3, 1921, it was arranged by the two directors to sell the stock, machinery, fixtures and fittings in the factory to the defendant, Charles Reading, and one Botterill for £1,600 on the understanding that the remaining assets, that is, cash in hand and at the bank, and book debts, were to be the sole property of Arthur Parker, who was to pay all accounts due by the company up to Oct. 3, 1921. This arrangement was confirmed at a board meeting on October 3, which also resolved to transfer all the shares in the company to the purchasers in such proportions as the purchasers should decide. In pursuance of this arrangement a resolution of the board was passed on Oct. 19, 1921, under which, on December 30, 1,875 shares were transferred to the defendant Charles Reading, 625 shares to his son, 1,875 shares to Botterill, and 625 shares to Botterill's son. The transfers of these shares were passed at a board meeting on January 23, and certificates were issued to the several transferees, and Arthur and Elizabeth Parker, as directors, appointed Charles Reading and Botterill directors and Reading's son secretary of the company. Charles Reading and Botterill took over the business of the company and acted as directors without any suspicion that there was any irregularity in the transfer of the shares or in their appointments as directors. They appointed the defendant James, an accountant, auditor of the company, and H
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- A acted throughout on his advice, which was given honestly and bona fide. There was a small loss on the business of the company, but James was of opinion that the company might be successful with a little assistance. In February, 1922, the defendant Reading and Botterill guaranteed an overdraft of the company at its bank to the extent of £750. In July, 1924, the bank were unwilling to increase this overdraft and the directors consulted the defendant James, and on his advice
- B it was arranged that Charles Reading should advance £1,750 to the company, to be secured by a debenture for £2,000, and that out of this advance the overdraft of £750 should be discharged, leaving £1,000 for working capital. This arrangement was discussed by the four shareholders from time to time between themselves, and they all individually assented to it. The defendant James
- C instructed the company's solicitors to prepare this debenture. At a board meeting on Aug. 1, 1924, a resolution was passed authorising the issue of the debenture in exchange for Charles Reading's cheque for £1,750. The debenture purported to be sealed, but the sealing was irregular within cl. 76 of Table A, as the debenture was first sealed by Botterill and taken to Charles Reading's house for signature. The cheque for £1,750 was paid into the company's bank and the overdraft of £750
- D was discharged. On May 22, 1925, Charles Reading appointed the defendant James receiver under his debenture, and James took possession of the company's undertaking and assets. On May 29, 1925, the company passed an extraordinary resolution to wind up voluntarily and appointed the plaintiff, Palmer, liquidator. On Sept. 23, 1925, the company and the liquidator commenced this action against Charles Reading and James, claiming a declaration that the debenture and the resolution authorising its issue, and the appointment of James as receiver, were
- E valid, and ancillary relief. They contended that the original appointment of Charles Reading and Botterill as directors was invalid; that, even if it were valid, they had ceased to be directors before Aug. 1, 1924; that Charles Reading was interested in the resolution authorising the issue of the debenture and not entitled to vote, and that, therefore, there was no quorum present at the board meeting of August 1; and that the seal was not affixed in the manner prescribed by Table A.
- F The defendants pleaded that in any event every act and matter impugned was intra vires the company, and had been adopted and ratified by all the shareholders.

Topham, K.C., and *Roger Turnbull*, for the plaintiffs, referred to *Re George Newman & Co.* (1), *Re Express Engineering Works, Ltd.* (2).

- Archer, K.C.*, and *Geoffrey Howard*, for the defendants, referred to *Re Express*
- G *Engineering Works, Ltd.* (2), *Re Oxted Motor Co.* (3), *Salomon v. Salomon & Co.* (4), *Re George Newman & Co.* (1).

- ASTBURY, J.**, stated the facts, held that everything had been done bona fide, and continued: For the purpose of my judgment I will assume that the defendants Reading and Botterill were not validly and formally appointed directors. But
- H they believed that they were, and they continued during the remaining history of the company to act as such. I will assume again that the sealing of the debenture was quite irregular. The company had the benefit of the money. The debenture was issued with the assent of every shareholder, and the question is whether the plaintiffs, or rather the liquidator, ought to succeed in obtaining a declaration that the debenture and the resolution authorising it were inoperative and invalid, so that the creditors may get the advantage of the defendant Reading's
- I £1,750, and deprive him of the security on which he made that advance. Unless I am bound by authority to give this relief I certainly do not propose to do so. It is, however, suggested that I am so bound, because the shareholder's assent to the irregular transactions was not given at any actual meeting.

In *Re George Newman & Co.* (1) the chairman of a company, in which substantially all the shares were held by him and his family, purchased on behalf of the company the right to a building agreement to be obtained from certain commissioners. The commissioners objected to the company as tenants, and proposed to substitute the chairman, who thereupon sold the benefit of the agreement

to the company at an advance of £10,000, of which £7,000 was spent upon commissions and otherwise in order to obtain the agreement from the commissioners, and £3,000 was applied to the chairman to his own use. A further sum of £3,500 was spent by the chairman out of the company's assets upon his private house. These payments were made out of moneys borrowed by the company for the purposes of its business; they were sanctioned by resolutions of the directors, and were approved of by all the shareholders. The articles contained no power to make presents to directors. On a summons taken out by the liquidator it was held that he was not liable for the £7,000, but was liable for the £3,000 and the £3,500; first, because the shareholders for the time being had no power to authorise the making of presents to directors out of moneys borrowed by the company; and, secondly, because if there had been such power it could be exercised only at a general meeting. LINDLEY, L.J., delivering the judgment of LORD HALSBURY, A. L. SMITH, L.J., and himself, said :

"When the facts are understood, both these sums were in truth presents by the directors out of the company's assets to [the chairman] with the consent of the other shareholders who were of age; and the question is whether these presents can be treated as valid by the liquidator on the winding up of the company, which is hopelessly insolvent and which was largely in debt when these presents were made. VAUGHAN WILLIAMS, J., has held that they were unimpeachable, and he referred to *Re British Seamless Paper Box Co.* (5) as supporting his view. But that case is very unlike this. The directors there had allotted shares to some of themselves as fully paid up. The shares were in fact allotted in consideration of some patents taken over by the company; and an agreement to issue the shares as fully paid up was registered. The transaction, therefore, was *intra vires*, and it was taken to be so both by counsel and by the court. Further, the transaction was perfectly honest throughout, and it was sanctioned by a general meeting of the company, which there consisted of only the directors and one other person, who assented to what was done. More than a year afterwards shares were issued to other people, and, the company being ultimately wound up, the liquidator sought to recover the nominal value of the shares, treating them, in fact, as not fully paid up. The court held that this could not be done, because the transaction (being *intra vires*) was honest and was sanctioned by all the members of the company at the time. But in this case the presents made by the directors to . . . their chairman were made out of moneys borrowed by the company for the purposes of its business; and this money the directors had no right to apply in making presents to one of themselves. The transaction was a breach of trust by the whole of them; and, even if all the shareholders could have sanctioned it, they never did so in such a way as to bind the company. It is true that this company was a small one, and is what is called a private company; but its corporate capacity must not be ignored. Those who form such companies obtain great advantages, but accompanied by some disadvantages. A registered company cannot do anything that all its members think expedient, and which, apart from the law relating to incorporated companies, they might lawfully do. An incorporated company's assets are its property and not the property of the shareholders for the time being; and, if the directors misapply those assets by applying them to purposes for which they cannot lawfully be applied by the company itself, the company can make them liable for such misapplication as soon as anyone properly sets the company in motion."

Later on LINDLEY, L.J., says :

"Directors have no right to be paid for their services, and cannot pay themselves or each other, or make presents to themselves out of the company's assets, unless authorised to do so by the instrument which regulates the company or by the shareholders at a properly convened meeting. The share-

- A holders at a meeting duly convened for the purpose, can, if they think proper, remunerate directors for their trouble or make presents to them for their services out of assets properly divisible among the shareholders themselves. . . . But to make presents . . . out of moneys borrowed by the company is a very different matter. Such money cannot lawfully be divided amongst the shareholders themselves, nor can it be given away by them for nothing to the directors so as to bind the company in its corporate capacity.
- B But even if the shareholders in general meeting could have sanctioned the making of these presents, no general meeting to consider the subject was ever held. It may be true, and probably is true, that a meeting if held would have done anything which [the chairman] desired; but this is pure speculation, and the liquidator, as representing the company in its corporate capacity,
- C is entitled to insist upon and to have the benefit of the fact that, even if a general meeting could have sanctioned what was done, such sanction was never obtained. Individual assents given separately may preclude those who give them from complaining of what they have sanctioned; but for the purpose of binding a company in its corporate capacity individual assents given separately are not equivalent to the assent of a meeting. The company is entitled
- D to the protection afforded by a duly convened meeting, and by a resolution properly considered and carried and duly recorded. The articles of this company, wide as they are, do not authorise such presents as those impeached by the liquidator."

E All LINDLEY, L.J.'s statements, both with regard to *Re British Seamless Paper Box Co.* (5) and *Re George Newman & Co.* (1) then before him, are made with reference to the particular facts which he states. It is quite true that in reciting the facts of the former case he states that the transaction was sanctioned by a general meeting, but he does not in any way rely on that fact. The plaintiffs suggest that this was the whole point of his decision. But what he really means is that, where a transaction is intra vires the company and honest, the sanction of all the members of the company, however expressed, is sufficient to validate it,

F especially if it is a transaction entered into for the benefit of the company.

In *Re Express Engineering Works, Ltd.* (2), a syndicate of five persons formed a private company, in which they were the sole shareholders, and sold it for £15,000 in debentures of the company property which they had a few days before acquired for £7,000. The contract for the sale and the issue of the debentures was carried out at a meeting of the five, who there and then appointed themselves

G directors. This meeting was described in the minutes as a board meeting. At a subsequent meeting the company's seal was affixed to the debentures. The articles provided that no director should vote in respect of any contract or agreement in which he might be interested. On the liquidator claiming a declaration that the issue of the debentures was invalid, it was held, there being no suggestion of fraud, that the company was bound in a matter of intra vires by the unanimous agreement of its members. Although the meeting was styled a directors' meeting,

H all the five shareholders were present, and they might well have turned it into a general meeting and transacted the same business. In these circumstances the issue of the debentures was not invalid. LORD STERNDALÉ, M.R., who was referred to *Re George Newman & Co.* (1), in the same way that I have been, said:

I "There were, however, two differences between that case and the present one: First, the transaction there was ultra vires, and, secondly, in that case there never was a meeting of the corporators. In the present case these five persons are all the corporators of the company and they did all meet, and did all agree that these debentures should be issued. There, it seems that the case came within the meaning of what was said by LORD DAVEY in *Salomon v. Salomon & Co.* (4):

'I think it an inevitable inference from the circumstances of the case that every member of the company assented to the purchase, and the company

is bound in a matter *intra vires* by the unanimous agreement of its members.'

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It is true that a different question was then under discussion, but I am of opinion that this case falls within what LORD DAVEY said. It was said here that the meeting was a directors' meeting, but it might well be considered a general meeting of the company, for although it was referred to in the minutes as a board meeting, yet, if the five persons present had said, 'We will now constitute a general meeting,' it would have been within their powers to do so, and it appears to me that that was in fact what they did."

B

WARRINGTON and YOUNGER, L.JJ., said the same thing. All three judges no doubt refer to the fact that there had been a meeting. But I cannot think that they came to their decision because the five shareholders happened to meet together in one room or place, as distinct from agreeing to the transaction *inter se* in such manner as they thought fit. WARRINGTON, L.J., said:

C

"It was competent to [the shareholders] to waive all formalities as regards notices of meetings, &c., and to resolve themselves into a meeting of shareholders and unanimously pass the resolution in question."

He is there speaking of the actual facts before him.

D

The view I take of both these decisions is that, where the transaction is *intra vires* and honest, and especially if it is for the benefit of the company, it cannot be upset if the assent of all the corporators is given to it. I do not think it matters in the least whether that assent is given at different times or simultaneously. The plaintiffs contend that the two directors acted throughout as if they were partners, and cannot now turn round and shelter themselves behind the company law. I do not take this view. If company law enables the entirety of the corporators to ratify an irregular *intra vires* transaction, why should this not protect an honest, bona fide, *intra vires* transaction entered into for the benefit of the company? I can find nothing in *Re George Newman & Co.* (1) to prevent all the corporators from arranging to carry out an honest *intra vires* transaction entered into for the benefit of the company, even if they do not meet together in one room or place, but all of them merely discuss and agree to it one with another separately. The action is misconceived, and must be dismissed with costs.

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Solicitors: *James Mellor & Coleman*, for *Phipps & Troup*, Northampton; *Roscoe & Hincks*, for *T. J. Parker & Sons*, Wellingborough.

[Reported by E. K. CORRIE, Esq., Barrister-at-Law.]

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MARSDEN v. EDWARD HEYES, LTD.

[COURT OF APPEAL (Bankes, Scrutton and Atkin, L.J.J.), November 3, 1926]

[Reported [1927] 2 K.B. 1; 96 L.J.K.B. 410; 136 L.T. 593]

B *Landlord and Tenant—Tenancy from year to year—Waste—Alteration of premises—No reinstatement before delivery up—Landlord's right to damages—Limitation of action—Time of accrual of landlord's cause of action.*

It is an implied obligation of a tenancy that the tenant will use and deliver up the premises let to him in a tenantlike manner, and so a tenant must not make such structural alterations in the premises as will change their character. A tenant who makes such alterations is guilty of voluntary waste, and is under an implied obligation, which continues throughout the tenancy, to reinstate the premises.

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Horsefall v. Mather (1) (1815), Holt N.P. 7, and *Ferguson v.* ————— (2) (1797), 2 Esp. 589, applied.

D

Premises consisting of a dwelling-house and shop were let to a tenant on an oral yearly tenancy in 1895. In 1914 the tenant gutted the premises, removing all the internal fixtures and fittings and some of the internal walls, the staircase and some of the windows, so converting the whole of the ground floor into a shop and the whole of the first floor into a loft approached by a ladder. The premises were delivered up to the landlord in this condition in May, 1925, and on Sept. 25, 1925, the landlord issued a writ claiming damages. The tenant relied inter alia on the Statute of Limitations, contending that any remedy was barred six years after the alterations had been completed in 1914.

E

Held: the tenant had changed the character of the premises and so had broken the implied obligation to use them in a tenantlike manner; by failing to reinstate the premises he had broken both the continuing obligation to do so and the obligation to deliver up the premises in a tenantlike manner; the breaches of these obligations had continued until the end of his tenancy; and, therefore, the Statute of Limitations afforded him no defence.

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Notes. The Statute of Limitations referred to in the judgments has been repealed and replaced by the Limitation Act, 1939, s. 2 (1) (a) of which repeats the six-year period of limitation for breach of contract.

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Referred to: *Warren v. Keen*, [1953] 2 All E.R. 1118.

As to liability of a tenant for years for waste, see 23 HALSBURY'S LAWS (3rd Edn.) 566-570; and for cases see 31 DIGEST (Repl.) 45, 2044. As to the limitation of actions in respect of such liability, see 24 HALSBURY'S LAWS (3rd Edn.) 288; and for cases see 32 DIGEST 466. For the Limitation Act, 1939, see 13 HALSBURY'S

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STATUTES (2nd Edn.) 1159.

Cases referred to:

(1) *Horsefall v. Mather* (1815), Holt, N.P. 7, N.P.; 31 Digest (Repl.) 349, 4798.

(2) *Ferguson v.* ————— (1797), 2 Esp. 590; 31 Digest (Repl.) 395, 5225.

I

(3) *West Ham Central Charity Board v. East London Waterworks Co.*, [1900] 1 Ch. 624; 69 L.J.Ch. 257; 82 L.T. 85; 48 W.R. 284; 44 Sol. Jo. 243; 31 Digest (Repl.) 390, 5158.

(4) *Hyman v. Rose*, [1912] A.C. 623; 81 L.J.K.B. 1062; 106 L.T. 907; 28 T.L.R. 432; 56 Sol. Jo. 535, H.L.; 31 Digest (Repl.) 365, 4972.

(5) *Henderson v. Squire* (1869), L.R. 4 Q.B. 170; 10 B. & S. 183; 38 L.J.Q.B. 73; 19 L.T. 601; 33 J.P. 532; 17 W.R. 519; 31 Digest (Repl.) 612, 7276.

(6) *Defries v. Milne*, [1913] 1 Ch. 98; 82 L.J.Ch. 11; 107 L.T. 593; 57 Sol. Jo. 27, C.A.; 31 Digest (Repl.) 398, 5277.

Appeal from the decision of Mr. Commissioner COURTHOPE WILSON, K.C., in an action tried by him without a jury at Manchester Assizes on May 11, 1926. A

By an oral agreement entered into on or about July 12, 1895, between one William Henry Marsden, then the husband of the plaintiff, but since deceased, of the one part, and the defendant company on the other part, the latter became tenants of a shop and dwelling-house, No. 179 Derby Street, Bolton, in the county of Lancaster, at a yearly rent of £26, payable quarterly on the usual quarter days. B
The demised premises consisted, as regards the ground floor, of a shop facing the street and a kitchen separated from it by a partition wall. The shop and the kitchen each had a fireplace. The first floor comprised a front bedroom and a back bedroom separated from each other by a partition wall which was a continuation of the partition wall on the ground floor. There was a fireplace in each bedroom, and a staircase led from the ground floor to the first floor. W. H. C
Marsden died on Jan. 14, 1914, leaving all his property to his widow, the plaintiff. The defendants remained in possession of the demised premises until June 25, 1923. On June 25, 1923, the defendants sold their undertaking and assets to George G. Mason & Co., Ltd., and assigned their tenancy of the premises to that company who thereupon took possession of the premises and carried on business there until May, 1925. The plaintiff said that it was an implied term of the agreement that the defendants should, during the term of the tenancy, use the premises in a tenantlike and proper manner, and should keep them in repair and deliver them up with all the fixtures contained therein in the same state and condition as they were in at the commencement of the tenancy, reasonable wear and tear only excepted. The plaintiff alleged that the defendants had used the said premises in an untenantlike and improper manner and had failed to keep them in repair and to deliver them up in the same condition as they were in at the commencement of the tenancy, reasonable wear and tear excepted, and had committed waste in pulling down and removing walls, doors, windows and fixtures and carrying them away and disposing of them to their own use. Evidence was given at the trial that some time in 1914 the defendants had taken down and removed the partition wall which separated the front and back rooms on both floors, all the fireplaces, the staircase and the windows, and doors at the back of the premises, and had converted the ground floor into a shop and the first floor into a loft which was approached by a ladder in place of the staircase. In his judgment the learned commissioner said: "The evidence shows that the premises have been gutted by the defendants, and there is nothing left except the four walls of the building. All the internal fixtures and fittings and some of the walls and grates and so on, have all been removed." E F G

The defendants' contention was that, if they had committed waste, which they denied, it was committed more than six years before the date of the writ, which was Sept. 25, 1925, and that the action was therefore barred by the Statute of Limitations; that any waste committed was of an ameliorative character and improved the value of the premises, regard being had to their nature and user or probable user, and to the purpose for which they were let. The learned commissioner held that the defendants' acts with regard to the user of the demised premises having been committed in 1914, any relief in respect of them was barred by the Limitation Act. He held further that the only implied obligation of a tenant for years was to keep the demised premises wind and water tight, and that there was no evidence of any breach of this obligation on the part of the defendants. Judgment having been given for the defendants, the plaintiff appealed. H I

Cyril Atkinson, K.C., and T. T. Russell for the plaintiff.

Archer, K.C., and Laski for the defendants.

BANKES, L.J.—In my opinion, this appeal succeeds. I desire, however, to confine my decision to the particular facts as proved. [His Lordship stated the facts and continued:] I take the evidence as establishing that the defendants have completely altered the character of the demised premises by converting

A them into something which was not a dwelling-house. This was done more than six years before the action was brought and while the defendants' tenancy was continuing. What does this conversion amount to in the eye of the law?

When the tests laid down in *West Ham Central Charity Board v. East London Waterworks Co.* (3) and *Hyman v. Rose* (4) are applied, it is clear that what has been done here amounts to voluntary waste. I would cite the words of

B LORD LOREBURN in the House of Lords, suggesting as a matter to be considered the question whether what has been done is inconsistent with the terms of the lease. He says ([1912] A.C. at p. 632):

"It is a question of fact whether such an act changes the nature of the thing demised, and regard must be had to the user of the demised premises which is permissible under the lease."

C In the court below it seems to me that only two points were taken on behalf of the defendants; first, that the plaintiff had no vested interest in the reversion in the premises at the time when the acts of waste were committed. That point was not pressed here; in the second place it is said that assuming the waste was wrongful, it was committed more than six years before action brought. The

D learned judge decided this point in favour of the defendants. To this the plaintiff replies that this last contention, even if sound, is not conclusive, and that apart from any tort the law recognises a contractual obligation on the defendants as tenants arising out of the relationship between tenant and landlord, and a distinct obligation in reference to the user to which the premises were to be put, and the extent to which they were to be maintained and repaired by the tenant. I do not intend to define the extent of the obligation. It is enough to

E say that the facts of this case lead to the clear conclusion that here was a breach of that obligation. Some cases were referred to as indicating the judicial views on this matter. In *Horsefall v. Mather* (1), in an action of assumpsit against a tenant at will of a dwelling-house, GIBBS, C.J., referring to a tenancy from year to year of a dwelling-house, said that the defendant was not bound to repair generally, but said: "He is bound to use the premises in a husbandlike manner; the law implies this duty and no more." In *Ferguson v. ———* (2), LORD

F KENYON said:

"A tenant from year to year is bound to commit no waste, and to make fair and reasonable repairs, such as putting in windows or doors that have been broken by him so as to prevent waste and decay of the premises,"

G indicating thereby that if a tenant commits voluntary waste he must do such repairs to the premises as will enable them to exclude wind and water. It may be that he must restore them to the state they would be in if he had committed no waste, or deliver up premises in the state in which they were demised to him, fair wear and tear excepted. To that extent there would be an obligation on the tenant to repair. This is, however, not a question of repair, but of restoration.

H At any rate, the tenant must deliver up premises of the same character as those which were demised to him; for example, a tenant who takes a dwelling-house cannot at the end of the tenancy yield up a storehouse, or a stable, or cowhouse, however elaborately constructed. He cannot turn the house let to him into a house of any other description. I do not think it is necessary further to define the obligation of the tenant because it cannot be contended that a tenant from

I year to year, who completely alters the character of his premises, does not commit a breach of his implied obligation in respect of the premises.

Counsel for the defendants very properly admitted that if there was a continuing breach the Statute of Limitations would not assist the defendants. It follows from the facts of this case that on June 25, 1923, the plaintiff had a cause of action for damages. It has been agreed between the parties that the cost of repairs is the measure of the damages. The appeal will therefore be allowed and judgment will be entered for the plaintiff for £215 6s. 7d., the amount agreed by the parties.

SCRUTTON, L.J.—I am of the same opinion. The defendants became tenants of premises which included a dwelling-house. They have made alterations to the latter to such an extent that there is no longer any dwelling-house. That, in my view, is voluntary waste. But it is said that waste once committed is committed once for all, and comes within the Statute of Limitations, and that as the writ was issued more than six years after it was committed the plaintiff is not entitled to sue for it. That argument overlooks the fact that there is an implied obligation on them as tenants to deliver up the demised premises. In my opinion there is an implied contract by a tenant not only to use the premises in a tenantlike manner, but also to deliver them up at the end of the term unless prevented from so doing by the act of God. To use premises in a tenantlike manner means, at any rate, that a tenant will not make such structural alterations in the premises demised to him as will change their character. If a dwelling-house is let and something which is not a dwelling-house is delivered up the contract to deliver up in a tenantlike manner is broken. *Henderson v. Squire* (5) decides that the contract is not merely in the nature of a covenant for title. It imposes an obligation to deliver up possession of the entire premises at the end of the term, and has relation to their physical condition. Counsel for the defendants contended that as it was merely an implied and not an express obligation, and as there was a subsequent assignment, and a recognition of the assignee as tenant by the landlord, the implied obligation ceased, but that point was not taken in the court below, and it is not open to the defendants here. The case was argued on the assumption that all the acts of waste were done before the assignment took place. The parties have agreed that £215 6s. 7d., which is all that is necessary to put the premises in proper order, should be taken as the amount of damages, on the footing that the defendants are liable. In the result, there must be judgment for the plaintiff for the agreed amount.

ATKIN, L.J.—It appears to me that the plaintiff is entitled to succeed. I do not think that this is a case in which the plaintiff's only remedy is by way of an action for waste. It may be that voluntary waste is the subject-matter of an action of tort, see *Defries v. Milne* (6), but no doubt the tenant would also be liable on an obligation express or implied in the contract of tenancy to deliver up the premises after using them in a tenantlike manner. In the present case the contract of tenancy was oral, and contained no express obligation on the part of the tenants with reference to their user of the premises, so that the question is whether there is an implied term in an oral agreement for a yearly tenancy that the tenant will abstain from such acts as the defendants have committed in this case. The precise obligation of such a tenant in relation to the demised premises has been the subject of discussion for over a century, and I am not sure that the obligation can be satisfactorily defined, for it must depend on the relation between the parties, the character and condition of the demised premises and other varying circumstances. But the cases cited from *ESPINASSE* (*Ferguson v. ———* (2)) and *HOLT'S NISI PRIUS REPORTS* (*Horsefall v. Mather* (1)), at least 110 years old, show that there is an obligation on the tenant to use the premises in a tenantlike, or, which is the same thing, a husbandlike manner. It follows that he is under a continuing obligation to repair acts which would amount to voluntary waste which involve a breach of the obligation to use the premises in a husbandlike manner. It is clear that these tenants, by entirely altering the character of the premises, did acts amounting to voluntary waste and to a breach of this obligation. The result is that in 1923 they were in default as regards that continuing obligation, which involved an obligation to remedy the breach. That is all we need decide in this case.

Counsel argued that this obligation in regard to the character of the premises, if it existed, was not broken by the defendants, because in 1923 it passed to their assignees. I am not satisfied and do not decide that the obligation passed to the assignees, or whether if it did it so passed as to absolve the defendants or to

- A leave them still liable, because that point was not taken in the court below. Apart from those questions, in my view the breach of the defendants' obligation is sufficient to support the plaintiff's claim. In other circumstances the measure of damages might have to be considered, because they are damages to the reversion, and we do not know what they are, but in the present case the parties have agreed, reasonably taking into consideration the fact that it is a yearly tenancy, that if the defendants should be held liable the cost of necessary repairs should represent the damages. There will, therefore, be judgment for the plaintiff for that amount.

Appeal allowed.

Solicitors: *Woodcock, Ryland & Parker*, for *Russell & Russell*, Bolton;
H. Isaacs, Lewis & Co., for *F. O. S. Leak & Co.*, Manchester.

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

D

GARNETT AND OTHERS v. PRATT AND OTHERS

- E [CHANCERY DIVISION (Lawrence, J.), June 2, 1926]
 [Reported [1926] 1 Ch. 897; 95 L.J.Ch. 453; 135 L.T. 471;
 70 Sol. Jo. 736]

Commons—Inclosure—Award—Fences dividing allotments—Express statutory power to direct erection—No express power to direct maintenance—Implication of power—Enforceability against owners of tenanted land—Inclosure Act, 1836 (6 & 7 Will. 4, c. 115), ss. 26, 27, 32—Inclosure Act, 1845 (8 & 9 Vict., c. 118), s. 83.

- F Although the Inclosure Act, 1836 (Lord Worsley's Act) gave inclosure commissioners appointed thereunder no express power to direct any person to maintain a wall which that person had been directed, under the Act, to erect, such a power is to be implied from the authority the Act gave the commissioners to divide land and direct the erection of boundary fences.

- G Held, accordingly, that a direction, contained in an award made on Mar. 22, 1859, which allotted certain land to a commoner, his heirs and assigns, that they should make and for ever thereafter maintain certain fences on the boundary thereof, was valid, and that the direction to maintain was enforceable in 1926 by the owners of adjoining land against the owners of the land, as assigns of the commoner, even though the land was occupied by a tenant.

- H *Cuckfield R.D.C. v. Goring* (1), [1898] 1 Q.B. 865, distinguished.

Notes. The Inclosure Act, 1836, was repealed by the Commons Act, 1899, s. 23 and Sched. 2. As to the Inclosure Act, 1836, see 5 HALSBURY'S LAWS (3rd Edn.) 374.

- I Cases referred to:

- (1) *Cuckfield R.D.C. v. Goring*, [1898] 1 Q.B. 865; 67 L.J.Q.B. 539; 78 L.T. 530; 62 J.P. 358; 46 W.R. 541; 14 T.L.R. 362; 42 Sol. Jo. 471, D.C.; 26 Digest 369, 945.
- (2) *Micklethwaite v. Vincent* (1892), 67 L.T. 225; 8 T.L.R. 685; affirmed (1893), 69 L.T. 57; 9 T.L.R. 268; 2 R. 603, C.A.; 11 Digest (Repl.) 78, 993.

Witness Action by the owner and tenant of a farm for a declaration that the defendants, the owners and tenant of an adjoining farm, were bound to repair and maintain a boundary wall.

The predecessors in title of the plaintiff and the predecessors in title of the defendants had certain rights in "Green Scarr Pasture" at Hawes, in the North Riding of Yorkshire, and on Mar. 22, 1859, an award was made in respect of these rights under the Inclosure (Lord Worsley's) Act, 1836, whereby there were allotted to the plaintiff's predecessor in title in respect of his cattle gates or stints and other rights in the open and common stinted pasture field, "Green Scarr Pasture" at Hawes, 149a. 1r. 9p. being No. 4 on the plan on the award and to the defendant's predecessors in title in respect of their rights in "Green Scarr Pasture," 182a. 1r. 29p., being No. 6 on the same plan, and the land so allotted was assigned to the defendants' predecessors, their heirs and assigns. A
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Under the award of Mar. 22, 1859, the person to whom the land No. 4 was allotted was directed to make and for ever thereafter to maintain certain fences on the boundaries thereof, and the persons to whom the land No. 6 was allotted were directed to make and for ever thereafter to maintain a good and sufficient fence on the whole of the south-west side thereof adjoining the land No. 4. In accordance with that award a wall or fence was erected about 5ft. in height, extending 847 yards, and separating the defendants' and the plaintiff's respective allotments, No. 4 and No. 6 respectively. On the evidence it was held that the wall had been allowed to fall into disrepair, and that the tenants of these respective allotments had for twenty years or more acquiesced in the sheep of the other straying through the gaps in the walls and grazing upon his allotment. The tenants of the two allotments having recently fallen out, disputes arose between the owners and tenants on either side of the boundary wall as to which of them were liable to put the wall into a proper state of repair. As a result the plaintiff, the owner of the allotment No. 4, and his tenant brought this action against the owners of the allotment No. 6 and their tenant Mr. Pratt, asking for a declaration that the defendants, the owners of No. 6 were, and as from the commencement of his tenancy or occupation, the defendant Pratt was, bound to rebuild, repair and maintain the wall, or to erect, repair and maintain on the site of such wall a good and suitable wall sufficient to turn cattle and sheep, and also a mandatory order to rebuild such parts of the wall as were decayed or had been destroyed. C
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By ss. 26 and 27 of the Inclosure Act, 1836, the commissioner was authorised to allot the lands to be inclosed and at the desire of the parties might set out several allotments together without being fenced from each other though distinguished in the award by metes and bounds, and he was empowered to give directions for the erection of fences sub-dividing the several allotments, but he was not authorised in express terms to give directions for the maintenance of such fences. The Inclosure Act, 1845, however, by s. 83, authorised the valuer making the award to direct who was to maintain the fences. G

J. M. Paterson, for the plaintiffs, referred to *Micklethwaite v. Vincent* (2).

G. D. Johnston, for the defendants, the owners of the allotment No. 6, referred to *Cuckfield R.D.C. v. Goring* (1). H

Meyrick L. Beebee for the defendant Pratt, the tenant in occupation of allotment No. 6.

LAWRENCE, J.—This case is an unfortunate one in that it involves a very small pecuniary consideration, and I fear that the law expenses have far exceeded the intrinsic value of the subject-matter in dispute. At the same time it does raise an important question as to the liability to repair fences directed to be erected under an award made pursuant to the Inclosure Act, 1836. The real question to be decided in this case is on whom is the liability to repair the length of wall which lies between two points which have conveniently been marked A and B on the ordnance map which has been used in the course of the trial. There would be nothing out of the common in this case but for the fact that the two tenants of the properties on each side of the wall had been friends for many years, and for some reason or other which I do not propose to inquire into, fell I

- A out, and thereupon the disputes which culminated in this action began. Up to a very short period, as the defendant, Mr. Pratt, the occupier of the defendant owner's land, put it, twelve months ago, the parties had been friends, and, as I hold on the facts, they allowed each other's sheep to stray across the boundary wall. I do not accept as a fact that it was all one-sided as I was asked to hold. I hold as a fact that the straying took place on both sides. In other words in
- B order to ease the liability to repair which, as between the two parties, would fall, in my opinion, upon the defendants, the parties actually in occupation were content that the sheep should go through any gaps for want of repair. It may be that the sheep of the plaintiff went more on to the defendant's land than the defendant's sheep went on to the plaintiff's, but I am not going to count the number of sheep that strayed through these various gaps in the wall. One thing
- C stands out quite clearly in this case, that the wall has been allowed to get into a very bad condition, and now that the parties have got at arm's length, the court has to decide the legal rights, and who is liable to restore it as a proper boundary wall, having regard to the country in which it is situate, and to the purpose for which it was originally placed upon the land. It has undoubtedly been partially patched and repaired from time to time by the defendants, but now they deny all
- D liability to repair the wall at all and say that if the plaintiff wants a fence between their land and his, he ought to erect a wall or boundary fence on his own land. That brings me to the point whether the direction contained in the award in this case is one which can be enforced at the present time by the plaintiff against the defendants. The award, which is quite clear on the point, directed the predecessors of the defendants to erect this wall and directed them for ever after
- E to maintain it in a proper condition. It has been forcibly argued by counsel for the defendant owners that the commissioner who made the award was acting ultra vires in so far as he directed the maintenance of the wall which he directed the defendant's predecessor to erect. He does not go so far as to say that the commissioner was acting ultra vires in directing the erection of the wall, but contends that he had no power to direct the person to maintain that wall thereafter. In support of that contention he has referred to the Inclosure Act, 1845, which, by s. 83, confers an express power upon the valuer making the award to direct who is to maintain it and to give direction in his award as to the persons who are for ever after to maintain the fence.

- It is contended that that section supplied an omission from the 1836 Inclosure Act, and that this award having been made under that Act the commissioner
- G had no such power. My view of the construction of the Act of 1836 is this, that although there is no express direction in that Act empowering an award to be made directing any person to maintain a wall he had been directed to erect, those powers are implied by the Act by reason of the authority conferred upon the commissioner to divide the land and to erect boundary fences on the land so allotted. It is true that there are certain special provisions in that Act which
- H show that in certain cases the persons to whom allotments are made can waive the direction that fences should be erected to divide their property, in other words, where allotments were proposed to be made by the commissioner to various persons they might combine together, and, by giving notice, demand the commissioner to make one allotment without sub-division by fences of the property which he was going to allot in severalty to each of them. That provision, which
- I is contained in s. 27 of the Act of 1836, shows to my mind conclusively that the authority conferred on the commissioner under s. 26 included the direction as to the erection of fences round the allotments which he was authorised to make. Section 32, which has been relied upon by the defendants, in my judgment, shows only this, that, if an owner had a piece of land allotted to him which did not carry with it the burden of erecting a fair proportion of the boundary fences, the commissioner had power to direct him to pay a sum of money to the neighbouring allottee in relief of their obligations to erect boundary fences. Counsel for the defendant owners has rightly pointed out that neither in s. 27 nor in s. 32 is there

anything said about maintaining the fences after they have been erected. In my judgment, however, it follows from the authority which the commissioner had to direct fences to be erected that he had the power to direct who was to maintain the fences thereafter. It seems to me that it would be extraordinary if, after he had directed the fences to be erected, the persons on whom he had laid that obligation could, the moment after they had erected them, have pulled down the fences or let them go into decay, so that after a few years they would be useless. A

The true meaning and effect of these Common Inclosure Acts, to my mind, is that the persons who are directed to erect fences must, for the protection of the other persons having land on the other side of the fences, maintain those fences; otherwise it seems to me the Inclosure Act would result in nothing short of a farce, because the adjoining owner has no right to go on to the land of his neighbour in order to effect the necessary repairs of those walls. It would mean, notwithstanding an obligation to erect the walls which had been placed upon the defendant's predecessor in title and the defendants themselves, yet the plaintiff for his protection would have to erect another wall on his side which he could repair. In the result, I have come to the conclusion that, although not expressed, there is an implied authority in the Act of 1836 on the commissioner to direct, as he has directed, who is to keep the walls in repair. The direction which I find in the award is that the persons on whom the obligation to repair is placed are the persons to whom the parcels of ground are respectively assigned, set out, allotted and awarded their several and respective heirs, executors, administrators, and assigns according to the natures and tenures thereof respectively. Counsel for the defendant owners has argued that under that direction the defendants, as the personal owners, not being in occupation are not under any liability, and he has cited *Cuckfield R.D.C. v. Goring* (1) in support of that proposition. In my judgment that case has nothing to do with the case that I have to consider on the present occasion. Here there is imposed a direct statutory liability on certain persons who are identified as heirs, executors, and assigns. The defendant owners are the assigns of the original allottee of the land, and, therefore, there is here direct statutory obligation upon them in the character of assigns of the land. In *Cuckfield R.D.C. v. Goring* (1) the court was dealing with s. 25 (2) of the Local Government Act, 1894, in which it was enacted that where a highway repairable *ratione tenuræ* appears not to be in proper repair and the person liable to repair the same fails when requested so to do, the district council may repair it, and it was there held that the person who was liable to repair the highway in that case was the occupier and not the owner who was not in occupation. To my mind that is a different state of circumstances from what there is here. In one sense the obligation to repair and maintain this wall imposed by the award is one which follows the land, and, therefore, in a sense may be said to be *ratione tenuræ*; but it is not the case, as I understand that phrase where it is used usually in connection with repair of highways. This is an obligation imposed for the benefit of two persons, adjoining owners, and it is an obligation imposed for the purpose of carrying out the scheme of the Inclosure Act of allotting common land unenclosed to various persons who had common rights over those lands. B

For these reasons I have come to the conclusion that the defendants, the owners of the land, are the persons on whom the obligation primarily rests. No doubt as between themselves and William Pratt they may have an arrangement which would throw the burden on to him, but as to that I have no evidence and I am not in a position to decide as between those two. In my opinion, the plaintiffs are entitled to have a declaration that the liability to repair is on the defendants and I am prepared to make that declaration without prejudice to any question as to the liability between the defendant Pratt and the other defendants. Having heard the evidence I have no hesitation in determining that the fence is now out of repair and requires to be repaired and repaired in such a way as to form a turnable stone fence between the two properties. On the evidence it is plain that the original height of the fence when it was first erected is the right C

A height. If it should happen that after such a fence has been erected that the sheep of the plaintiffs still escape and get on to the defendant's land the plaintiff cannot complain of that when a proper wall has been erected. All that the defendant need do is to keep in proper repair an effective fence between the two properties. After that the plaintiff will be liable if his sheep get on to the defendant's land. There only remains the counterclaim to be dealt with. The counter-claim claims damages for trespass. I think the short answer to that claim is that the trespass has resulted mainly, if not entirely, owing to the breach of the duty to repair this wall. It may very well be that owing to the arrangement between the two tenants the wall has got into a worse condition than it would have if the plaintiffs had insisted strictly on their rights and had had the wall repaired; but, in the circumstances, I have no hesitation in holding that the liability has never
 B been abandoned or waived or that there is any statute of limitations or other statute which would prevent the plaintiffs from now enforcing their rights under the award to have the wall now placed in proper repair. It may very well be that among neighbours, where good will prevails, the occupying tenant may come to an arrangement among themselves, which arrangement, however, I hold has no effect in prejudicing or affecting the rights of the owners of the land to prevent
 C them or to form a bar against their enforcing their rights as and when the occasion has arisen. Here the occasion has arisen and so I hold that the counterclaim of the defendants fails and must be dismissed with costs. The plaintiffs will get the costs of the action.

E Solicitors: *Golding, Hargrove & Golding*, for *Holden & Wilson*, Lancaster; *Maude & Tunncliffe*, for *Willan & Metcalfe*, Hawes; *Jenkinson, Meyler & Campbell*.

[Reported by GEOFFREY P. LANGWORTHY, Esq., Barrister-at-Law.]

F

Re DEBTOR (No. 3 of 1926)

G

[COURT OF APPEAL (Lord Hanworth, M.R., Scrutton, L.J., and Russell, J.), June 25, 1926]

[Reported [1927] 1 Ch. 97; 135 L.T. 689; [1926] B. & C.R. 86]

H

Bankruptcy—"Business"—Professional artist—Contracts for fixed sums to supply costumes, scenery, and assistant artists—*Bankruptcy Act, 1914* (4 & 5 Geo. 5, c. 59), s. 125.

A married woman debtor engaged in producing for the stage scenes and vocal acts in which she appeared and for which she received fixed sums, out of which she had to supply any assistants who appeared with her, properties, and costumes,

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Held: the debtor was a married woman who "carries on a . . . business" within the meaning of the *Bankruptcy Act, 1914*, s. 125, and so was liable to be made bankrupt.

Notes. Although the distinction for bankruptcy purposes between a married woman and a feme sole has been abolished, and s. 125 repealed, this case remains an authority as to what constitutes a "trade or business" for the purposes of the *Bankruptcy Act*, and may, therefore, be of assistance in construing, e.g., "in the possession, order or disposition of the bankrupt, in his trade or business, . . . under such circumstances that he is the reputed owner thereof," in s. 38 (c).

Considered: *Re Debtor, Ex parte Debtor* (No. 490 of 1935), [1936] Ch. 237. **A**
 Referred to: *Re Bankruptcy Notice* (No. 292 of 1928) (1928), 44 T.L.R. 533.

As to what constitutes carrying on a trade or business for the purposes of bankruptcy law, see 2 HALSBURY'S LAWS (3rd Edn.) 438; for cases see 4 DIGEST 16-24; and for the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Cases referred to:

- (1) *Doe d. Bish v. Keeling* (1813), 1 M. & S. 95; 105 E.R. 36; 31 Digest (Repl.) 169, 2038.
- (2) *Smith v. Anderson* (1880), 15 Ch.D. 247; 50 L.J.Ch. 39; 43 L.T. 329; 29 W.R. 21, C.A.; 9 Digest (Repl.) 70, 270.
- (3) *Re Collins*, [1925] 1 Ch. 556; 133 L.T. 479; sub nom. *Re Collins, Ex parte Salaman (Trustee)*, 95 L.J.Ch. 55; [1925] B. & C.R. 90; Digest Supp.
- (4) *Re Allen, Ex parte Shaw*, [1915] 1 K.B. 285; 84 L.J.K.B. 271; 112 L.T. 194; 59 Sol. Jo. 130; [1915] H.B.R. 39, C.A.; 4 Digest 33, 273.
- (5) *Rolls v. Miller* (1884), 27 Ch.D. 71; 53 L.J.Ch. 682; 50 L.T. 597; 32 W.R. 806, C.A.; 43 Digest 6, 10.
- (6) *Re Wilkinson*, [1922] 1 K.B. 584; 126 L.T. 673; 66 Sol. Jo. 269; sub nom. *Re Wilkinson, Re Randall*, 91 L.J.K.B. 326; 44 Digest 1304, 94.
- (7) *Currie v. I.R. Comrs., Durant v. I.R. Comrs.*, [1921] 2 K.B. 332; 90 L.J.K.B. 499; 125 L.T. 33; 37 T.L.R. 371; 12 Tax Cas. 245, C.A.; Digest Supp.
- (8) *Re Dagnall, Ex parte Soan and Morley*, [1896] 2 Q.B. 407; 65 L.J.Q.B. 666; 75 L.T. 142; 45 W.R. 79; 40 Sol. Jo. 731; 3 Mans. 218, D.C.; 4 Digest 32, 267. **E**

Appeal by petitioning creditors from a decision of Mr. Registrar FRANCKE, given on May 15, 1926, refusing to make a receiving order against the debtor, a married woman.

The petitioning creditors by a bankruptcy petition on Jan. 2, 1926, alleged that the debtor, a married woman, had carried on the trade or business of a scena producer for six months or more last past at the London Coliseum and other places, and that she was indebted to them in £294 18s. 3d. the amount remaining due on a final judgment obtained on July 14, 1925, for £404 8s. 3d. and £11 5s. costs for the price of goods sold and delivered. Within three months before the date of the presentation of the petition, the debtor committed an act of bankruptcy by failing to comply before Dec. 1, 1925, with the requirements of a bankruptcy notice issued by the petitioning creditors against her on Nov. 17, 1925, and served on her on Nov. 23, 1925. On Mar. 13, 1926, notice was given that the debtor intended to oppose the making of a receiving order on the ground that she had not carried on the trade or business of a scena producer or any trade or business for six months last past or at all. The case came before Mr. Registrar FRANCKE, was adjourned, and was finally heard by him on May 5, 8, and 15, 1926. Contracts entered into by the debtor were produced, of which the following are typical: "Sept. 21, 1925, between debtor assisted by Thrope Bates and Moss's Empire, Ltd., artistes to appear as vocalists." "Nov. 27, 1925, debtor and Nat Ayer and Moss's Empire, Ltd., to appear in and provide vocal act. The money in each case is paid over to Thomas Conolly by authority of the debtor." Eleven other contracts were produced of the same nature, all signed by the debtor alone. The contracts were all in award form such as is given to all artists. Exclusive contract in same form save as to barring clauses. Evidence was given that goods supplied to the debtor were dresses for personal wear on the stage, that the debtor only went on the stage, accompanied by another singer and a pianist, to sing songs, and that she had sung with the same man before she commenced to produce her own scenes. The debtor was paid a fixed sum under each contract, and out of that sum had herself to pay those who appeared with her and also to provide any necessary properties and costumes. **F**
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A The registrar held that the debtor was not carrying on a trade or business, and so refused to make a receiving order.

The petitioning creditors appealed.

Edward Clayton, K.C., and E. W. Hansell, for the petitioning creditors, referred to *Doe d. Bish v. Keeling* (1), *Smith v. Anderson* (2); see also the recent case of *Re Collins* (3), 2 HALSBURY'S LAWS (2nd Edn.), p. 173, para. 281.

B WILLIAMS' BANKRUPTCY PRACTICE, p. 217, was also referred to.

W. T. Monckton, for the debtor, referred to *Re Allen, Ex parte Shaw* (4). [MASTER OF THE ROLLS.—That the word "business" can be used to include profession is shown by the Finance (No. 2) Act of 1915, which excludes a profession from the word "business."] *Rolls v. Miller* (5), *Smith v. Anderson* (2), *Re Wilkinson* (6). [MASTER OF THE ROLLS.—Is there any case to show that a professional person is to be excluded from the word "business."'] I know of none.

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E LORD HANWORTH, M.R.—This is an appeal from an order made by the registrar refusing a receiving order and discharging a petition presented by the creditor against the debtor No. 3 of 1926. The act of bankruptcy was the failure to comply with a bankruptcy notice founded on a judgment obtained in respect of a debt incurred by the debtor and in respect of which the petitioning creditor had obtained a regular judgment. There is no question raised as to the proceedings up to the service of the bankruptcy notice. On Mar. 13, 1926, a notice was given disputing the petition by the debtor and that was heard before the registrar in May, 1926. The debtor is a married woman and application was made for a receiving order against her with a view to making her a bankrupt. The application was made relying on the provision in s. 125 of the Bankruptcy Act, 1914, that

"Every married woman who carries on a trade or business, whether separately from her husband or not, shall be subject to the bankruptcy laws as if she was a feme sole."

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I It is said on behalf of the debtor that she was not carrying on a trade or business and that, though she is a married woman, s. 125 was not applicable. The facts are these: This lady, the debtor, is a person well known as a comedy artiste and has a professional name under which she acts on the stage. Up to May, 1925, she was engaged in musical comedy, after that she produced scena and vocal acts. In the course of producing these scena she required certain goods and became also involved in other liabilities. A number of contracts have been produced under which she engaged to supply in particular cases one or more assistants and to pay them when they were necessary in the production of the scena, and she was bound to provide such properties as were required for the proper completion of her scena. In some cases she had to supply the necessary accompaniment to her musical scena, and at rehearsal to supply something in the nature of a band. It is therefore clear that she is not solely contracting for her own services, but also for additions and properties to make the scena more effective and that involved the addition to her own personal service of slight services of other artists, and in course of obtaining these properties and services of assistants it was necessary for her to pay for them and thereby incur liabilities. Her artistic performance is added to and enhanced by these et cetera and by those she employs.

It is said that she is not engaged in a business but is still a professional artiste, and that it is not right to say that she is carrying on a business within the meaning of s. 125, but that she is a professional artiste only. I do not wish to derogate from her status and she is entitled to be called a professional artiste, but the question is: as so engaged is she within s. 125? I will say nothing as to what constitutes a profession except to quote the remarks of SCRUTTON, L.J., with which I agree, in *Currie v. I.R. Comrs.* (7) ([1921], 2 K.B. at pp. 340, 341):

"In my view it is impossible to lay down any strict legal definition of what is a profession, because persons carry on such infinite varieties of trades and businesses that it is a question of degree in nearly every case whether the form of business that a particular person carries on is, or is not, a profession. Accountancy is of every degree of skill or simplicity. I should certainly not assent to the proposition that as a matter of law every accountant carries on a profession or that every accountant does not. The fact that a person may have some knowledge of law does not, in my view, determine whether or not the particular business carried on by him is a profession."

Later on he indicates the difficulty in making a delimitation. The question does not arise here, we have to determine only whether this lady is carrying on a business within the meaning of s. 125.

Section 1 (5) of the Married Women's Property Act, 1882, provided that every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole, and it will be noticed that that sub-section refers to the carrying on of a trade only. The Bankruptcy Act, 1883, used the same word "trade" only, but in the Bankruptcy Act, 1913, the responsibility of a married woman was enlarged to include trade or business and that extension to business as well was also contained in the Bankruptcy Act, 1914. When in the Bankruptcy Act, 1914, trade or business was used s. 1 (5) of the Married Women's Property Act, 1882, was repealed. The intention was to enlarge the sphere of responsibility of a married woman. It is clear from a consideration of the cases that the addition of the word "business" has added much to the scope of the word "trade" when used alone. In *Smith v. Anderson* (2) (15 Ch.D. at p. 259) SIR GEORGE JESSEL said: "It is unnecessary to refer to authorities to show that 'business' has a more extensive signification than 'trade.'" Again in the case of *Rolls v. Miller* (5) (27 Ch.D. at p. 85) COTTON, L.J., says: "I cannot read the two words 'trade' and 'business' as synonymous." It is clear therefore that the legislature intended to add to the sphere of the responsibility of a married woman. The Registrar took a different view holding that the words "trade or business" were ejusdem generis, perhaps he did not have the opportunity of considering these cases; he said:

"I do not believe that the object of s. 125 of the Bankruptcy Act, 1914, was to include profession or occupation under 'business' and that 'trade or business' are ejusdem generis and intended to bring within the scope of the Act women who are actually trading or carrying on a business in the nature of a trade. From her own evidence she only goes on and sings songs with a man with whom she has sung before on the stage. The fact that she is assisted by another singer and a pianist does not seem to me to make her any the less a professional artiste than when she was on the stage."

We have to consider whether the activities of this lady were such that she can be said to have been carrying on a business. It is a question of fact but it is difficult to see why she should be immune from bankruptcy proceedings as she has, in the course of carrying out her contracts, to incur liabilities to traders though that fact in itself may not be sufficient. In *Rolls v. Miller* (5) (27 Ch.D. at p. 87) LINDLEY, L.J., said that a private family who, on premises the subject of a covenant not to carry on a trade or business thereon, had their meals cooked in the ordinary way by a cook on the premises could not possibly be said to be within the covenant, showing that the purchase and cooking of the ordinary necessities of life was not such as to bring one within a covenant not to carry on a business. In *Smith v. Anderson* (2) (15 Ch.D. at p. 258) SIR GEORGE JESSEL said:

"Then taking the last edition of the Imperial Dictionary, which is a very good dictionary, we find it a little more definite, but with a remark that is worth reading: 'Business, employment; that which occupies the time and

A attention and labour of men for the purpose of profit or improvement.' That is to say, anything which occupies the time and attention and labour of a man for the purpose of profit is a business. It is a word of extensive use and indefinite signification."

He accepts that definition. That such has been the trend of the authorities for a long period is shown by the judgment of LE BLANC, J., given in 1813, in the case of *Doe d. Bish v. Keeling* (1), in which he said (1 M. & S. at p. 100):

B "I do not think that the meaning of the parties can be fairly confined to trade, because they have used in addition the word 'business'; which must be intended of something not falling within the description of trade."

And he proceeds to decide that a school falls within the terms of the covenant.

C That being the true interpretation to be given to this word, is an exception to be made on the ground that the person is or claims to be a professional artiste? It is useful to call attention to the fact that in the Finance (No. 2) Act, 1915, the terms of s. 39 are "The trades or businesses to which this part of this Act applies are all trades or businesses (whether continuously carried on or not) of any description." There the word "business" was being used in the sense explained in the cases I have referred to, *Rolls v. Miller* (5) and *Smith v. Anderson* (2). It is plain, therefore, that the word "business" is used in a comprehensive sense, and that is made more clear by the words of sub-cl. (c) of that s. 39:

E "Any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on, and in which no capital expenditure is required, or only capital expenditure—of a comparatively small amount."

F That is an indication that a profession may be indicated by the word "business," and if you use the word "business" you must except a profession otherwise it may be included. Therefore this lady is brought within the terms of s. 125 by what she is engaged in. In my judgment the Registrar has taken too narrow a view of the section. There is no reason why a receiving order should not be made, for this lady's activities seem to involve liabilities to others of a nature which ought to be solved by process of the bankruptcy laws. The appeal will be allowed with costs and a receiving order be made.

SCRUTTON, L.J.—This is an attempt to make a married woman a bankrupt. The Registrar, however, declined to make a receiving order against her and the creditor appeals. Whether the Registrar is right depends on s. 125 of the Bankruptcy Act, 1914, which provided that every married woman who carried on a trade or business, whether separately from her husband or not, should be subject to the bankruptcy laws as if she were a feme sole, and the question, therefore, is whether this lady carried on a trade or business. In the progress of legislation on this subject the immunity enjoyed by married women has been cut down. By H the first statute she was made liable to the bankruptcy laws only if she carried on a trade, but later that was extended to a trade or business, and I cannot agree with the Registrar that these two words mean the same. Originally she could only be made liable if she was trading separately, but now she is liable whether trading separately from her husband or not. The word trade is often confined to buying and selling commodities. Where to draw the line between what is a profession and what a trade is a matter which it is not possible to deal with by any general definition. Business is a much wider term than trade. The word "business" at least covers a continuous occupation involving liabilities to others, and it is difficult to see the reason why a married woman should not be liable to the ordinary consequences of the bankruptcy laws by incurring liabilities and not meeting them. It is said that this section only applies to such debts as are incurred in the course of trading, but the section does not say so. I agree with what was said by WRIGHT, J., in *Re Dagnall, Ex parte Soan and Morley* (8) ([1896] 2 Q.B. at p. 411), that in his view

"a married woman who trades separately is to be subject to bankruptcy laws in respect of all debts incurred by her in the period during which she was carrying on the trade."

He was there construing s. 1 (5) of the Married Women's Property Act, 1882, which did not include the word "business" as well as the word "trade." If that is the meaning to be given to the section, what is it that this lady has done? She was at one time an actress in musical comedy relying upon her personal gifts. She changed from that to the production of scena for which she received a fixed sum out of which she pays persons to assist her in the act, and also pays for her costumes, for extra scenery, and possibly in certain cases for band parts. She is carrying on a continuous occupation for the purpose of making a profit and enters into contracts by which she binds herself to give or put on the stage such productions and provide for the extras I have mentioned. That, in my view, comes well within the word "business." I am not going to decide to what extent purely personal service known as professional is within the section. In the circumstances of this case I am satisfied the lady is carrying on a business within this section.

RUSSELL, J.—I am of the same opinion. The question is whether this particular debtor is carrying on a business within the meaning of this s. 125 of the Bankruptcy Act, 1914. She is engaged in giving performances on the stage involving the incurring of liabilities and is paid a fixed sum, and after paying what is necessary for the production of the scena contracted to be produced she retains the balance as her profits, and in these circumstances in my opinion this debt can properly be described as carrying on a business within the meaning of the section.

Solicitors: *Finnis, Downey, Tirrell & Chessher; Withers, Bensons, Currie & Williams.*

[Reported by GEOFFREY P. LANGWORTHY, Esq., Barrister-at-Law.]

BISSETT v. WILKINSON AND ANOTHER

[PRIVY COUNCIL (Viscount Dunedin, Lord Atkinson, Lord Phillimore, Lord Carson and Lord Merrivale), June 14, 15, 17, July 20, 1926]

[Reported [1927] A.C. 177; 96 L.J.P.C. 12; 136 L.T. 97;
42 T.L.R. 727]

Misrepresentation—Innocent misrepresentation—Statement of opinion—Opinion erroneous, but reasonably held—Sale of land—New Zealand—Vendor's statement that land would carry 2,000 sheep—Claim by purchaser to rescind.

In an action for the rescission of a contract on the ground of misrepresentation it is essential to ascertain whether the statement relied on is a representation of a specific fact or a statement of opinion, since an erroneous but reasonably held opinion stated by the party affirming the contract, though it may have been relied on and have induced the contract on the part of the party who seeks rescission, gives no right to relief unless fraud is established.

Held, accordingly, that a statement honestly made by the vendor prior to the sale of a farm, the capacity of which had never been practically ascertained, that it would carry two thousand sheep, which statement proved to be mistaken, was not to be regarded as being anything more than an expression of the vendor's opinion, and did not entitle the purchaser to claim rescission of the contract.

Per **Curiam**: The material facts of the transaction, the knowledge of the parties respectively, and their relative positions, the words of representation used, and the actual condition of the subject-matter spoken of, are relevant to the two inquiries to be made. What was the meaning of the representation? Was it true? If a reasonable man with the vendor's knowledge could not have come to the conclusion he stated, the description of that conclusion as an opinion would not necessarily protect him against rescission for misrepresentation.

Notes. As to statements of opinion relied on as misrepresentation, see 26 HALSBURY'S LAWS (3rd Edn.) 823, 824; and for cases see 35 DIGEST 9-10. As to misrepresentations on the sale of land, see 29 HALSBURY'S LAWS (2nd Edn.) 384; and for cases see 40 DIGEST (Repl.) 271-275.

Cases referred to:

- (1) *Re Metropolitan Coal Consumers' Association, Karberg's Case*, [1892] 3 Ch. 1; 61 L.J.Ch. 741; 66 L.T. 700; 8 T.L.R. 637, C.A.; 9 Digest (Repl.) 123, 657.
- (2) *Smith v. Land and House Property Corp'n.* (1884), 28 Ch.D. 7; 51 L.T. 718; 49 J.P. 182, C.A.; 40 Digest (Repl.) 274, 2288.
- (3) *Smith v. Chadwick* (1882), 20 Ch.D. 27; 51 L.J.Ch. 597; 46 L.T. 702; 30 W.R. 661, C.A.; affirmed (1884), 9 App. Cas. 187; 53 L.J.Ch. 873; 50 L.T. 697; 48 J.P. 644; 32 W.R. 687, H.L.; 35 Digest 18, 106.

Appeal by the plaintiff, the vendor of a farm, from the decision of the Court of Appeal of New Zealand (STOUT, C.J., ADAMS and OSTLER, JJ.; REED, J., dissenting) reversing the decision of the trial judge (SIM, J.) in favour of the plaintiff on the claim and the counterclaim. The action was brought by the plaintiff to recover six months' interest on the balance of the purchase money payable to him under an agreement for the sale and purchase of land. The defendants alleged by way of defence and counterclaim misrepresentation by the plaintiff as to the character and quality of the land in question and claimed rescission of the agreement with consequential relief, or alternatively damages for fraudulent misrepresentation or breach of warranty. The decision of SIM, J., in favour of the plaintiff having been reversed by the Court of Appeal, the plaintiff appealed to His Majesty in Council.

M. Myers, K.C. (of the New Zealand Bar), and *F. H. L. Errington* for the vendor. A

M. J. Gresson, K.C. (of the New Zealand Bar), and *F. O. Langley* for the purchasers.

July 20. **LORD MERRIVALE.**—The appellant in this litigation, the vendor, brought his action in the Supreme Court of New Zealand to recover a sum of money payable to him under an agreement for sale and purchase of land. The defendants, the purchasers, by way of defence and counterclaim alleged misrepresentation by the vendor in a material particular as to the character and quality of the land in question and claimed rescission of the agreement with consequential relief or alternatively damages for fraudulent misrepresentation or breach of warranty. On the trial of the action judgment was given for the vendor on the claim and the counterclaim. The Court of Appeal of New Zealand, by a majority, set aside the judgment of the trial judge and decreed rescission of the contract between the parties with consequential relief as prayed. The vendor claims to have the judgment of the Supreme Court reinstated. B C

The contract between the parties was an agreement in writing made in May, 1919, whereby the purchasers agreed for the purchase by them of two adjoining blocks of land at Avondale, in the Southern Island of New Zealand, called "Homestead" and "Hogan's," containing respectively 2,062 acres and 348 acres or thereabouts for £13,260 10s.; £2,000 payable—and it was in fact paid—on the signing of the agreement, and the balance payable in May, 1924, interest to be paid half-yearly in the meantime. The lands in question formed parts of an area of 5,225 acres which the vendor had bought in 1907 and after sundry works of reclamation and improvement had in 1911 subdivided for sale. He sold lots containing 1,500 acres and upwards, 964 acres, 350 acres, and Hogan's block of about 348 acres, retaining the Homestead block of 2,400 acres which he used for his business of a sheep-farmer and sheep dealer until 1919—during the war under some difficulties with regard to labour. Hogan's block was thrown on the vendor's hands by failure of the purchaser to complete, and in September, 1918, on the breakdown of a provisional arrangement which the vendor had made with another intending purchaser, he resumed his occupation of it. During the spring and summer, September, 1918, to April, 1919, the vendor carried out renewal work and stocked part of Hogan's block with young sheep, and in May he made his agreement for sale of the combined areas to the purchasers, who had agreed on a partnership as farmers. D E F

Sheep-farming was the purpose for which the purchasers purchased the lands of the vendor. One of them had no experience of farming. The other had been before the war in charge of sheep on an extensive sheep-farm carried on by his father, who had accompanied and advised him in his negotiation with the vendor and had carefully inspected the lands at Avondale. In the course of coming to his agreement with the purchasers the vendor made statements as to the property which, in their defence and counterclaim, the purchasers alleged to be misrepresentations. At an early period after the purchasers went into occupation and commenced their farming operations they found themselves in difficulties. They sought and obtained extensions of time for payment of the interest which fell due to the vendor. Sheep-farming became very unprofitable and they changed their user of the land. One of them withdrew from the partnership. The other made an assignment of the valuable part of his property to his wife, and on being eventually pressed by the vendor for payments under the agreement disclosed this assignment as an answer to the practical enforcement by the vendor of his demands. The vendor brought his action for a half-year's interest on the unpaid purchase money and the purchasers set up their case of misrepresentation. G H I

By their defence and counterclaim the purchasers alleged that the vendor had "represented and warranted that the land which was the subject of the agreement had a carrying capacity of 2,000 sheep if only one team were employed in the

A agricultural work of the said land." It was common ground at the hearing and in the Court of Appeal that the carrying capacity of a sheep-farm is its capacity the year round. As was said by REED, J., in the Court of Appeal:

B "The meaning of the representation as alleged was that the carrying capacity of the farm during the winter, with such special food and new pasture as could be grown by the proper use in ploughing of one team of horses regularly employed throughout the year, was 2,000 sheep."

The same learned judge said:

"It is also common ground that to bring a farm to its full carrying capacity skilled management is required. It is admitted that the purchasers were not experienced farmers."

C The vendor made these admissions at the hearing: "I told them that if the place was worked as I was working it, with a good six-horse team, my idea was that it would carry 2,000 sheep. That was my idea and still is my idea." Further he said: "I do not dispute that they bought it believing it would carry the 2,000 sheep."

D The learned judge who tried the action, SIM, J., based his judgment in favour of the vendor on conclusions at which he arrived on his examination of the evidence, first, that the representation made by the vendor was a representation only of his opinion of the capacity of the farm, not a representation of what that capacity in fact was; and, secondly, that this representation of opinion was honestly made by the vendor. The learned judge said:

E "It seems to me that the purchasers were not justified in regarding anything said by the vendor as to the carrying capacity as being anything more than an expression of his opinion on the subject. I am satisfied that what he said was, and still is, his honest opinion on the subject."

F These conclusions—if warranted by the evidence—were sufficient to dispose of the whole case of misrepresentation, whether as grounding a claim for rescission or a claim for damages. By them the charge of fraud in the pleadings is also specifically negatived. The cause of action founded on alleged warranty which is set up in the defence and counterclaim was, it has been agreed, not asserted at the trial, and the fact is not without bearing on the true effect of the claims which were relied upon. In the Court of Appeal, as is said in the judgment of STOUT, C.J.,

G "the real question in dispute turned out to be whether the purchasers were entitled to rescission of the contract. They did not rely on the breach of warranty, but they asked for rescission of the contract, though their claim for damages for misrepresentation had not been formally withdrawn."

H The learned judges of the Court of Appeal differed in opinion. REED, J.—who thought the appeal failed—dealt with the case on the contention of the purchasers that the representation made to them by the vendor was a representation of fact. He found it to be conclusively established by the purchasers' own evidence that, given proper management, the farm was fully capable of carrying at least 2,000 sheep. STOUT, C.J., held that the statement relied on was made and accepted as a statement of fact. The learned Chief Justice said:

I "It would surely be improbable that when a seller is asked to say what the carrying capacity of his farm is he should not answer the question but volunteer his opinion or estimate."

As to the truth of the representation, the learned Chief Justice said: "The evidence in my opinion is clear that this place never carried all the year round 2,000 sheep." He added this, "The vendor allowed the purchasers to purchase the farm from him believing that it would carry 2,000 sheep, and, therefore, they were misled." ADAMS, J., and OSTLER, J., alike held that the statement was a representation of fact and was proved to be untrue.

In an action for rescission, as in an action for specific performance of an executory contract, when misrepresentation is the alleged ground of relief of the party who repudiates the contract, it is, of course, essential to ascertain whether that which is relied on is a representation of a specific fact, or a statement of opinion, since an erroneous opinion stated by the party affirming the contract, though it may have been relied on and have induced the contract on the part of the party who seeks rescission, gives no title to relief unless fraud is established. The application of this rule, however, is not always easy, as is illustrated in a good many reported cases, as well as in this. A representation of fact may be inherent in a statement of opinion and, at any rate, the existence of the opinion in the person stating it is a question of fact. In *Re Metropolitan Coal Consumers' Association, Karberg's Case* (1) ([1892] 3 Ch. at p. 11), LINDLEY, L.J., in course of testing a representation which might have been, as it was said to be by interested parties, one of opinion or belief, used this inquiry: "Was the statement of expectation a statement of things not really expected?" The Court of Appeal applied this test and rescinded the contract which was in question. In *Smith v. Land and House Property Corpn.* (2) there came in question a vendor's description of the tenant of the property sold as "a most desirable tenant"—a statement of his opinion, as was argued on his behalf in an action to enforce the contract of sale. This description was held by the Court of Appeal to be a misrepresentation of fact, which, without proof of fraud, disentitled the vendor to specific performance of the contract of purchase. BOWEN, L.J., said:

"It is often fallaciously assumed that a statement of opinion cannot involve the statement of fact. In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is, in a sense, a statement of fact about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally well known to both sides, then a statement of opinion by one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion."

The kind of distinction which is in question is illustrated again in a well-known case, *Smith v. Chadwick* (3). There the words under consideration involved the inquiry in relation to the sale of an industrial concern whether a statement of "the present value of the turnover or output" was of necessity a statement of fact that the produce of the works was of the amount mentioned, or might be and was a statement that the productive power of the works was estimated at so much. The words were held to be capable of the second of these meanings. The decisive inquiries came to be, what meaning was actually conveyed to the party complaining; was he deceived, and, as the action was based on a charge of fraud, was the statement in question made fraudulently?

In the present case, as in those cited, the material facts of the transaction, the knowledge of the parties respectively, and their relative positions, the words of representation used, and the actual condition of the subject-matter spoken of, are relevant to the two inquiries necessary to be made. What was the meaning of the representation? Was it true? In ascertaining what meaning was conveyed to the minds of the purchasers by the vendor's statement as to the 2,000 sheep, the most material fact to be remembered is that, as both parties were aware, the vendor had not and, so far as appears, no other person had, at any time carried on sheep-farming upon the unit of land in question. That land as a distinct holding had never constituted a sheep-farm. The two blocks comprised in it differed substantially in character. Hogan's block was described by one of the purchasers' witnesses as "better land." "It might carry," he said, "one sheep, or perhaps two, or even three sheep to the acre." He estimated the carrying capacity of the land generally as little more than half a sheep to the acre. And

A Hogan's land had been allowed to deteriorate during several years before the purchasers purchased. As was said by SIM, J.:

B "In ordinary circumstances, any statement made by an owner who has been occupying his own farm as to its carrying capacity would be regarded as a statement of fact... This, however, is not such a case. The purchasers knew all about Hogan's block and knew also what sheep the farm was carrying when they inspected it. In these circumstances... the purchasers were not justified in regarding anything said by the vendor as to the carrying capacity as being anything more than an expression of his opinion on the subject."

In this view of the matter their Lordships concur.

C Whether the vendor honestly and in fact held the opinion which he stated remained to be considered. This involved examination of the history and condition of the property. If a reasonable man with the vendor's knowledge could not have come to the conclusion he stated, the description of that conclusion as an opinion would not necessarily protect him against rescission for misrepresentation, but what was actually the capacity in competent hands of the land the purchasers purchased had never been, and never was, practically ascertained. The purchasers, after two years' trial of sheep-farming, under difficulties caused in part by their inexperience, found themselves confronted by a fall in the values of sheep and wool which would have left them losers if they could have carried 3,000 sheep. As is said in the judgment of OSTLER, J.: "Owing to sheep becoming practically valueless, they reduced their flock and went in for cropping and dairy-farming in order to make a living." The opinions of experts and of their neighbours, on which the purchasers relied, were met by the vendor with evidence of experts admitted to be equally competent and upright with those of his opponents, and his own practical experience upon part of the land, as to which his testimony was unhesitatingly accepted by the judge of first instance. It is of dominant importance that SIM, J., negated the purchasers' charge of fraud.

F After attending to the close and very careful examination of the evidence which was made by learned counsel for each of the parties, their Lordships entirely concur in the view which was expressed by the learned judge who heard the case. The purchasers failed to prove that the farm, if properly managed, was not capable of carrying 2,000 sheep. Questions of laches and of affirmation of the contract on the part of the purchasers which were argued at the hearing are not material for further consideration, and in view of the course of the proceedings and the finding of SIM, J., as to the honesty of the vendor in the statements he in fact made, it would be improper to accede to the application which was made at the Board on behalf of the purchasers for leave to proceed anew upon the charge of fraudulent misrepresentation.

G Their Lordships will humbly advise His Majesty that the appeal should be allowed, and the judgment of SIM, J., restored. The purchasers must bear the vendor's costs here and below.

H *Appeal allowed.*

Solicitors: Collyer-Bristow & Co.; Mackrell, Maton, Godlee & Quincey.

[Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.]

A

Re PARK WARD & CO., LTD.

[CHANCERY DIVISION (Romer, J.), April 20, 1926]

[Reported [1926] Ch. 828; 95 L.J.Ch. 584; 135 L.T. 575;
70 Sol. Jo. 670; [1926] B. & C.R. 94]

B

Company—Winding-up—Avoidance of disposition of property after commencement of winding-up—Discretion of court—Debenture issued after presentation of petition—Knowledge of debenture-holder of petition—Summons for declaration of validity of debenture—Costs—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 205 (2).

A petition to wind-up a company was presented on Dec. 8, 1925. On Dec. 16, 1925, a sum of £1,200 was advanced by R. to enable the company to pay the wages of the staff, and the company issued a debenture to R. to secure the repayment of this sum. R. was aware, when he advanced the money, that the petition had been presented. On Jan. 12, 1926, an order was made for the compulsory winding-up of the company. The business of the company was eventually sold as a going concern, which might not have been possible but for the advance made by R.

C

Held: the debenture should be declared valid, and, as what the debenture-holder did was for the benefit of the company and not for his own benefit, the costs of the application for the declaration should be regarded as mortgagee's costs and added to the security.

Re Wiltshire Iron Co. (1), L.R. 3 Ch. 443, applied.

E

Re London, Hamburg, and Continental Exchange Bank (2) (1866), L.R. 2 Eq. 231, distinguished.

Notes. The Companies Act, 1908, has been repealed, but s. 227 of the Companies Act, 1948, corresponds to s. 205 (2) of the 1908 Act.

Applied: *Re Steane's (Bournemouth), Ltd.*, [1950] 1 All E.R. 21. Considered: *Re T.W. Construction, Ltd.*, [1954] 1 All E.R. 744.

F

As to the validation of the court of transactions made after the commencement of the winding-up, see 6 HALSBURY'S LAWS (3rd Edn.) 628; and for cases see 10 DIGEST (Repl.) 845, 904-905. For the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.).

Cases referred to:

(1) *Re Wiltshire Iron Co., Ex parte Pearson* (1868), 3 Ch. App. 443; 37 L.J.Ch. 554; 18 L.T. 423; 16 W.R. 682, L.J.J.; 10 Digest (Repl.) 904, 6142.

G

(2) *Re London, Hamburg, and Continental Exchange Bank, Emmerson's Case* (1866), L.R. 2 Eq. 231; 35 L.J.Ch. 652; 14 L.T. 457; 12 Jur.N.S. 494; 14 W.R. 785; reversed 1 Ch. App. 433; 36 L.J.Ch. 177; 14 L.T. 746; 12 Jur.N.S. 592; 14 W.R. 905, L.J.J.; 9 Digest (Repl.) 410, 2648.

H

Adjourned Summons, with witnesses, for a declaration of the validity of a debenture.

The facts are sufficiently set out in the headnote. Section 205, sub-s. 2, of the Companies (Consolidation) Act, 1908, provided that "In the case of a winding-up by or subject to the supervision of the court, every disposition of the property (including things in action) of the company . . . made after the commencement of the winding-up, shall, unless the court otherwise orders, be void."

I

Sir Thomas Hughes, K.C., and *Wilfrid Hunt* for the applicant debenture-holder.

Clayton, K.C., and *W. G. Swords* for the liquidator.

ROMER, J.—This is an application by a debenture-holder, Mr. J. G. Rowley, asking for an order validating his debenture, notwithstanding the provisions of s. 205 of the Companies (Consolidation) Act, 1908. Apart from the question of its

A date there is no doubt that this is a valid debenture. But it appears that the petition, on which the order for the winding-up of the company was made on Jan. 12, 1926, was presented on Dec. 8, 1925. The debenture was, therefore, created after the commencement of the winding-up.

By s. 205 (2) of the Act of 1908, it is provided as follows :

B "In the case of a winding-up by or subject to the supervision of the court, every disposition of the property (including things in action) of the company . . . made after the commencement of the winding-up, shall, unless the court otherwise orders, be void."

In *Re Wiltshire Iron Co.* (1), LORD CAIRNS, in the course of his judgment, referring to the corresponding section of the Companies Act, 1862, says :

C "The 153rd section no doubt provides that all dispositions of the property and effects of the company made between the commencement of the winding-up (that is, the presentation of the petition) and the order for winding-up, shall, unless the court otherwise orders, be void. This is a wholesome and necessary provision to prevent, during the period which must elapse before a petition can be heard, the improper alienation and dissipation of the property of a company in extremis. But where a company actually trading, which it is the interest of everyone to preserve, and ultimately to sell, as a going concern, is made the object of a winding-up petition, which may fail or may succeed, if it were to be supposed that transactions in the ordinary course of its current trade, bona fide entered into and completed, would be avoided, and would not, in the discretion given to the court, be maintained, the result would be that the presentation of a petition, groundless or well-founded, would, ipso facto, paralyse the trade of the company, and great injury, without any counter-balance of advantage, would be done to those interested in the assets of the company."

I must, therefore, consider the circumstances in which this debenture came to be issued. The position was this. The company was carrying on business and employing many workmen. Their wages fell due on Friday, December 11, three days after the presentation of the petition. In this state of affairs the debenture-holder was approached by the secretary with the object of inducing him to advance to the company moneys sufficient to pay the wages of the workmen on the Friday. To that request the debenture-holder acceded, on the terms that he should receive a debenture for the amount advanced. Had he not done so the wages would not have been paid and the business, temporarily at any rate, would have had to be closed down. The £1,200 was accordingly advanced by the debenture-holder for the purpose of preserving the business as a going concern. The transaction between him and the company was, therefore, just the sort of transaction which LORD CAIRNS thought it was the object of the proviso to the section to preserve and which ought to be rendered valid by an order of the court. During the negotiations for the debenture the debenture-holder knew that the petition had been presented, and counsel for the liquidator asks me to come to the conclusion that the power under the section ought not to be exercised in favour of a person who, at the date of the transaction in question, had knowledge that a petition had been presented. There appears to be no definite authority on that point, but my attention was drawn to a decision of LORD ROMILLY in *Re London, Hamburg, and Continental Exchange Bank* (2). That case, however, related to a transfer of shares after the presentation of a winding-up petition, and to such a case different considerations apply. If I were to adopt the view put forward by counsel for the debenture-holder, a company would in very few cases be able to obtain the assistance necessary to enable it to carry on business as a going concern. LORD CAIRNS evidently regarded the power given to the court by the section as one given for the benefit and in the interests of the company, so as to ensure that a company which is made the subject of a winding-up petition may nevertheless obtain money necessary for carrying on its business and so avoid its business being

paralysed. If, therefore, I were to hold that no one who knows of the presentation of a petition can safely enter into any arrangement with the company, I think I should be depriving the company of the benefit which, according to Lord CAIRNS, the provision of the section was introduced to secure to it.

In the present case the business of the company was eventually sold as a going concern. Had it not been for the timely assistance given by the debenture-holder, I very much doubt whether this would have been possible. I think, therefore, that I ought to accede to his application. In so doing I would add that I see no reason why an applicant, in circumstances of this kind, ought to be obliged to come to the court at his own cost. What the debenture-holder did was for the benefit of the company and not for his own benefit. It follows that the costs of the successful application may well be regarded as mortgagee's costs, and I therefore direct that he add them to his security. The costs of the liquidator will be included in his costs of the liquidation.

Solicitors: *Bulcraig & Davis; Doyle, Devonshire & Co.*

[Reported by J. S. SCRIMGEOUR, Esq., Barrister-at-Law.]

Re A. AND M. (DEBTORS)

[CHANCERY DIVISION (Astbury and Lawrence, JJ.), January 27, 1926]

[Reported [1926] Ch. 274; 134 L.T. 539; 95 L.J.Ch. 258;
70 Sol. Jo. 607; [1926] B. & C.R. 19]

Bankruptcy—Adjudication—Annulment—Infant—Trading debts—Infants Relief Act, 1874 (37 & 38 Vict., c. 62), s. 1.

Two infants, who had been trading in partnership, filed their petition in bankruptcy. The only debts proved in the bankruptcy were for goods supplied to them as traders or for other matters connected with the business. None of the debts was for necessities, and the infants had made no express representations that they were adults. On an appeal against a refusal to annul adjudications in bankruptcy made against the infants,

Held: in view of the provisions of the Infants Relief Act, 1874, s. 1, there were no valid debts on which receiving orders could be made, and so the adjudications must be annulled.

Ex parte Kibble (1), L.R. 10 Ch. 373; *Ex parte Jones* (2), 18 Ch.D. 109; and *Lovell and Christmas v. Beauchamp* (3), [1894] A.C. 607, applied.

Notes. See *Re a debtor* (No. 564 of 1949), [1950] All E.R. 308, in which the Court of Appeal reviewed earlier decisions on the bankruptcy jurisdiction over infants, and held that an infant can be adjudicated a bankrupt, or present a petition against himself, in respect of any debt—which is legally enforceable against him.

Referred to: *Re Debtor* (No. 564 of 1949), *Ex parte Customs Comrs. v. Debtor*, [1950] 1 All E.R. 308.

As to the bankruptcy jurisdiction over infants, see 2 HALSBURY'S LAWS (3rd Edn.) 257; and as to rescission of receiving order, see *ibid.*, 338–341. For cases see 4 DIGEST 28–31 and 161–166 respectively. For the Infants Relief Act, 1874, see 12 HALSBURY'S STATUTES (2nd Edn.) 940.

Cases referred to:

(1) *Re Onslow, Ex parte Kibble* (1875), 10 Ch. App. 373; 44 L.J.Bcy. 63; 32 L.T. 138; 23 W.R. 433, L.JJ.; 4 Digest 325, 3049.

- A** (2) *Re Jones, Ex parte Jones* (1881), 18 Ch.D. 109; 50 L.J.Ch. 673; 45 L.T. 193; 29 W.R. 747, C.A.; 4 Digest 29, 235.
- (3) *Lovell and Christmas v. Beauchamp*, [1894] A.C. 607; 63 L.J.Q.B. 802; 71 L.T. 587; 43 W.R. 129; 1 Mans. 467; 11 R. 45; sub nom. *Re Beauchamp Bros., Ex parte Beauchamp*, 10 T.L.R. 682, H.L.; 4 Digest 29, 230.
- B** (4) *Re Smedley* (1864), 10 L.T. 432; 4 Digest 29, 224.
- (5) *Re Hands, Ex parte Hands* (1867), 15 W.R. 1089; 4 Digest 29, 226.
- (6) *Re Purser, Ex parte Stevenson* (1868), 19 L.T. 23; 4 Digest 29, 225.

Appeal against the dismissal by the registrar of the Kingston-upon-Hull County Court of an application by the Official Receiver for the annulment of adjudications in bankruptcy made by the registrar on the petition of two infant debtors.

C On Mar. 6, 1925, L. A. and B. F. M. commenced business in partnership as fishmongers at Kingston-upon-Hull. On July 29, 1925, they filed their own petition in bankruptcy in the county court, and a receiving order and adjudication in bankruptcy were made on the same day. Their assets were estimated at £33, and realised £28, and the debts proved were £194, all either for goods supplied to them as traders or for other matters connected with the business. The Official Receiver acted as trustee. At the preliminary examination it was ascertained that both the debtors were infants at the time of the adjudication. There was no suggestion that they had made any express representation that they were adults, or that any of the debts were incurred for necessities. On July 28, the Official Receiver, by direction of the Board of Trade, applied to the county court to fix a day for the hearing of an application that the adjudication should be annulled on the ground that both the debtors were infants. A guardian ad litem of the debtors was appointed. The application was heard on Nov. 10, 1925, when the registrar dismissed it without costs. The Official Receiver, by direction of the Board of Trade, gave notice of appeal.

E *E. W. Hansell*, for the Official Receiver, said that by s. 1 of the Infants Relief Act, 1874, all contracts by an infant were made void, other than contracts for necessities, and therefore there were no valid debts on which an adjudication order could be based. He submitted that an infant could not, except possibly in respect of debts for necessities, or in case of an express representation that he was of full age, be made bankrupt, even on his own petition. *Re Smedley* (4), *Re Hands* (5), and *Re Purser* (6) were all before the Infants Relief Act, 1874, and were not now applicable. He referred to *Ex parte Kibble* (1), *Ex parte Jones* (2), *Lovell and Christmas v. Beauchamp* (3).

The debtors did not appear.

ASTBURY, J., stated the facts, and said that here there was no question as to necessities supplied to the debtors, nor was there any evidence that they had expressly represented themselves as of full age. *Ex parte Kibble* (1), *Ex parte Jones* (2), and *Lovell and Christmas v. Beauchamp* (3) showed clearly that since the Infants Relief Act, 1874, there were, in the case of trading infants, no valid debts on which an adjudication could be based, and it was clear that the decision of the registrar was wrong and that the adjudication should be annulled.

P. O. LAWRENCE, J.—I agree.

I Solicitor for the Official Receiver, *The Solicitor to the Board of Trade*.

[Reported by E. K. CORRIE, Esq., Barrister-at-Law.]

A

LOWTHER *v.* HARRIS

[KING'S BENCH DIVISION (Wright, J.), October 20, 21, November 4, 1926]

[Reported [1927] 1 K.B. 393; 96 L.J.K.B. 170; 136 L.T. 377;
43 T.L.R. 24]

B

*Agent—Mercantile agent—Limited authority—No general occupation as agent—
Art dealer—Possession of goods—Goods obtained by fraud—Position of servant—Factors Act, 1889 (52 & 53 Vict., c. 45), s. 1 (1), s. 2.*

A mere servant or shopman cannot be a mercantile agent within the Factors Act, 1889, s. 1 (1). A person who has his own shop and gives receipts and takes cheques in his own registered business name and earns commission is not a mere servant, but is an agent even though his discretionary authority is limited. Nor does the fact that he acts as agent for only one principal and has no general occupation as an agent prevent him from coming within s. 1 (1). Pictures and objects of art can constitute those who deal in them on commission mercantile agents. To bring a person within s. 2 of the Act he must have possession of the goods and also have such possession in his capacity as mercantile agent, and it matters not that he obtained the consent of the owner of the goods to that possession by fraud not amounting to larceny by a trick or that he had only a limited authority to sell.

C

D

Notes. Distinguished: *Budberg v. Jerwood and Ward* (1934), 51 T.L.R. 99. Referred to: *Lloyds Bank, Ltd. v. Bank of America National Trust and Savings Association*, [1937] 3 All E.R. 312.

E

As to mercantile agents, see 1 HALSBURY'S LAWS (3rd Edn.) 151, 214, 215; and for cases see 1 DIGEST 330 et seq.

Cases referred to:

F

(1) *Cole v. North Western Bank* (1875), L.R. 10 C.P. 354; 44 L.J.C.P. 233; 32 L.T. 733, Ex. Ch.; 1 Digest 333, 477.

(2) *Lamb v. Attenborough* (1862), 1 B. & S. 831; 31 L.J.Q.B. 41; 8 Jur.N.S. 280; 10 W.R. 211; 121 E.R. 922; 1 Digest 334, 484.

(3) *Hayman v. Flewker* (1863), 13 C.B.N.S. 519; 1 New Rep. 479; 32 L.J.C.P. 132; 9 Jur.N.S. 895; 143 E.R. 205; 1 Digest 332, 472.

G

(4) *Weiner v. Harris*, [1910] 1 K.B. 285; 79 L.J.K.B. 342; 101 L.T. 647; 26 T.L.R. 96; 54 Sol. Jo. 81; 15 Com. Cas. 39, C.A.; 1 Digest 334, 487.

(5) *Hastings, Ltd. v. Pearson*, [1893] 1 Q.B. 62; 62 L.J.Q.B. 75; 67 L.T. 553; 57 J.P. 70; 41 W.R. 127; 9 T.L.R. 18; 36 Sol. Jo. 866; 5 R. 26, C.A.; 1 Digest 334, 488.

(6) *Turner v. Sampson* (1911), 27 T.L.R. 200; 1 Digest 377, 829.

H

(7) *Baines v. Swainson* (1863), 4 B. & S. 270; 2 New Rep. 357; 32 L.J.Q.B. 281; 8 L.T. 536; 11 W.R. 945; 122 E.R. 460; 1 Digest 331, 469.

(8) *Vickers v. Hertz* (1871), L.R. 2 Sc. & Div. 113; 1 Digest 331, 468.

(9) *Biggs v. Evans*, [1894] 1 Q.B. 88; 69 L.T. 723; 58 J.P. 84; 10 T.L.R. 59; 1 Digest 334, 485.

(10) *Whitehorn Bros. v. Davison*, [1911] 1 K.B. 463; 80 L.J.K.B. 425; 104 L.T. 234, C.A.; 39 Digest 535, 1458.

I

(11) *Folkes v. King*, [1923] 1 K.B. 282; 92 L.J.K.B. 125; 128 L.T. 405; 39 T.L.R. 77; 67 Sol. Jo. 227; 28 Com. Cas. 110; 86 J.P.Jo. 552, C.A.; Digest Supp.

(12) *Oppenheimer v. Frazer and Wyatt*, [1907] 2 K.B. 50; 76 L.J.K.B. 806; 97 L.T. 3; 23 T.L.R. 410; 51 Sol. Jo. 373; 12 Com. Cas. 147, 280, C.A.; 1 Digest 335, 495.

- A** **Action for damages for conversion tried before WRIGHT, J.**
The facts and arguments appear sufficiently from the judgment.
Stuart Bevan, K.C., and Van den Berg for the plaintiff.
Greaves-Lord, K.C., and Costello for the defendant.

Cur. adv. vult.

- B** Nov. 4. **WRIGHT, J.**, read the following judgment.—This is an action brought by the plaintiff, Colonel Claude Lowther, to recover damages from the defendant, Lionel Harris, carrying on business as an art dealer under the name of the Spanish Art Gallery. The claim is pleaded in the alternative as for detainue or conversion, but the plaintiff's counsel elected to proceed as for conversion. The subject-matter consisted of two pieces of tapestry, one consisting of three panels, described as Aubusson tapestry, and the other a single piece described as the Leopard tapestry (also as a hunting scene). The defendant relied on the Factors Act, 1889, or, in the alternative, on estoppel at common law. The circumstances in regard to the two pieces were in some respects different.

- Colonel Lowther early in 1923 had a large quantity of valuable furniture and antiques for disposal. He had as secretary a Mr. Urwin. In March, 1923, he went into an antique shop in Ebury Street, where one Barton Prior dealt in antiques in a small way, principally glass and china. The plaintiff made some purchases and after some conversations came to an arrangement with Barton Prior that Prior should act as his agent for the disposal of the furniture and antiques. Among the articles so to be dealt with were the Aubusson tapestries which had been bought in 1919 for £900, and the Leopard tapestry which about the same time had cost £771. The plaintiff took a house, 10 Palace Street, a few minutes' distant from Prior's shops in Ebury Street, and there the plaintiff's furniture and antiques were stored. Mr. Urwin was the lessee, but in his capacity as agent for the plaintiff, and he had an office on the first floor. Prior was allowed to live in a flat on the top floor and to use as a sitting-room a room on the floor below. He retained his business in Ebury Street, where he had two shops at Nos. 5 and 9, and his business was registered under the Registration of Names Act, 1916, as "Period." Towards the end of 1923 he also had a telephone address at 10 Palace Street under the name "Period," with an extension to Ebury Street, but that was a private telephone of his own. Customers used to come to his shops in Ebury Street and he used to bring them round to see the furniture on view as for sale at 10 Palace Street, and in most, if not all, cases customers were not told that the furniture was the property of the plaintiff, or that Prior was merely selling on the plaintiff's behalf. He was left to make out invoices for goods sold as for "Period, 5 and 9 Ebury Street," and he collected the price by cheques made to himself; he accounted to the plaintiff by paying cash, at least during the time material to this case. As between the plaintiff and Prior, the latter's authority was strictly limited. The books were kept by Mr. Urwin who was in the office at 10 Palace Street during business hours. Prior had no authority to complete a sale or make a delivery without first getting the sanction of the plaintiff, whom he used to see about four times a week, or, if the articles were of less value than £100, the sanction of Mr. Urwin. Prior had no authority to remove any goods from 10 Palace Street without such sanction. Trouble began about the middle of 1924, or a little earlier in that year, between Prior and the plaintiff, who complained that money for goods sold was not coming in properly. Alterations in procedure were discussed, and in August, 1924, heads of agreement for the protection of the plaintiff as against Prior were signed. A little later, in October, 1924, it was discovered that various articles of value had been disposed of by Prior. He was arrested and was tried and convicted of larceny at the Old Bailey. As a result of what was then discovered by the plaintiff, this action was brought in respect of two of the articles with which Prior had dishonestly made away.

I find the following facts with reference to the Aubusson tapestry. Prior falsely

pretended to the plaintiff about August, 1923, that he was able to sell this tapestry A
to one Corbel Woodhall for £525; the plaintiff, after protesting that the price was
too small, agreed to the sale on the representation that Woodhall was a valuable
customer. After this consent, given in the presence of Mr. Urwin, the latter
permitted Prior to remove the tapestry in order to make delivery and complete
the sale as authorised by the plaintiff. This happened in August, 1923. I think
the entry in the plaintiff's book as of December, 1923, was direct bad book- B
keeping. In fact, Prior had not sold the tapestry to Woodhall at all, and his story
was a mere fiction in order to enable him to get possession of the tapestry, which
he did, with the intention of disposing of it in fraud of the plaintiff. Having
thus got the tapestry, he sent it in a van or cart by means of his brother, William
Prior, who was merely acting on his instructions, to the defendant's place of business
and offered it for sale. The tapestry had actually been offered to the defend- C
ant about a month before in the same way for £300. The defendant had had
some small dealings with Prior a little previously and offered £250 for the
tapestry. The defendant and his son recognised the tapestry as having been
offered by the plaintiff at Christie's in the preceding March, and on inquiry were
told by William Prior that it was being sold on behalf of the plaintiff. They
knew nothing of Barton Prior's general connection with the plaintiff or of the
premises at 10 Palace Street. They dealt with Prior as a commission agent D
carrying on business under the name of "Period" at 5 and 9 Ebury Street, and
when the price was agreed at £250 they gave their cheque for that sum to Barton
Prior, obtaining a receipt signed as "B. Prior" on paper headed "Period, 5 and 9
Ebury Street" and took the tapestry. A few days later they sold it to Simmons
of New York for £350, which I find to be its true value at that time. In January, E
1924, the same man, W. Prior, came again with the other piece of tapestry, the
Leopard tapestry, on a van and offered it for sale. The defendant bought it for
£200, paid a cheque in favour of B. Prior, and took a receipt headed "Period,
5 and 9 Ebury Street," and signed by William Prior for Barton Prior. The
defendant did not know or question whether Prior was selling for himself or for
a principal, nor had he any knowledge that the tapestry was the property of the
plaintiff. In fact, Prior had simply stolen the tapestry from 10 Palace Street, F
without the knowledge or consent of the plaintiff or of Mr. Urwin, who thought it
was still lying folded upon a shelf. It was not till October, 1924, that the theft
was discovered, along with the other frauds. The defendant sold the tapestry to
Cardinal and Harford almost at once for £300, less commission. I place its value
at that date at £270. No suggestion is made that the defendant acted otherwise G
than in good faith. I find it was in the usual course of business in fine art
dealing for a dealer, whether acting for himself or as agent for a principal, to
bring for sale to other dealers, articles which, if sufficiently bulky, would be
carried in a van or motor car.

Unless the defendant has a defence under the Factors Act, or on the ground
of common law estoppel, it is clear that he is liable in damages for conversion, H
which damages, if recoverable by the plaintiff, I fix at £350 in the case of the
Aubusson tapestry, and at £270 in the case of the Leopard tapestry. The circum-
stances relating to the two pieces of tapestry are different and require separate
consideration. I shall first deal with the Aubusson tapestry, and shall first con-
sider the defence based on the Factors Act, 1889, in order to ascertain if the
conditions of the Act are fulfilled. The first question is whether Prior was a I
mercantile agent—that is, an agent doing a business in buying or selling, or both,
having in the customary course of his business as such authority to sell goods.
I hold that he was. Various objections have been raised. It was contended that
Prior was a mere servant or shopman and had no independent status such as is
essential to constitute a mercantile agent. It was held under the earlier Acts
that the agent must not be a mere servant or shopman: *Cole v. North Western*
Bank (1), *Lamb v. Attenborough* (2), *Hayman v. Flewker* (3). I think this is
still law under the present Act. In my opinion, B. Prior, who had his own shops

A and who gave receipts and took cheques in his own registered business name and earned commissions, was not a mere servant, but an agent, even though his discretionary authority was limited. It is also contended that even if he were an agent he was acting as such for one principal only, the plaintiff, and that the Factors Act requires a general occupation as agent. This, I think, is erroneous. The contrary was decided under the old Acts in *Hayman v. Flewker* (3), and I think the same is the law under the present Act. In *Weiner v. Harris* (4) it appears the agent was not acting for any other principal than the plaintiff, and this was the case also in *Hastings, Ltd. v. Pearson* (5), in respect of which case the Court of Appeal, in *Weiner v. Harris* (4) held that the agent was a mercantile agent. It is also clear that pictures, as objects of purchase and sale, constitute those who deal in them on commission mercantile agents within the Factors Act: see, under the old Act, *Hayman v. Flewker* (3), and, under the present Act, *Turner v. Sampson* (6).

The next question is whether Prior was in possession of the Aubusson tapestry, and if so, with the consent of the plaintiff, and, if he had such possession, whether it was in his capacity as mercantile agent. I add the last consideration because I think that just as such a condition was imported in the old Factors Acts: see *Cole v. North Western Bank* (1) and cases there cited, the same condition must be satisfied under the Factors Act, 1889. Counsel for the defendant contended that the tapestry, while lying at 10 Palace Street, was in the possession of Prior, relying on the facts that Prior had the use for residence of the top floor and the sitting-room below, and further that he had disposing control over the goods in the house. As to Prior's residence in the house I hold that the furniture in it, including the tapestry, was in the possession of the plaintiff, because Mr. Urwin, who was the lessee and occupier of the house and was in attendance during business hours, was merely a servant of the plaintiff, so that his possession was the plaintiff's possession. I adopt the language of POLLOCK AND WRIGHT ON POSSESSION, p. 38,

F "It will hardly be denied that a man is in possession in fact, as well as in possession in law, of his own goods in the house which he occupies whether he be in the room at a given moment, or even in the house or not."

The plaintiff did all in his power to exclude any unauthorised dealing with the goods by Prior while they were in the house. As to Prior's use of the top floor and sitting-room, I think Prior was merely in the position of a licensee, and perhaps caretaker, but never in possession of the plaintiff's goods in 10 Palace Street. Counsel also contended that Prior had possession of the goods because he was in a position to dispose of them by a sale enforceable by specific performance. Assuming that he was able to do so, though, as I find, he was forbidden to sell without specific authority, possession would not thereby be established, any more than if the goods had been in an independent warehouse. But I do hold that H Prior became in possession of the Aubusson tapestry when he was allowed to take it away in the van after the plaintiff had sanctioned a sale to Woodhall. It is true that no such sale had in fact been made or was intended to be made, and that the possession was obtained by the fraud of Prior. Possession was in fact obtained by Prior, and obtained by him in his capacity as mercantile agent. Counsel for plaintiff contended that Prior obtained the tapestry under colour of an actually completed sale, and merely for purposes of delivery and as a sort of carrier between vendor and vendee. I think that is erroneous. Prior's functions as a mercantile agent were not completed even if a bargain had been concluded, but extended to the delivery of the goods, the collecting of the price and the giving of a receipt and a subsequent accounting to the plaintiff. Delivery of possession to Prior was a necessary step to enable him to complete his office. The same point was raised under the old Acts in *Baines v. Swainson* (7) and in *Vickers v. Hertz* (8), referred to in *Cole v. North Western Bank* (1) (10 C.P. at p. 374), in which case it was held that possession given to the agent in similar circumstances was

possession given to him in his capacity as a mercantile agent. I think that is still the law. But it must further be determined if the possession was obtained with the consent of the plaintiff. It is not necessary here to rely on the presumption expressed in s. 2 (4) of the Factors Act, 1889, because I hold that the plaintiff did consent to the possession. It is true that the consent was obtained by fraud, and that in any event the plaintiff's sanction to Prior's selling was limited to a selling at a definite price and to a definite purchaser, and, accordingly, counsel for the plaintiff relied on certain observations of WILLS, J., in *Biggs v. Evans* (9) ([1894] 1 Q.B. at p. 88), stated to be to the effect that there was no entrusting for sale within the old Factors Acts because the principal gave only a partial or limited authority to sell. If that were the effect of that judgment, it would seem inconsistent with the principles laid down in the cases relating to the old Factors Acts and would clearly be contrary to the language and purpose of the Factors Act, 1889, and to the cases decided under it. But it is said there was no consent in law because Prior obtained the tapestry in circumstances which rendered him guilty of larceny by a trick. I do not think he was guilty of that offence. When Prior obtained the possession of the tapestry, the plaintiff intended not merely to part with possession, but also to confer a power to pass the property; it is clear in such a case the misappropriation is either larceny by a bailee or obtaining goods by false pretences on the principles explained in *Whitehorn Bros. v. Davison* (10) and *Folkes v. King* (11). But a fraud of that character, and such as not to amount to larceny by a trick, does not vitiate the consent of the owner to the agent's possession. Whether even larceny by a trick can, consistently with the policy and purpose of the Factors Act, which was passed to protect innocent purchasers for value, be held to vitiate consent in fact given and intended by the principal, remains the subject of two conflicting decisions of the Court of Appeal, namely, *Oppenheimer v. Frazer and Wyatt* (12) and *Folkes v. King* (11). I do not, on my view of the facts, consider that the particular question arises in this case.

I, accordingly, hold that Prior obtained possession of the Aubusson tapestry in his capacity as a mercantile agent and with the consent of the plaintiff: having such possession, he made (as I have found above), in the ordinary course of business of a mercantile agent, a sale to the defendant, who, it is not contested, acted in good faith and with no notice of Prior's want of authority. I hold that the defendant establishes his defence as regards the Aubusson tapestry under the Factors Act, 1889. This conclusion renders it unnecessary to discuss the plea based on estoppel at common law. I merely observe that on the facts established the defendant had no notice of the actual relations between the plaintiff and Prior, or of how as between them business was conducted, and knew nothing except that the tapestry belonged to the plaintiff, and that Prior, whom the defendant regarded as a commission dealer, stated he was selling it on behalf of the plaintiff.

I now deal with the Leopard tapestry, which raises different considerations. In my judgment, the defendant here fails in his defence under the Factors Act, 1889, because Prior never had possession of the tapestry with the consent of the plaintiff, and hence the conditions of the Factors Act were never fulfilled. I have held that, while the tapestry was at 10 Palace Street, it was not in the possession of Prior but of the plaintiff. The plaintiff never in fact parted with that possession. Prior simply stole the tapestry in January, 1924. It was not till October, 1924, that the plaintiff, or Mr. Urwin, discovered it had been taken, and it was that discovery which led to Prior's arrest the same night. Similar reasons show, in my opinion, that no estoppel at common law can be established. The defendant, in purchasing the Leopard tapestry, did not know or consider whether he was buying from Prior as an agent or a principal, or whether the tapestry belonged to Prior or not, and if not to whom it did belong. Such considerations, which would be immaterial under the Factors Act, are vital in regard to a plea of estoppel. Such a plea involves a representation, express or implied, by words or conduct by the principal becoming in ordinary course known to and being relied

A on by the purchaser, that whereas the goods belong to the principal they are being sold on his behalf and by his authority. But the defendant, far from knowing of or acting on any such representation on the part of the plaintiff, did not even know or consider that the tapestry belonged to the plaintiff. Nor did the plaintiff by his conduct do anything to represent, expressly or impliedly, to the defendant that Prior was authorised to sell on his behalf; such a contention

B might in some cases be put forward where a principal has entrusted for sale, even though under limitations, an article to a person who carries on a general business as a commission agent. But the plaintiff never so entrusted, or entrusted at all, the Leopard tapestry to Prior, who in fact simply took it dishonestly by stealth. It may be that the theft was facilitated because Prior had free access to 10 Palace Street, but that fact is, in my opinion, immaterial. The plaintiff is

C therefore entitled to recover in respect of the Leopard tapestry, the damages being £270.

Solicitors: *Windybank, Samuel & Lawrence; Powell, Rogers & Merrick.*

[Reported by R. A. YULE, Esq., Barrister-at-Law.]

D

Re WILKINSON. PAGE v. PUBLIC TRUSTEE

[CHANCERY DIVISION (Tomlin, J.), April 16, 19, 1926]

[Reported [1926] Ch. 842; 95 L.J.Ch. 528; 135 L.T. 736]

Will—Gift subject to limitation—Condition subsequent—Uncertainty—Gift dependent on beneficiary not voluntarily ceasing to live in demised house—Cessation of residence to join husband in matrimonial home.

F A testatrix gave her dwelling-house to her niece and bequeathed to her trustees a sum of £7,000 to pay the income thereof to the niece to enable her to reside in the said dwelling-house for her life or until she voluntarily ceased to make the said dwelling-house her permanent home and thereafter as her niece should appoint, and in default of appointment to fall into residue, and continued: "Provided however that in the event of my said niece voluntarily

G ceasing to make the said dwelling-house her permanent home as aforesaid I direct that the said sum of £7,000 and the investments representing the same shall fall into" residue.

H **Held:** on construction, the gift was made to the niece with a limitation for her life or until the happening of the named event and was not subject to a condition subsequent which might be void as being in restraint of marriage; the words "make the said dwelling-house her permanent home" bore a sufficiently defined meaning—viz., to keep up the house as what might be called the niece's headquarters—and so there was no such uncertainty in the gift as would render it bad; if the niece ceased to make the house her permanent home because her husband wanted her to make another house the matrimonial home she would not so cease "voluntarily" since she would be acting in accordance with her legal duty to reside and cohabit with her husband; and, therefore, in such an event the gift of the income of the £7,000 would not determine.

I **Notes.** Considered: *Re Talbot-Ponsonby's Estate, Talbot-Ponsonby v. Talbot-Ponsonby*, [1937] 4 All E.R. 309; *Re Coxon, MacCullum v. Coxon*, [1948] 2 All E.R. 492; *Re Field's Will Trusts, Parry-Jones v. Hillman*, [1950] 2 All E.R. 188. Applied: *Re Wolfe's Will Trusts, Shapley v. Wolfe*, [1953] 2 All E.R. 697. Referred to: *Re Gape, Verey v. Gape*, [1952] 1 All E.R. 827; *Re Allen, Faith v.*

Allen, [1953] 2 All E.R. 898; *Re Burton's Settlements*, *Scott v. National Provincial Bank, Ltd.*, [1954] 3 All E.R. 193.

As to conditions in a will, see 34 HALSBURY'S LAWS (2nd Edn.) 103 et seq.; and for cases see 44 DIGEST 434 et seq.

Cases referred to:

- (1) *Mitchel v. Reynolds* (1711), 1 P. Wms. 181; 24 E.R. 347; 43 Digest 11, 59.
- (2) *Wilkinson v. Wilkinson* (1871), L.R. 12 Eq. 604; 40 L.J.Ch. 242; 24 L.T. 314; 19 W.R. 558; 44 Digest 454, 2762. B
- (3) *Cartwright v. Cartwright* (1853), 3 De G. M. & G. 982; 1 Eq. Rep. 138; 22 L.J.Ch. 841; 31 L.T.O.S. 214; 17 Jur. 584; 1 W.R. 245; 43 E.R. 385, L.J.J.; 27 Digest (Repl.) 217, 1728.
- (4) *Wren v. Bradley* (1848), 2 De G. & Sm. 49; 17 L.J.Ch. 172; 10 L.T.O.S. 438; 12 Jur. 168; 64 E.R. 23; 44 Digest 453, 2756. C
- (5) *Morley v. Rennoldson*, *Morley v. Linkson* (1843), 2 Hare, 570; 12 L.J.Ch. 372; 7 Jur. 938; 67 E.R. 235; 44 Digest 454, 2766.
- (6) *Partridge v. Partridge*, [1894] 1 Ch. 351; 63 L.J.Ch. 122; 70 L.T. 261; 44 Digest 478, 2960.
- (7) *Re Boulter, Capital and Counties Bank v. Boulter*, [1922] 1 Ch. 75; 91 L.J.Ch. 250; 126 L.T. 653; 66 Sol. Jo. (W.R.) 14; 44 Digest 459, 2804. D
- (8) *Re Hewett, Eldridge v. Iles*, [1918] 1 Ch. 458; 118 L.T. 524; 87 L.J.Ch. 209; 44 Digest 455, 2773.
- (9) *Fillingham v. Bromley* (1823), Turr. & R. 530; 37 E.R. 1204, L.C.; 44 Digest 442, 2675.
- (10) *A.-G. v. Ellis*, [1895] 2 Q.B. 466; 64 L.J.Q.B. 813; 73 L.T. 190, 350; 59 J.P. 774; 44 W.R. 13; 11 T.L.R. 566; 39 Sol. Jo. 709; 15 R. 584, D.C.; 21 Digest 15, 72. E
- (11) *Heath v. Lewis* (1853), 3 De G. M. & G. 954; 1 Eq. Rep. 55; 22 L.J.Ch. 721; 21 L.T.O.S. 135; 17 Jur. 443; 1 W.R. 314; 43 E.R. 374, L.J.J.; 44 Digest 437, 2641.
- (12) *Re Trenchard, Trenchard v. Trenchard*, [1902] 1 Ch. 378; 71 L.J.Ch. 178; 86 L.T. 196; 50 W.R. 266; 46 Sol. Jo. 231; 40 Digest (Repl.) 810, 2896. F
- (13) *Re Lovell, Sparks v. Southall*, [1920] 1 Ch. 722; 88 L.J.Ch. 540; 122 L.T. 26; 35 T.L.R. 715; 64 Sol. Jo. 35; 44 Digest 438, 2647.
- (14) *Savoy Overseers v. Art Union of London*, [1896] A.C. 296; 65 L.J.M.C. 161; 74 L.T. 497; 60 J.P. 660; 45 W.R. 34; 12 T.L.R. 377, H.L.; 38 Digest 498, 525.
- (15) *Re Moore, Trafford v. Maconochie* (1888), 39 Ch.D. 116; 57 L.J.Ch. 936; 59 L.T. 681; 52 J.P. 596; 37 W.R. 83; 4 T.L.R. 591, C.A.; 44 Digest 438, 2646. G

Adjourned Summons.

By her will, dated July 4, 1913, Mary Wilkinson, after appointing executors and trustees, by cl. 3 devised and bequeathed the dwelling-house in which she was residing in North Walsham, Norfolk, with the furniture, linen, china, and indoor and outdoor effects in and about the same to her niece Edith Carter absolutely, expressing the wish (but without imposing any legal liability) that, as the dwelling-house had been in her family for more than eighty years, her niece should adopt and use the surname of "Wilkinson." After making a number of specific and pecuniary bequests the testatrix devised and bequeathed all her residuary real and personal estate to her trustees upon trust for sale, calling in, and conversion, and out of the money to arise from such sale, calling in, and conversion, to pay her funeral and testamentary expenses and debts and legacies, and the duties therein mentioned, and then to set aside three sums, of which the third was a sum of £7,000. The trusts with regard to this sum which were contained in cl. 9, were as follows:

"In the third place I direct that my trustees shall set aside the sum of £7,000 and invest the same in any of the investments hereinafter authorised to pay

- A the income arising therefrom to my said niece Edith Carter (in order to enable her to reside in the dwelling-house in North Walsham now occupied by me and by this my will devised to my said niece) for and during the term of her natural life or until she shall voluntarily cease to make the said dwelling-house her permanent home without power of anticipation, and after her death I direct that my trustees shall hold the sum of £7,000 and the investments
- B representing the same in trust for such person or persons for such purposes and in such manner as my said niece Edith Carter shall from time to time by any deed or deeds revocable or irrevocable or by will or codicil appoint and in default of such appointment or so far as any such appointment shall not extend the said sum of £7,000 and the investments representing the sum shall fall into and form part of my residuary estate. Provided, however,
- C that in the event of my said niece voluntarily ceasing to make the said dwelling-house her permanent home as aforesaid I direct that the said sum of £7,000 and the investments representing the same shall fall into and form part of my residuary estate."

The will contained trusts of the residuary estate. The testatrix died on July 20, 1914, and Edith Carter, who was then a spinster, took up her permanent residence at the testatrix's dwelling-house at North Walsham, which was called the Lower House. On Jan. 20, 1923, Edith Carter married Cecil Herbert Winter Page, and on their marriage her husband went to reside with her at Lower House. In an affidavit Mrs. Page stated that her husband had a house in a much more healthy part of North Walsham, that he was pressing her to go and live with him at his house, and that she was anxious to comply with his wishes, but desired to know

E whether, if she did so, she would forfeit her life interest and power of appointment over the sum of £7,000.

Luxmoore, K.C., and *Roxburgh*, for the plaintiff, referred to *Mitchel v. Reynolds* (1), *Wilkinson v. Wilkinson* (2), *Cartwright v. Cartwright* (3), *Wren v. Bradley* (4), *Morley v. Rennoldson* (5), *Partridge v. Partridge* (6), *Re Boulter, Capital and Counties Bank v. Boulter* (7), *Re Hewett* (8), *Fillingham v. Bromley* (9), *A.-G. v. Ellis* (10).

Stamp for the trustees.

Spens and Errington, for persons interested in the residue, referred to *Heath v. Lewis* (11), *Re Trenchard* (12), *Re Lovell*, *Sparks v. Southall* (13), *Savoy Overseers v. Art Union of London* (14).

- G **TOMLIN, J.**—In this case it falls on me to determine the construction of certain provisions in the will of a testatrix who died on July 20, 1914. [His LORDSHIP read the material part of the will of the testatrix and continued:] The testatrix having died, the niece, Edith Carter, went to live in the house which had been given to her absolutely, and she lived there as a spinster for some time—some nine years, I think. On Jan. 20, 1923, she married her present husband,
- H Dr. Page, a medical practitioner at North Walsham. Dr. Page has a house of his own in North Walsham, and it is said that that house is situate in a more salubrious spot than the house devised to Mrs. Page by the testatrix and that Dr. Page desires that the matrimonial home should be constituted in his own house, and has requested his wife to go and live with him there.

- I In those circumstances, the question has arisen as to what is the effect of the provisions of the will with regard to the bequest of £7,000—whether, if Mrs. Page accedes to her husband's injunction and goes to live with him in his own house, she will thereby forfeit all the interest which she has in the income of £7,000 and her power of appointing it after her death. It is said by Mrs. Page that on the true construction of the clause in the will dealing with the bequest of £7,000 there is a gift which is cut down by a subsequent condition, and that this subsequent condition is void either as being contrary to public policy, because it tends in restraint of marriage, or as being too uncertain, and that, in those circumstances, the gift goes to her free from the conditions. She further says that, even if she

is wrong in that regard, still, the leaving of her home at the instance of her husband, in order to comply with her legal duty of living with him at that spot which he elects as the matrimonial home, is not a voluntary ceasing to make the testatrix's home in North Walsham her home. A

The first question which I have to determine is, whether on the true construction of the gift it is made to her by way of limitation until the happening of certain events, or is made to her for her life, but subject to a condition subsequently determining it on the happening of the same events. I think it is plain that the gift is in the form of a limitation, and that a limitation until the happening of some event, which if it were expressed in the form of a condition subsequent might be bad as being in restraint of marriage, will not be bad. Of course a question may always arise in cases of this kind whether the whole gift is bad as being against public policy. Thus in *Re Moore* (15) there was a gift which was held to be bad, because it tended to produce future separation between the spouses. On the other hand, if, on its true construction, a gift is not in the form of a limitation until the happening of an event, but is a gift subject to a condition subsequent, which would operate to cut the gift down upon the happening of the event, then, if the condition is bad on the ground of public policy, the condition goes and the gifts stands unaffected by it. I have had cited to me a large number of cases upon this topic, and I think what I have stated correctly summarises their effect up to a point. But as regards the cases relating to conditions subsequent, it is not clear whether the form of gift is conclusive when the event is one which tends to some result contrary to public policy, or whether the court is entitled to examine into the intention of the testator as shown by the language employed and the surrounding circumstances and determine whether or not his purpose in prescribing the condition was to produce an illegal result and to decide as to its validity or invalidity according to what was the intention. There is some obscurity in the authorities on this point. It may be that the true view is that one is entitled to examine into the question of intention, a view accurately and fully expressed in *Re Hewett* (8), which came before YOUNGER, J., or it may be that that case goes somewhat beyond the earlier authorities, that it must not be read too literally, and that one is not entitled to examine in the way there suggested into the intention of the testator. Having regard, however, to the conclusion which I am about to express with regard to the construction of this will, I think it is necessary for me to determine that interesting question. B

When I come to examine the language of the will, I am satisfied that I am not dealing with a case of a gift cut down by a condition subsequent, but that I am dealing with a case of limitation. The language of the gift is C

"pay the income . . . to my niece . . . (in order to enable her to reside . . .) for and during the term of her natural life or until she shall voluntarily cease to make the . . . dwelling-house her permanent home." D

If the clause had paused there, I feel great difficulty in appreciating what argument could have been addressed to me to suggest that that was other than a limitation similar to the ordinary limitation to a woman for life, or until she shall marry again. But it is said truly that, in construing these words, I must read the clause as a whole, and it is contended that when I go on to find the direction that after her death the trustees shall hold the sum of £7,000 in trust as she shall appoint, and that in default of appointment this sum shall fall into residue followed by the proviso E

"Provided however that in the event of my said niece voluntarily ceasing to make the said dwelling-house her permanent home as aforesaid I direct that the said sum of £7,000 and the investments representing the same shall fall into"

residue, I must in some way modify my view of the earlier language, and read it as though it were a gift to her for life, with a condition subsequent that her interest shall cease if at any time she voluntarily ceases to make the dwelling- I

- A house her permanent home. I am unable to follow that argument. The scheme of the clause seems to me to be reasonably plain. There is, first of all, a limitation of the income to her for life, or until the happening of the named event. The next branch of the clause, as I read it, deals with the alternative, of her death without having ceased to occupy the house, and then the proviso deals with the other alternative of her ceasing to reside in the house. The words "Provided however," seem to me to mean nothing more than "but in the other alternative." The matter, it seems to me, would have been beyond argument if after the words "after her death" there had been inserted "should she continue during her life to make it her permanent home," and the fact that those words do not occur are not, in my judgment, sufficient to alter the whole frame of the clause. I think this conclusion is most in accord with the natural meaning of the words and with that which is, so far as one can judge from the words, contemplated by the testatrix.

- Having arrived at that result, the only remaining questions are: (i) whether the alternative event specified is too uncertain to be ascertained, and, if so, whether that affects the validity of the gift to her for life; and (ii) whether, assuming that there is no uncertainty, an event will happen in certain hypothetical circumstances which will determine the interest. I confess I do not feel any difficulty in giving a rational meaning to the words "to make the dwelling-house her permanent home." I think it is reasonably plain what that means. It seems to me it means, to keep it up as what may be colloquially called the headquarters. I do not think there is any particular difficulty in attaching a reasonable meaning to the phrase. I do not propose, and I do not think it necessary for me to-day, to define precisely what I understand the phrase to mean. I am satisfied that it bears a sufficiently definite meaning to enable me to say that there is no case of uncertainty which renders the gift in any way bad or defective. The fact that the language of the will is not uncertain has, of course, no necessary bearing upon the question whether, when particular events have happened, there may not be some difficulty in saying whether or not they fall within that which is contemplated by the will, but that is not a matter with which I have anything to do.

- That leaves only one other point, namely, whether the contemplated event will have happened upon the hypothetical events occurring, for the lady has done nothing up to date in respect of which it could be alleged that her interest had ceased, but she and her husband are contemplating a change of the matrimonial home, for the reasons which have been indicated in the affidavits that have been filed in the case. I am not going to give any decision which will prejudice the position in the event of anything happening which may fairly give rise to the suggestion that the interest has determined. The only point that I am going to determine is whether, upon the assumption that the husband elects to change the matrimonial home and requires his wife to accompany him to the place that he selects as the matrimonial home and that she complies with the instructions of her husband in that regard, she will have voluntarily ceased to make the present house her home. "Voluntarily" means, obviously, the doing of something as the result of the free exercise of the will. In *A.-G. v. Ellis* (10), which was a revenue case, LORD RUSSELL, when dealing with the meaning of "voluntarily," in connection with a voluntary transfer, said:

- I "We are, however, of opinion that in the section under consideration the word voluntarily is not used in the sense of without consideration, but in its ordinary sense of freely, without compulsion, and not under any obligation."

So, too, I think in this will the phrase is used to refer to an act done as the result of the exercise of the lady's own free will, in circumstances in which there is nothing in the nature of a legal duty or obligation requiring her to take a particular course. The duty of a wife, in law, is a duty, as stated in 16 HALSBURY'S LAWS, p. 818 [see now 3rd Edn., vol. 19, p. 819, para. 1339], "to reside and cohabit with her husband." It may be that, from a juristic point of view, that duty is of

imperfect obligation, but, at any rate, it is capable, up to a point, of enforcement by means of an action, or suit for restitution of conjugal rights. The question is, whether, if the wife in compliance with her legal duty, but without compulsion by proceedings of the nature which I have indicated, joins the husband in the new matrimonial home as the result of his direction to her to do so, she will have voluntarily ceased to reside in his house. In my opinion, she will not. In my view, when she leaves the house in order to comply with a legal duty, she cannot be said to have ceased to make the dwelling-house her permanent home voluntarily, and, if that is so, then the mere fact that she complies with the injunctions of her husband in this regard will not injure her interest in the £7,000.

I desire to confine my decision to the hypothesis upon which it is based, and I am expressing no opinion at all whether there may not be some change of circumstances which would affect the result. All that I leave absolutely at large, and unprejudiced, and any of the parties are free, whenever they think there are circumstances which justify any further application to the court in the matter, to come and have them determined without suffering prejudice by my present decision. I propose to make a declaration to the effect that I have indicated; and the costs of the summons must come out of residue.

Solicitors: *Gadsden & Co.*; *Cunliffe, Blake & Manners*; *Collyer-Bristow & Co.*

[Reported by L. MORGAN MAY, Esq., Barrister-at-Law.]

RICHMOND v. SAVILL

[COURT OF APPEAL (Bankes, Atkin and Sargant, L.JJ.), June 22, 1926]

[Reported [1926] 2 K.B. 530; 95 L.J.K.B. 1042; 136 L.T. 15;
70 Sol. Jo. 875]

Landlord and Tenant—Lease—Surrender—Release of tenant from liability for breach of covenant to repair—Release in respect of future, not accrued, liability.

A landlord of a dwelling-house claimed to recover from the defendant, the executor of a deceased tenant, damages for breaches of covenant to repair. Immediately on the death of the tenant the defendant entered into negotiations with the plaintiff's agent for permission to sublet the dwelling-house furnished for a period of not less than six months, or, in the alternative, for an immediate surrender of the lease. The plaintiff was not willing to grant the licence to sublet, but his agent wrote to the defendant's solicitor to the effect that if the defendant agreed to pay the rent of the dwelling-house up to Lady Day, 1925, and gave up possession not later than the end of February, 1925, the plaintiff "is willing to release him." The first date on which the term could be determined under the lease was December 25, 1925. The defendant accepted the plaintiff's offer and gave up the house. On the plaintiff's claim for damages for breaches of covenant,

Held: (i) the surrender of the lease only operated to relieve the defendant of liability for future obligations under the lease, and did not relieve him of liability for breaches of covenant before the date of the surrender; (ii) general words in a release were always limited to the matters which were specially in the contemplation of the parties at the time when the release was granted; in the present case what was in the contemplation of the parties at the relevant time was not the obligation of the defendant to pay damages for breach of

A covenant, but the offer of the landlord to accept a surrender as from the specified date; and, therefore, the release was confined to the defendant's obligation to continue the tenancy after that date and did not affect his liability for breaches of covenant accruing previously.

Notes. As to surrender of a lease, see 23 HALSBURY'S LAWS (3rd Edn.) 683 et seq., and as to release from a contract, see *ibid.*, vol. 12, p. 217 et seq. For cases see 31 DIGEST (Repl.) 565 et seq., and 12 DIGEST (Repl.) 561 et seq.

Cases referred to:

- (1) *A.-G. v. Cox, Pearce v. A.-G.* (1850), 3 H.L.Cas. 240; 10 E.R. 93, H.L.; 31 Digest (Repl.) 589, 7083.
- (2) *Gray v. Owen*, [1910] 1 K.B. 622; 79 L.J.K.B. 389; 102 L.T. 187; 26 T.L.R. 297, D.C.; 31 Digest (Repl.) 569, 6903.
- (3) *Hartshorne v. Watson* (1839), 4 Bing. N.C. 178; 6 Dowl. 404; 1 Arn. 15; 5 Scott 506; 7 L.J.C.P. 138; 2 Jur. 155; 132 E.R. 756; 31 Digest (Repl.) 525, 6477.
- (4) *Blore v. Giulini*, [1903] 1 K.B. 356; 72 L.J.K.B. 114; 88 L.T. 235; 51 W.R. 336; 47 Sol. Jo. 258; 31 Digest (Repl.) 596, 7140.
- (5) *Dalton v. Pickard* (1911), post, p. 371; [1926] 2 K.B. 545, n.; 95 L.J.K.B. 1052, n.; 136 L.T. 21, n., C.A.; 31 Digest (Repl.) 589, 7087.
- (6) *Re Morrish, Ex parte Hart Dyke* (1882), 22 Ch.D. 410; 52 L.J.Ch. 570; 48 L.T. 303; 31 W.R. 278, C.A.; 31 Digest 529, 6516.
- (7) *London and South-Western Rail. Co. (Directors, &c.) v. Blackmore* (1870), L.R. 4 H.L. 610; 39 L.J.Ch. 713; 23 L.T. 504; 35 J.P. 324; 19 W.R. 305, H.L.; 12 Digest (Repl.) 568, 4325.
- (8) *Leschallas v. Woolf*, [1908] 1 Ch. 641; 77 L.J.Ch. 345; 98 L.T. 558; 31 Digest (Repl.) 230, 3655.
- (9) *Re Fussell, Ex parte Allen* (1882), 20 Ch.D. 341; 51 L.J.Ch. 724; 47 L.T. 65; 30 W.R. 601, C.A.; 31 Digest (Repl.) 589, 7086.
- (10) *Walker's Case* (1587), 3 Co. Rep. 22a, cited in Lat. at p. 260; 76 E.R. 676; sub nom. *Walker v. Harris, Moore*, K.B. 351; cited in Cro. Eliz. at p. 556; 31 Digest (Repl.) 589, 7081.

Appeal from an order of FINLAY, J.

The plaintiff was the landlord, and the defendant the executor of Lady Humphery, the lessee, of a dwelling-house at St. Leonards-on-Sea. The plaintiff claimed to recover from the defendant damages for breaches of covenant to repair the dwelling-house contained in the lease which was dated Dec. 12, 1923. The lessee died in November, 1924, and immediately on her death the defendant entered into negotiations with the landlord's brother, who acted as the landlord's representative, for permission to sublet the dwelling-house furnished for a period of not less than six months, or in the alternative, for an immediate surrender of the lease. The plaintiff was not willing to grant the licence to sublet, but his brother, acting on his behalf, wrote to the solicitor a letter dated Nov. 15, 1924, to the effect that if the defendant agreed to pay the rent of the dwelling-house up to Lady Day, 1925, and would give up possession not later than the end of February, 1925, the landlord would give him a release. The first date on which the term could be determined under the lease in the events which happened was Dec. 25, 1925. The defendant accepted the offer and gave up the house. The action was brought in respect of breaches of covenant to repair which had accrued before the date of the surrender of the term. The defendant contended that he was not liable for the damages claimed, because the effect of the surrender and of an express release was to release him from all liability under the lease, whether for past or future breaches. FINLAY, J., held that the effect of the surrender of the term and the release was to extinguish the defendant's liability for all breaches of covenants, including past breaches, and the plaintiff appealed.

A. Neilson, K.C., and *Hildesley*, for the plaintiff, referred to *A.-G. v. Cox* (1), per BUCKNILL, J., in *Gray v. Owen* (2), per TINDAL, C.J., in *Hartshorne v. Watson*

(3), *Blore v. Giulini* (4), *Dalton v. Pickard* (5), *Re Morrish, Ex parte Harte Dyke* A
(6), *London and South-Western Rail. Co. (Directors, &c.) v. Blackmore* (7), per
LORD WESTBURY.

Hawke, K.C., and *F. E. Farrer*, for the defendant, referred to Co. Litt. 397b;
Leschallas v. Woolf (8); OLD NATURA BREVIAN, Edn. 1872, p. 37; STATHAM
ABRIDGMENT DETTE (46).

BANKES, L.J.—This is a dispute between a landlord and the executor of a B
former tenant. The lease of the premises in respect of which the difficulty arises
was a lease dated Dec. 12, 1923. It was a lease for a term of twenty-one years
from Sept. 29, 1923, at the substantial rent of £230, and it contained onerous
covenants with regard to repairs and so on. There was a provision in the lease C
for its determination by either party in certain events, but only after Sept. 29,
1925, and among the other events which entitled the tenant to determine the
lease was the giving of three months' notice after Sept. 29, 1925, or the death of
the tenant after that date and the giving of three months' notice. The tenant
died on Nov. 2, 1924, and in those circumstances the lease was not determinable,
under the terms of the clause, until Dec. 25, 1925, because, I think, that the clause D
indicates that the three months' notice would have to be given after Sept. 29,
1925, or, at any rate, on September 29. It is not necessary to decide that point,
but, at any rate, the term had a considerable number of months to run before
the defendant had a right to determine the lease. In those circumstances he got
into communication with the landlord's representative, with the object of obtaining
permission, if possible, to sublet the premises furnished for a period of six months.
The landlord did not approve of that suggestion and he made a counter-suggestion, E
with the result that a letter dated Nov. 15, 1924, was written by the landlord's
brother. On that letter, in my opinion, everything turns. It had reference to
the negotiations which had been proceeding up to that time and were confined to
the possible granting of a licence to sublet the premises furnished, or, alterna-
tively, the acceptance by the landlord of an immediate surrender of the lease,
and it was in these terms:

"If Lady Humphery's executor agrees to pay the rent of The Grove up to F
Mar. 25, 1925, and gives up possession not later than the end of February
next, my brother is willing to release him."

As I said, in my opinion, everything turns on the true construction of that
letter, which was an offer. The offer was accepted, and the defendant gave up G
possession of the premises in accordance with the terms of that letter. After that
the parties were unable to agree with regard to what that letter meant, and what
the obligations of the parties were, and as a result this action was brought. In
it the landlord claims a sum of £300, which he says is due under the lease in respect
of the dilapidations, and he also claims damages. There were pleadings at great
length raising several different aspects of the rights of the parties, but ultimately H
a letter of Dec. 15, 1925, was written as between the solicitors of the parties, in
which they agreed what the points were that the learned judge would have to
decide. The first one was this: "Did the surrender of the 1923 lease relieve the
defendant of his liabilities under all or any of the covenants?" Putting the case
in that way assumes that there had been a surrender, and apparently it was
treated in the court below, or, at any rate, treated by the learned judge, as a I
question of law—namely, there having been a surrender, what was the position
of the tenant's representative in reference to these claims of the landlord? The
learned judge proceeded to consider the matter, but whether the particular point
that was discussed before us at length was discussed before him or not, I do not
know. He does not refer to it, but in his answer to the first question he founded
himself on a statement of the law by *COTTON, L.J.*, in *Re Fussell, Ex parte Allen*
(9), that a surrender operates to extinguish the lease and all the obligations of the
parties, past as well as future, and relieves the tenant from all liability for

- A breaches of the covenants of the lease in respect of which rights of action had already accrued. It does not seem from the learned judge's judgment that his attention was specially directed to the particular question whether the effect of the surrender was to extinguish breaches of covenant in respect of which rights of action had accrued, and I certainly do not think that COTTON, L.J.'s statement of the law can be read as including, not only future obligations, but accrued breaches.
- B The passage in *Re Fussell, Ex parte Allen* (9) to which the learned judge refers is this (20 Ch.D. at p. 348):

"In my opinion a surrender of a lease involves this, that there shall be a giving back to the lessor of the entirety of the property which is comprised in the lease, with a corresponding release of the tenant from the covenants contained in the lease."

- C A surrender implies the giving up in its entirety of the lease which is put an end to by the surrender. With reference to the argument of counsel for the plaintiff, I do not think that the learned judge was influenced in that statement of the law at all by the fact that he was dealing with a case under s. 23 of the Bankruptcy Act, 1869, but I think that he was stating his view of the law generally applicable to a case of surrender. He was not drawing a distinction which we have to consider, namely, a distinction between a liability in respect of future obligations and a liability in respect of breaches for which rights of action had already accrued, and I think that, if we look at the rest of the judgment, we shall see that, if his attention had been specially directed to that point so that he had to give a decision on it, he would have drawn a distinction between a liability in respect of future obligations and a liability for breaches of obligations in respect of which rights of action had already accrued, as SIR GEORGE JESSEL, M.R., did in *Re Morrish, Ex parte Hart Dyke* (6).

In that case SIR GEORGE JESSEL, M.R., referred to what COTTON, L.J., had said in *Re Fussell, Ex parte Allen* (9) in reference to the lease coming to an end as the result of a surrender, and he went on to say (22 Ch.D. at p. 425):

- F "The result, therefore, is that in the present case neither party can claim the benefit of those provisions of the lease which arise only at the end of, or other sooner determination of, the lease, and that is the main point of the case."

- G I think that the learned Master of the Rolls is there clearly pointing out that, in his view, the effect of the surrender is to operate only in reference to obligations under the lease, obligations unperformed and unperformable because the lease is put an end to.

- H So much for that view of the law as founded on COTTON, L.J.'s statement, but I do not think that FINLAY, J.'s attention was directed to, or, at any rate, he did not refer to, the distinction which undoubtedly exists between an extinguishing by surrender of obligations in future and the effect of surrender upon breaches of covenant in respect of which causes of action have accrued. In reference to that distinction I should like to refer to two of the cases which were mentioned. One was *Hartshorne v. Watson* (3), in which the point was taken, which was afterwards said to be an absurd point, that, because a lease had come to an end under its terms, the matter should be as if the indenture had never been made, and there could be no right of action in respect of breaches which had accrued before the lease came to an end. That was said to be an absurd contention, and so it obviously is, because if that was true no action could be brought for breaches of covenant or for dilapidations after the expiration of a lease by effluxion of time.
- I In the House of Lords the matter progressed one stage further, in *A.-G. v. Cox* (1), where LORD COTTENHAM's view of the law was read by LORD LANGDALE. He there deals with the case of accrued rent prior to a surrender, and states emphatically that, in his view, a surrender does not operate to extinguish a claim in respect of accrued rent, and he says (3 H.L.Cas. at p. 275):

"The third exception of the representative of the duke disputes the Master's finding that the Crown is a specialty creditor for the arrears of rent reserved by the lease. I cannot find any ground for this proposition. The personal covenant is independent of the estate in the property mortgaged and is not affected by its surrender or other determination." A

It is quite true that in that case the personal covenant there referred to was a covenant to pay rent, but with all submission to the argument that has been presented to us, I cannot see any distinction at all between a personal covenant to pay rent and a personal covenant to repair and keep in repair. They seem to me equally, within the language of the judgment, personal covenants independent of the estate. B

But the matter goes a stage further because in an unreported judgment of *Dalton v. Pickard* (5) the view of the law which was indicated in the case I have just referred to was expressly applied, not merely to rent, but to breaches of covenant which were the equivalent of covenants to repair. I often complain that too many cases are reported, but in this particular instance I think that my complaint must take the opposite line, because it does seem to me that this is a case which ought to have been reported, because it does express the opinion of the Court of Appeal on facts which have not been previously dealt with in any of the cases. The facts in *Dalton v. Pickard* (5) were these. There was a dispute between landlord and tenant, the tenant having been a tenant under a lease for years. He was requested to surrender his tenancy, and he agreed to do it upon terms. In the terms no mention was made of any claim by the landlords for dilapidations, and when the case came to be considered before an arbitrator, the tenant contended that the effect of the surrender, which had been accepted upon the terms suggested, excluded the possibility of the landlords making any claim for the dilapidations. That matter came before the Court of Appeal on a Special Case, and it is quite indistinguishable from the present case, as it seems to me. C
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E
VAUGHAN WILLIAMS, L.J., said in his judgment:

"There is no pretence here for saying, and it has not been argued, that the surrender amounts to an accord and satisfaction of the breaches in respect of which causes of action have accrued." F

He goes on to deal with the agreement, and he says that it clearly contemplated such a claim as the one made by the landlords, and that there was nothing in the bare fact of the surrender to deprive the landlords of their right to bring in their claim for dilapidations. FLETCHER MOULTON, L.J., deals with the matter in his judgment more fully and more directly, because he says in one passage: "They [the landlords] acquire a surrender of the lease at Michaelmas with all the legal consequences." He goes on: G

"A question has been raised as to what are the rights of a landlord who has accepted from his lessee a surrender of the lease before the term is expired. To my mind it is clear beyond dispute that by accepting that surrender, and terminating the continuance of the lease, he does not in any way waive or get rid of accrued rights of action in respect of breaches of the covenants of the lease during the time that the lease existed. His lessee entered into those covenants, and was bound to keep them, and if he broke them there were vested causes of action, and there is nothing in the legal operation of the surrender which takes away from the reversioner any of those vested causes of action." H
I

FARWELL, L.J., says:

"The case really depends upon the construction of these letters, because, notwithstanding the somewhat wide range over which the argument has travelled, the law has been settled for centuries that the mere acceptance of a surrender does not affect the rights of action under the lease accrued before that surrender."

A With all deference to counsel for the defendant, who has gone back centuries, I venture to think that FARWELL, L.J.'s view is the more acceptable, and I am unable myself to draw the distinction which counsel wishes to draw between the two classes of surrender—the surrender made by the tenant as of right and a surrender made by the tenant at the request of the landlord.

B If, therefore, the case depended upon the point which was the only point the learned judge in the court below decided, namely, the effect of the surrender, I should not be able to agree with him. From the form of the judgment I think that he was allowed to treat the matter as though the question was merely what was the effect of a surrender upon covenants in a lease without having his attention drawn to the distinction there might be between breaches already accrued and obligations in the future. Be that as it may, if the matter depended upon C the law relating to a surrender, I think that the plaintiff would be entitled to succeed. But I do not think it does depend upon that, because there is something more here than the surrender, and everything, in my opinion, depends upon what is the true construction of that something more, which is contained in the letter of Nov. 15, 1924. That letter uses the word "release," and "release" is a word of extremely wide application. Time and again attention has been called in D the decisions to the necessity of ascertaining what it was that the parties were contracting about before the proper meaning can be put upon the word "release" in the agreement to which they came. LORD WESTBURY—I will cite only his language from the case to which our attention has been called, but there are quantities of cases which might be referred to—says this in *London and South-Western Rail. Co. (Directors, &c.) v. Blackmore* (7) (L.R. 4 H.L. at p. 623):

E "The general words in a release are limited always to that thing or these things which were specially in the contemplation of the parties at the time when the release was given. But a dispute that had not emerged, or a question which had not at all arisen, cannot be considered as bound and concluded by the anticipatory words of a general release."

F In the present case there is a general release, and counsel for defendant relies on the fact that it is a general release and says that, because it is general, it must include everything. My answer to that is that the authorities are clear to show that one must first ascertain what the parties were contracting about; one must then apply the release to that, and one must not allow it to include matters which were never at the time of the contract in the contemplation of the parties G at all. What was in the contemplation of these parties were clearly not any question of dilapidations or the obligation to pay damages in respect of breaches of covenant. What was in the contemplation of the parties, and what they were bargaining about, was the counter-offer of the landlord to accept a surrender and the terms upon which the tenant should be allowed to depart, and the letter of November 15 refers to that, and, in my opinion, to that only. In my opinion, the H release in that letter is confined to the obligation to continue tenant after that date, and it has no reference whatever to any obligation on the tenant, or on the executor representing the tenant, for breaches of covenant which had accrued prior to that date.

I There is only one other matter I want to refer to, and that is this—the peculiar terms of the lease in reference to dilapidations to the house and the amount that is payable in respect of those dilapidations on the determination of the lease. I felt some doubt with regard to what the true meaning of that clause is, but as I understand no special point is made of that, but the parties are willing both of them to treat the last part of that clause as a clause by which the parties desire to quantify the amount of damages in the event of there being a breach, and not to regard it as an event arising only upon the determination and at the determination of the lease. In those circumstances, therefore, my difficulty on that ground is removed, and the position is that the tenant's representative is not released from the obligation of the covenant to repair by reason of the surrender. In those

circumstances the damages are agreed at £300. Whether the plaintiff is desirous to pursue a claim for damages beyond in respect of dilapidations of the garden I do not know, and there is no appeal, I understand, from the other two decisions of the learned judge on the two other points in the case. The result, therefore, is that the appeal will be allowed, and the judgment will be set aside and entered for the plaintiff for the agreed amount of damages. A

ATKIN, L.J.—I agree. This action is brought against the defendant as executor of Lady Humphery, who was the tenant of the plaintiff under a lease granted in 1923. The action is brought by the plaintiff against the executor for damages for breach of covenant to keep in repair. The answer is that, by arrangement between the parties made within a month after the lady died, the lease was surrendered by the defendant to the plaintiff, and that, therefore, the defendant is under no further obligation on the covenant to repair. The case is put by the defendant in two ways: First of all, he says that the surrender was on the terms of a written agreement which provided that the defendant was released by the plaintiff from all obligations past and future with regard to the covenants in the lease; and, secondly, he says that, even if there was not that express release, yet the legal effect of a surrender is to discharge the defendant from all liability past and future on the covenant to repair. B

On the question whether or not there is an express agreement to release I have very little to add to what has been said by my Lord. It appears to me that on giving a proper construction to this document of Nov. 15, 1924, what the landlord agreed to do was to discharge the defendant from the tenancy if he would pay the rent up to March 25 and give up possession at the end of February, and to release him, therefore, from such of his liabilities as he would naturally be released from on the acceptance by the landlord of such a surrender. To my mind, the doctrine with regard to the construction of general releases applies and would apply in this case even if the words were capable of extending to a general release. It seems to me plain that the parties had only been contemplating the question of surrender and of future liabilities, and that they had not in contemplation at all existing, accrued liabilities, and, to my mind, there is no express agreement to release the defendant from such accrued liabilities. C

Thereupon the other case is made which is that which appealed to the learned judge who came to the conclusion that the surrender of a tenancy by the tenant to the landlord creates a position in which the landlord could no longer enforce any obligation of the lease against the tenant whether those obligations had already accrued due before the date of surrender or whether they had not. With great respect to the learned judge, that appears to me to be wrong, and I think the law has been the contrary ever since the days of LORD COKE. My Lord has referred to some recent cases, and inasmuch as counsel for the defendant has challenged us on this point, and I think has said that the law has been otherwise for 900 years—at any rate for quite a substantial number of years—I should like to refer to three passages in works that seem to me of great authority showing the contrary. The first is the passage that is cited by FARWELL, L.J., in *Dalton v. Pickard* (5) from *Walker's Case* (10), at 23 b. I do not refer to the whole case, but the passage is this: D

“It was agreed that if the lessor enters for condition broken, or if the lessee surrenders to the lessor, now the estate and term is determined, and yet the lessor shall have an action of debt for the arrearages due before the condition broken or the surrender made, as it appears by F.N.B. 120.” E

Other passages he quotes. That assumes that the action of debt, which would be the real action, does still exist for the arrearages notwithstanding the surrender; but there is a direct authority that the action exists on covenant and for that purpose I cite from SHEPPARD'S TOUCHSTONE, at p. 301, chap. 17, “Of a surrender.” After dealing with certain kinds of surrender he says: F

A "The fruit and effect of a surrender is that it doth pass the estate of the surrenderor to the surrenderee, and that thereupon the estate of the surrenderor is drowned and extinct in the estate of the surrenderee; and yet not so but that to some purposes it shall be said to have continuance still. . . . So if lessee for life, or years, break a covenant with his lessor, and after surrender his estate to him, his breach of covenant is not hereby salved, for the lessor may have an action of covenant still notwithstanding the surrender."

The other passage that I would like to cite is the passage from *PLATT ON LEASES*, also referred to by the lord justice, in vol. 2 of the edition of 1847, Part 6, chap. 1. At p. 352 he says:

C "It is perfectly settled by a multitude of decisions that notwithstanding an assignment of his lease the lessee continues liable in the personal privity of contract to the payment of the rent and the performance of the covenants during the whole term, although the lessor concur in the assignments. . . . While the lessee remains tenant the lessor has his option to sue him for arrears of rent in debt or covenant; but when the privity of estate is transferred and the lessor has once accepted rent of the assignee or otherwise assented to his tenancy and not before the right to maintain an action of debt against the lessee is determined; the right to an action of covenant, however, survives the assignment; and the lessor may sue at his election, either the lessee or the assignee; the former, in covenant, on the personal privity of contract; the latter either in debt on the privity of estate; or in covenant, on the privity of contract in respect of estate. . . . A right of action once accrued to the lessor against the lessee is not defeated by the expiration of the lease, nor by the surrender by the lessor of his reversion—as if he be the tenant for life—to a paramount reversioner, nor by the lessee's surrender of his term to the lessor."

Obviously I think what is meant by the lessee's surrender of his term to the lessor is a surrender which the lessee voluntarily makes and the lessor voluntarily accepts, because it has to be remembered that in these cases where the law may operate, where the lessee surrenders the term, or gives up possession to the lessor, and the landlord accepts the possession, that is a surrender and the consequences of a surrender come into existence, but nevertheless that surrender depends upon the voluntary act of the landlord in accepting the possession because he need not accept the possession if he does not think fit to do so.

F That is followed by the case in the House of Lords of *A.-G. v. Cox* (1), which G my Lord has referred to, and by a series of other cases which it is not necessary to mention which have been referred to in the argument. The only case which is said to be contrary is a case which arose in respect to disclaimer of a lease under s. 23 of the Bankruptcy Act, 1869, which provides:

H "The property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication, and if the same is a lease to be deemed to have been surrendered on the same date."

A judgment of *CORRON, L.J.*, was cited which is said to go to the full extent of saying, entirely contrary to the whole of the law up to that time, that if a lease was surrendered, the whole of the liability on covenant was wiped out. It appears to me that that is not the meaning of *CORRON, L.J.*'s judgment. He was directing I his remarks to that which alone was relevant at that particular time and that was a case where the trustee had had vested in him certain chattels in a lease by reason of their being within the order and disposition clause and those were vested in him from the date of the act of bankruptcy. He afterwards disclaimed the lease as from the date when the adjudication took place, a later date and that operated as a surrender, but it was held that it operated as a surrender of all the chattels together with the lease, and it seems to me quite irrelevant to any question as to the position of any accrued liabilities on covenants before the date of the surrender. But that the lord justice was not directing his mind to the question

of past liabilities or attempting to lay down or intending to lay down any different law, seems to me to be made plain from the case of *Ex parte Hart Dyke* (6), in which SIR GEORGE JESSEL, M.R., expressly confined his remarks to future liabilities, and in which COTTON, L.J., himself said (22 Ch.D. at p. 428): "But here the surrender has put an end to that covenant," that is the covenant as to what was to be done with regard to hay and straw at the end of the term. "As regards covenants which were only to take effect after the period at which the surrender takes effect, they are gone." It is quite plain that the lord justice would not have confined his remarks to covenants which were only to take effect after the period at which the surrender takes effect if in fact his view of the law was that it applied to covenants which had taken effect before the period of surrender as well as after. I think that for these reasons there is no answer to the plaintiff's claim so far as there were breaches of covenants committed in respect of such term and before the surrender. It appears to me, therefore, that the appeal must be allowed and judgment entered for the plaintiff.

SARGANT, L.J.—I am of the same opinion, and I will express my difference from the judge in the court below in the shortest possible terms.

As regards the question of the effect of a surrender, if that were the true question on which the liability of the parties depend, it seems to me that we are entirely governed by the decision in *Dalton v. Pickard* (5) in this court, and I desire to add nothing more to the remarks which have been made by my Lord and ATKIN, L.J., on that point of surrender. With regard to what I consider to be the true matter which determines the respective rights of the parties, namely, the letter of Nov. 15, 1924, which has been treated by the parties as being a definite offer definitely accepted I would say this. It does not seem to me necessary to resort to the general principles under which general words in a release may be controlled. Those cases are cases where there were words in the release which, taken without qualification, would have applied to almost every cause of action including the cause of action which was before the court at the time, for instance, in the case referred to by my Lord of *London and South-Western Rail. Co. (Directors, &c.) v. Blackmore* (7), the release was a release of all claims and damages therein mentioned for or on any other account or ground whatsoever, and those words, which were of the utmost possible generality were held to be controlled by the context. Here, it does not seem to me to be necessary to apply that doctrine at all, because when once it is considered that what the parties were talking about was not any question of the amount that had to be paid under the covenants, or anything of that sort, but was a proposal for an earlier determination of the lease in default of a licence to let for more than six months furnished, the terms of the letter appear to me to be in favour of the contention of the plaintiff. The letter reads thus:

"If Lady Humphery's executor agrees to pay the rent of The Grove to Mar. 25, 1925, and gives up possession not later than the end of February next, my brother is willing to release him."

To release him from what? That is the question we have to determine. I should have thought that that on its plain and obvious language meant release him from retaining possession as from the date mentioned. If that is so, and I am glad to think so, though I am not founding my judgment on this in any way, it appears pretty clear from the subsequent letters that that was really what the executor meant, and, if that is so, it seems to me that the matter is really at an end.

Appeal allowed.

Solicitors: *C. S. Moor; Druces & Allen.*

[Reported by L. MORGAN MAY, Esq., Barrister-at-Law.]

A

NOTE

DALTON AND ANOTHER v. PICKARD

[COURT OF APPEAL (Vaughan Williams, Fletcher Moulton, and Farwell, L.JJ.),
May 3, 1911]

B

[Reported [1926] 2 K.B. 545, n.; 95 L.J.K.B. 1052 n.;
136 L.T. 21, n.]

*Landlord and Tenant—Lease—Surrender—Release of tenant from liability for
dilapidations—Release in respect of future, not accrued, liability.*

C

The mere acceptance by a landlord of a surrender of a lease does not affect
rights of action under the lease accrued before surrender.

The tenant of an agricultural holding surrendered his lease on terms which
were silent regarding his liability for dilapidations.

D

Held: while the effect of the surrender was to bring to an end the tenant's
obligations under the lease as from that point, there was nothing in the bare
fact of the surrender to deprive the landlords of their right to claim for
dilapidations, liability for which had accrued before the surrender.

Appeal from Canterbury County Court on a Case stated by an arbitrator under
the Agricultural Holdings Act, 1908.

E

The defendant held a farm known as "Tonford Farm" as tenant to the plaintiffs
under a lease which in the ordinary course would not expire till October, 1913.

F

In January, 1910, the landlords were desirous of getting possession of the farm,
and on January 15 there was a meeting between them and the tenant at which
certain terms were proposed with respect to the surrender of the lease by the
tenant. At that meeting nothing was said about the landlords' claim for dilapi-
dations, or that the tenant would be discharged from his liability for them if he
surrendered. Eventually the tenant made the following proposal in the form of

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a letter dated January 15: "I am willing to give up the whole of my holding
known as 'Tonford Farm' at Michaelmas next providing I am allowed fair valua-
tion, and the whole of my live and dead stock to be included in the valuation,
and also an allowance of a half-year's rent." That proposal was accepted by the
landlords' solicitors by a letter dated January 18: "We are acting for the (land-
lords). Your letter of the 15th inst. stating you are willing to give up the whole

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of your holding known as 'Tonford Farm' at Michaelmas next provided you are
allowed a fair valuation and the whole of your live and dead stock to be included
in the valuation, and also an allowance of a half-year's rent, has been handed to
us, and we are instructed on behalf of our clients to accept your terms. Your
tenancy will therefore cease on October 11 next." In pursuance of that agree-
ment the tenant surrendered possession of the farm on Oct. 11, 1910. The parties

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went to arbitration under the Agricultural Holdings Act, 1908, and the landlords
put in a schedule of dilapidations. The tenant protested that when he entered into
the agreement he understood that he was to get as consideration for the surrender
the value of his live and dead stock and half a year's rent, free of all cross-claims
for dilapidations. He said that if he had known that claims were going to be
made against him for dilapidations, he would not have surrendered. The
arbitrator, in the Special Case, submitted the following question of law for the
opinion of the county court judge: "Whether the landlords are entitled, in view
of the circumstances under which the tenancy was determined, and giving due
consideration to the letters of January 15 and January 18, to an amount for
dilapidations claimed in the schedule." The county court judge held that the
landlords were not so entitled. The landlords appealed.

St. John Raikes for the landlords.

Foa for the tenant.

VAUGHAN WILLIAMS, L.J.—It is said that some of the covenants in the lease are covenants that raise a continuing obligation. With respect to the future I think that the obligations have come to an end, but in so far as there have been breaches of covenant anterior to the surrender I think the right of action accrued. There is no pretence here for saying, and it has not been argued, that the surrender amounts to an accord and satisfaction of the breaches in respect of which causes of action have accrued. I have very little to add here, except that the arbitrator, in stating the question for the opinion of the court, lays stress on “the circumstances under which the tenancy was determined” and the giving of “due consideration to the letters of January 15 and January 18.” I have those letters before me, and I see nothing in them which deprives the landlords of any of their rights, on the valuation being taken, to bring in their claim for dilapidations or for bad cultivation. It is quite plain that the tenant, by his own letter, anticipates that there will be a valuation. A valuation is a very well-known thing in agriculture, and there are always two sides to the matter. There is the landlords’ claim, and there is the tenant’s claim, and then the balance is what ultimately has to be paid. I see nothing in this agreement and nothing in the bare fact of the surrender to deprive the landlords of their right to bring in their claim for dilapidations when the valuation is taken. Of course, their right is more or less qualified by the provisions of the statute law, especially those of late years, but there is nothing in this agreement to take away from the landlords their right to bring in their side of the account when the valuation is made.

FLETCHER MOULTON, L.J.—I am of the same opinion. It appears to me that the letter of January 15 is an offer on the part of the tenant to surrender his lease at Michaelmas for a certain consideration moving to him from the landlords. No question arises here about that consideration. It is partly a liquidated sum of money—namely, half a year’s rent—and partly a claim to be liquidated by the process of valuation. The landlords are prepared to give to the tenant all that consideration, and what does he acquire thereby? He acquires a surrender of the lease at Michaelmas with all the legal consequences. A question has been raised as to what are the rights of a landlord who has accepted from his lessee a surrender of the lease before the term is expired. To my mind it is clear beyond dispute that by accepting that surrender and terminating the continuance of the lease, he does not in any way waive or get rid of accrued rights of action in respect of breaches of the covenants of the lease during the time that the lease existed. His lessee entered into those covenants, and was bound to keep them. If he broke them there were vested causes of action, and there is nothing in the legal operation of the surrender which takes away from the reversioner any of those vested causes of action. Of course, the damages must be properly assessed by the arbitrator, but it appears to me that our direction to him must be that by the effect of the surrender, following on these two letters, the landlords waived or deprived themselves of none of the rights which they would have in a case of an ordinary surrender.

FARWELL, L.J.—I am of the same opinion. The case really depends on the construction of these letters, because, notwithstanding the somewhat wide range over which the argument has travelled, the law has been settled for centuries that the mere acceptance of a surrender does not affect the rights of action under the lease accrued before that surrender. The question is between the landlords and the tenant, the tenant having bargained certain things for himself, and the landlords having accepted the surrender on the terms stated by the tenant. So far as the terms stated are concerned they do not express or suggest any waiver by the landlords of any legal right which they possessed. In order to get rid of a liability under the covenants the tenant would have to show either release or accord and satisfaction. It is quite plain that the surrender by itself is not an accord and satisfaction. I have been looking at some of the older cases. I will

A go back to *Walker's Case* (3 Rep. 22a): "It was agreed that if the lessor enters for condition broken, or if the lessee surrenders to the lessor, now the estate and term is determined, and yet the lessor shall have an action of debt for the arrearages due before the condition broken or the surrender made, as appears by F.N.B. 120." I find the same law stated in Platt on Leases, a great authority, the author of which became a Baron of the Exchequer: "A right of action once

B accrued to the lessor against the lessee is not defeated by the expiration of the lease, nor by the surrender by the lessor of his reversion (as if he be tenant for life) to a paramount reversioner, nor by the lessee's surrender of his term to the lessor." LORD COTTENHAM states the law as perfectly well settled and clear in *Mason v. Bogg* (2 My. & Cr. 443). That being so, here we are dealing with those rights which had accrued to the landlord as rights of action before the surrender,

C and there is nothing whatever to discharge or get rid of those rights. The measure of damages is the amount by which the reversion has been injured by the breach of covenant. All those matters are easily ascertainable by the valuer. The case must go back with a direction to the valuer to ascertain the values in the way that has been pointed out.

Appeal allowed.

D

E

Re BLYTH SHIPBUILDING AND DRY DOCKS CO. LTD.
FORSTER AND OTHERS v. BLYTH SHIPBUILDING AND
DRY DOCKS CO., LTD.

F [COURT OF APPEAL (Pollock, M.R., Warrington and Sargant, L.JJ.), January 27, 1926]

[Reported [1926] Ch. 494; 95 L.J.Ch. 350; 134 L.T. 643]

Sale of Goods—Goods to be manufactured—Appropriation of materials to contract—Ship under construction—Materials intended for vessel in ship-builders' yard—Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), s. 18, r. 5 (1).

G

By an agreement, dated Nov. 24, 1924, the B. company agreed to build and an Italian company agreed to buy a steel motor ship with engines, machinery and appurtenances as specified on plans and specification. The contract provided for the inspection of the ship during its building and of its materials by a surveyor appointed by the purchasers and for the payment by instalments of the purchase money. By cl. 6: "From and after the payment by the purchasers to the builders of the first instalment on account of the purchase price the vessel and all materials and things appropriated for her shall thenceforth, subject to the lien of the builders for unpaid purchase money, including extras, become and remain the absolute property of the purchasers. . . ."

H

The construction of the vessel proceeded until an order was made in 1925, in an action brought by debenture holders to enforce their security, appointing a receiver and manager of the assets and undertaking of the company, and from that time no further work was done under the agreement. At the date of the appointment of the receiver the vessel had been partly constructed under the inspection and with the approval of the surveyor for the Italian company, and the first two instalments of the purchase price had been duly paid by the Italian company. At that date there was lying in the yard certain worked material, which was ready to be, but had not in fact been, incorporated in the hull of the vessel, and had been approved by the surveyor, and there

I

was also certain unworked material intended to be used for the construction of the vessel, but which had not been approved of by the surveyor. On a summons taken out by the plaintiffs in the action to determine, inter alia, whether (i) the worked material intended for the vessel, and (ii) the unworked material intended for the vessel, were respectively the property of the ship-building company or of the Italian company,

Held: the mere fact that the shipbuilders had brought appropriate materials to their yard and had them fashioned and made ready to be affixed to the vessel was not appropriation in the legal sense within cl. 6 of the contract, and that was so although the quality had been approved by the shipowners' surveyor; to be "appropriated for the ship" the materials must have been fitted into the vessel, or, if not completely fixed in her, must be substantially in situ so that a removal of them would involve a going back on the work to be done on the vessel, or there must be some definite agreement between the parties which amounted to an assent to the property in the materials passing from the builders to the shipowners; and neither class of the materials in question had become so inextricably a part of the vessel as to satisfy the meaning of the word "appropriated."

Notes. Referred to: *Behnke v. Bede Shipping Co.*, [1927] All E.R.Rep. 689; *Cammell, Laird & Co., Ltd. v. Manganese Bronze and Brass Co., Ltd.*, [1934] All E.R.Rep. 1.

As to the transfer of the property in goods to be manufactured from the manufacturer and seller to the buyer, see 29 HALSBURY'S LAWS (2nd Edn.) 80-82; and for cases see 39 DIGEST 497 et seq. For Sale of Goods Act, 1893, see 22 HALSBURY'S STATUTES (2nd Edn.) 985.

Cases referred to:

- (1) *Tripp v. Armitage* (1839), 4 M. & W. 687; 1 Horn. & H. 442; 8 L.J.Ex. 107; 3 Jur. 249; 150 E.R. 1597; 39 Digest 359, 8.
- (2) *Wood v. Bell* (1856), 6 E. & B. 355; 25 L.J.Q.B. 321; 2 Jur.N.S. 664; 4 W.R. 602; 119 E.R. 897, Ex. Ch.; 39 Digest 499, 1162.
- (3) *Woods v. Russell* (1822), 5 B. & Ald. 942; 1 Dow & Ry. K.B. 587; 106 E.R. 1436; 39 Digest 498, 1153.
- (4) *Goss v. Quinton* (1842), 3 Man. & G. 825; 4 Scott, N.R. 471; 12 L.J.C.P. 173; 7 Jur. 901; 133 E.R. 1372; 39 Digest 500, 1182.
- (5) *Seath v. Moore* (1886), 11 App. Cas. 350; 55 L.J.P.C. 54; 54 L.T. 690; 5 Asp.M.L.C. 586, H.L.; 39 Digest 502, 1206.
- (6) *Wait v. Baker* (1848), 2 Exch. 1; 17 L.J.Ex. 307; 154 E.R. 380; 39 Digest 488, 1075.

Appeal from an order made by ROMER, J., in a debenture holders' action.

By an agreement, dated Nov. 24, 1924, and made between the Blyth Shipbuilding and Dry Docks Co., Ltd., of the one part, and Consulich Societa Triestina di Navigazione of Trieste, an Italian company, of the other part, the English company agreed to build and the Italian company agreed to buy a steel motor ship, with engines, boiler, machinery, fittings, outfit, and appurtenances as specified and shown on the specifications and plans signed by and on behalf of both parties thereto. The contract contained clauses which, so far as material, were in the following words:

"Clause 3. The vessel shall be built under the inspection of such surveyors as the purchasers shall from time to time appoint, but so that there shall not be more than one surveyor at a time over the hull, and one over the engines, boiler, and machinery, and such surveyors shall at all reasonable times during work hours have free access to the vessel during construction. The quality of the material used in the construction of the vessel and the workmanship shall be subject to the approval of the surveyor for classification, and any defective or unsound material or workmanship rejected by him shall be

- A replaced and made good to his satisfaction before delivery of the vessel to the purchasers, but after the vessel shall have been delivered to the purchasers all responsibility on the part of the builders arising under this agreement, except as provided in the specification, shall cease whether such responsibility shall have arisen before or after delivery. Clause 5. The purchasers shall pay to the builders as the purchase price for the vessel the sum of
- B £133,000 sterling to be paid in manner following, that is to say: On the signing hereof £13,300. When the keel of the vessel is laid £19,950. When the vessel is framed £19,950. When the vessel is plated £19,950. When the vessel is launched £19,950. On delivery and in exchange for builders' certificate £39,900, £133,000. Clause 6. From and after the payment by the purchasers to the builders of the first instalment on account of the purchase
- C price the vessel and all materials and things appropriated for her shall thenceforth, subject to the lien of the builders for unpaid purchase money including extras, become and remain the absolute property of the purchasers.... Clause 8. In the event of any instalment of the purchase price remaining unpaid for fourteen days after the same is due the builders shall be entitled to interest thereon at £2 per cent. per annum over the current
- D Bank of England rate and shall be at liberty by notice in writing to be given to the purchasers or sent to them by registered post to rescind this agreement, in which case the purchasers shall thereupon cease to have any interest or property in the vessel, and the same shall become and be the sole property of the builders, free from any claim on the part of the purchasers....
- E Clause 10. During the construction of the vessel and until it shall be delivered to the purchasers, the builders shall at their own expense insure the vessel and all materials and things built into the vessel against all fire, launching, harbour and marine risks, before launching for at least the full amount of the instalments paid on account by the purchasers, and after launching for the full value of the vessel from time to time on the basis of the purchase price...."
- F The English company proceeded with the construction of the vessel, but on May 15, 1925, an order was made in an action brought by debenture holders to enforce their security appointing a receiver and manager of the assets and undertaking of the company, since which date no further work had been done under the agreement. At the date of the appointment of the receiver the vessel had
- G been partly constructed under the inspection and with the approval of the surveyor for the Italian company, and the first two instalments of the purchase price—namely, the £13,300 payable on the signing of the agreement and the £19,950 payable when the keel of the vessel had been laid—had been duly paid by the Italian company. In addition to the partly completed vessel there had been assembled at the yard of the company worked material which was ready to be, but
- H had not in fact been, incorporated in the hull of the vessel, all of which material had been approved of by the surveyor. There was also lying in the company's yard unworked material intended to be used for the construction of the vessel which, however, had not been approved by the surveyor. In these circumstances a summons was taken out by the plaintiffs in the action to have it determined whether (a) the partly constructed vessel, (b) the worked material intended for the vessel, and (c) the unworked material intended for the vessel, were respectively
- I the property of the English company or of the Italian company.
- ROMER, J., decided that the property in the uncompleted vessel had passed to the Italian company, but that the property in the materials not actually built into the vessel had not so passed, because, until those materials were so built into the vessel, they were not to be paid for by the Italian company, and the only fact in any way tending to show that the parties intended the property in them to pass was the fact that they were inspected and passed by the surveyor of the Italian company. That circumstance, however, could have no weight in

view of the fact that, according to the construction which he had put on the contract, the parties had expressly agreed that the property in the uncompleted vessel should pass to the Italian company, but had made no express provision as to the passing of the property in the loose materials. The Italian company appealed against the decision relating to the ownership of the materials. A

C. E. E. Jenkins, K.C., and Rivière for the Italian company.

F. H. Maugham, K.C., and Norman Daynes for the debenture holders. B

POLLOCK, M.R.—This is an appeal from a portion of the judgment of ROMER, J., who, on the hearing of the summons, decided that the receiver and manager had no right to retain the partly constructed hull, but that he could retain (i) the worked material intended for the vessel, and (ii) the unworked material intended for the vessel. From the latter portion of that decision the Italian company has appealed, and the main question which has been argued before us is whether or not the receiver is entitled to retain the worked material intended for such ship. There is no appeal on the other point. C

The question has to be determined by an examination of the terms of the contract of November, 1924. It follows a very unusual form, and cl. 5 provides that the purchasers, the Italian company, are to pay the builders the purchase price for the vessel, amounting altogether to £133,000, in the manner specified in that clause, that is to say, on the signing of the contract, £13,300, when the keel of the vessel is laid, £19,950, when the vessel is framed £19,950, and other like sums when the vessel is plated and when the vessel is launched. It appears, therefore, that in the three cases to which I have referred—namely, when the vessel was framed, plated and launched—although the vessel is in building, it is described as a vessel. We then come to cl. 6, which is the crucial clause, and that provides as follows. [His Lordship read the clause and continued:] It appears that at the time when the receiver for the debenture holders came upon the scene and at the time when his title accrued there was worked material worth £7,660, which had been approved by the Italian company's surveyor, and a certain amount of unworked material worth £1,160, which had not been approved. The contest arises in respect of this worked material to the value of £7,660. Is that worked material part of the "materials and things appropriated for" the vessel which are to "become and remain the absolute property of the purchasers" by virtue of the contract made between the builders of the vessel and the purchasers of the vessel and contained in cl. 6? I do not think that much help is to be gained from the other clauses of the contract. It is perhaps, however, worth calling attention to the fact that cl. 10 of the contract provides for the insurance in these words: D

"During the construction of the vessel and until it shall be delivered to the purchasers, the builders shall at their own expense insure the vessel and all materials and things built into the vessel against all fire, launching, harbour and marine risks." E

It is pointed out that when the question of insurance is dealt with the parties are not content with using the term "vessel," but they add "all materials and things built into the vessel." One would have supposed that those added words were unnecessary, because one would have thought that the word "vessel" would have covered all materials and things which were attached to it at the time. Although, therefore, it may be that a contrast is observable in cl. 10, and that it is difficult to treat cl. 6, when it refers to a vessel, as meaning all materials which are attached to it, yet I doubt very much whether there is sufficient reason for treating the one clause as explained by the other, or the one as being an interpretation clause to be applied to the other. F

Speaking for myself, if these words in cl. 6, "all materials and things appropriated for her," were absolutely free from and unfettered by any decision, I think that it would be attractive to say that they were intended to mean and G

- A** cover materials and things which had been brought to the slip for the purpose of being put upon that particular vessel, or had been shaped or numbered, or in some way made of the appropriate size, for the purpose of being used in the progress of the completion of the vessel. On the other hand, one has to remember that cl. 6 is a very important clause, and must be carefully construed, because the effect of it *ex facie* is to take away certain materials and things which up to that time are owned by and the property of the building company and hand them over to the owner of the vessel, an operation which may have considerable effect upon the position and credit of the building company. For a good number of other reasons I think it is clear that one must be cautious in the interpretation put upon the word "appropriated." It can easily be seen that a loose construction might enure to the benefit of a particular purchaser, but be a very serious matter for the building company. More than that, the words "appropriated for" may be used in respect of goods which have been passed by the surveyor of the Italian company, to whom is entrusted the duty of watching the progress of the vessel, or it may mean goods which have been appropriated, but not passed by the surveyor, or it may mean goods which have been built specially for and only to the particular design, or the plates which are to be used upon the work of this particular ship. I am clear, therefore, that, although it might appear easy to construe the word "appropriated," one has to be very careful to follow the cases which have been decided and must, or ought to, have been in the mind of the draftsman of this clause. It is clear that a clause of this nature is no uncommon one in the matter of building ships or building houses, and a table of the cases which have been decided on this point, cases showing where the property in unfixed materials has not passed, is to be found usefully set out in HUDSON ON BUILDING AND ENGINEERING CONTRACTS.
- B**
- C**
- D**
- E**

- The learned judge came to the conclusion that this worked material which has been approved by the surveyor to the value of £7,660 is not within the words "materials and things appropriated for the vessel." In a very careful judgment he has examined the cases. At the outset of his judgment he deals with the appropriate sections of the Sale of Goods Act, 1893. I do not desire to go over the same ground again, but it is pointed out that in s. 18, r. 5 (1), for the purpose of ascertaining when the property passes the goods must be "unconditionally appropriated to the contract." If any test is to be derived from the Sale of Goods Act I do not think that that word "unconditionally" ought to be overlooked. What is meant by "appropriated" in this connexion? Does it mean that once some goods have been brought on the site definitely to be used in the vessel, no others can be substituted for them—that if those particular goods were damaged or injured or found for some other reason unsuitable, no change could be made except at increased cost to the purchaser of the vessel? Does it mean that those goods and those goods only are to be used, and in respect of them, if any misfortune happens, it falls upon the shoulders of the purchaser? Unless such is found to be the case it does not appear that it would be right to say that the materials and things had been unconditionally appropriated. More than that, it would appear from an examination of the Sale of Goods Act that there must be an assent to the appropriation. The appropriation offered by the builder must be assented to for or on behalf of the purchaser of the vessel, and it appears to me that you cannot accept the passing of these materials and things by the surveyor appointed by the purchaser of the vessel as being an acceptance of the appropriation for the purposes of this contract.
- F**
- G**
- H**
- I**

In *Tripp v. Armitage* (1), a case decided in 1839, which has been approved in recent years, LORD ABINGER deals with this very argument. He says:

"I cannot at all adopt the first ground he has taken—namely, that by reason of the approbation of Turnbull, the clerk of the works, and the application of the pulleys sent by the defendants to be fixed to the sashes, the property was appropriated to the defendants."

He gives his reasons, which are too long for me to set out, but he points out the difficulties to which I have referred. If the appropriation is to be held to have been complete, then the purchaser is placed in the unfortunate position of having to replace the goods if they are lost before they have actually been fixed into the vessel. *Wood v. Bell* (2) was to the same effect. There the same question arose whether or not the plaintiff was to recover as against the assignees in bankruptcy of the builder in respect of the ship and loose things, engines and materials. JERVIS, C.J., in giving the judgment of a very strong court, says this, in speaking of these materials:

"Here they are merely provided for the ship. If the circumstances in *Woods v. Russell* (3) were the same as here, I should doubt whether the decision in that case was right, and I should say the same as to *Goss v. Quinton* (4). The question is, What is the ship? not, What is meant for the ship? I think those things pass which have been fitted to the ship, and have once formed part of her, as, for instance, a door hung upon hinges, although afterwards removed for convenience. I do not think the circumstance that materials have been fitted and intended for the ship makes them part of the ship."

It is clear, therefore, upon those authorities that mere acceptance by a surveyor or assent to a particular design appropriated to the ship are not sufficient to appropriate them for the purpose of making them the property of the purchasers. Lastly, in *Seath v. Moore* (5) (11 App. Cas. at pp. 370, 382), to which the learned judge below referred, LORD BLACKBURN says this:

"It is, I think, a question of the construction of the contract in each case, at what stage the property shall pass; and a question of fact, in each case whether that stage has been reached."

LORD WATSON says:

"It appears to me to be impossible to hold that any of these articles were specially appropriated to the several contracts for which they were provided, or, in other words, that they were 'sold' in such sense as to give the appellants a *ius ad rem*, unless your Lordships shall be of opinion that the decisions of the Court of Exchequer in *Tripp v. Armitage* (1) and of the Exchequer Chamber in *Wood v. Bell* (2) are contrary to law."

With these authorities before me I feel that I am guided to give a construction to these words far narrower than at first sight I should myself have given. It seems to me that the materials and things must be appropriated in a much closer and more complete sense than by mere acceptance by the surveyor or by having been made in such a manner as that they could be fitted upon the vessel. I come ultimately to the conclusion after examining the cases that the words in question mean materials which have been fitted into the vessel, or, if they have not been completely fixed in the vessel, are substantially *in situ*, so that the removal of them would involve a going back upon the work to be done upon the vessel. It seems to me that we are to read the word "appropriated" in that sense. I have, therefore, come to the conclusion that these worked materials, although worked up and suitable for placing into the vessel at the appropriate time, and accepted, it may be, by the surveyor, have not yet taken their place and become so inextricably a part of the vessel as to have satisfied the meaning of the word "appropriated." For these reasons I think that the learned judge was right, and that the appeal must be dismissed with costs.

WARRINGTON, L.J.—I am of the same opinion. We have to determine a point arising on the construction of a contract for the building of a ship, and the point we have to determine is whether certain material that was worked and lying in the yard or the building berth ready to be incorporated in the hull of the vessel and which had been approved by the purchasing company's surveyor became thereby the property of the purchasers. The question turns directly

A upon a clause in the contract. The contract provided for the building of a ship, for the inspection of the ship during its building and of its materials by a surveyor appointed by the purchasers, and for the payment by instalments of the purchase money. One instalment was to be paid on the signing of the contract, that is to say, before any work had been done at all, the next when the keel of the vessel was laid, and others at certain stages of its construction. [His Lordship read cl. 6 of the contract, and continued:] It is important to notice that the effect of that clause, whatever may be the incident of its subject-matter, is to make that subject-matter the property of the purchasers. The contract is for the sale, not of detached chattels which these worked materials not yet added to the ship are, but is for the sale of a particular chattel, which is the ship. I think that the result of the argument has been to convince me that the word "appropriated" is used in this contract to express what would have been inferred to be the intention of the parties if we had had nothing but the contract for the building of the ship and the payment of certain instalments as the building progressed. That the result of that state of things would have been to vest the vessel at its various stages of construction with, of course, the materials which at that stage formed part of it, I think is quite plain from a passage in the speech of LORD WATSON, addressing the House of Lords in *Seath v. Moore* (5) (11 App. Cas. at pp. 380, 381). I need not read the whole of that passage. It expresses what would have been the result, but he then adds the passage which, in my judgment, determines the present case:

E "There is another principle which appears to me to be deducible from these authorities and to be in itself sound, and that is, that materials provided by the builder and portions of the fabric, whether wholly or partially finished, cannot be regarded as appropriated to the contract, or as "sold," unless they have been affixed to or in a reasonable sense made part of the corpus. That appears to me to have been a matter of direct decision by the Court of Exchequer Chamber in *Wood v. Bell* (2). In *Woods v. Russell* (3) the property of a rudder and some cordage which the builder had bought for the ship was held to have passed in property to the purchaser as an accessory of the vessel, but that decision was questioned by JERVIS, C.J., delivering the judgment of the court in *Wood v. Bell* (2), who stated the real question to be

G 'what is the ship, not what is meant for the ship,' and that only the things can pass with the ship 'which have been fitted to the ship and have once formed part of her, although afterwards removed for convenience.'

H If that is true, then these things which have only been prepared by the builders, approved so far as quality is concerned by the purchasers' surveyor, and no doubt intended by the builders to be used in the construction of the ship, cannot be said to be appropriated. If any other construction were put upon the contract the result would be startling, because if these goods from the moment they were intended by the builder, brought into the yard and approved of by the surveyor, as materials to be used in the construction of the ship, belonged to the purchaser of the ship and were his property, they would be entirely at his risk; if anything happened to them before they were built into the ship he would have to pay for the substitution of other materials. It seems to me impossible to suppose that the parties intended any such consequence as that. I think, therefore, that the real way of dealing with this question is to read the word "appropriated" in its proper technical sense and as limited to goods which have been so dealt with that the builder could not use them except for the purposes of the ship, and that the purchasers could not refuse to accept them as part of the ship, but that the mere intention on the part of the builder to use them is not enough to transfer the property to the purchasers. In my opinion, the judgment of ROMER, J., is correct, and the appeal ought to be dismissed.

SARGANT, L.J.—I am of the same opinion. The question here turns upon the meaning of the word "appropriated" in cl. 6, and it seems to me that "appropriated" is a term of legal art and has a certain definite meaning. I do not think that a material is appropriated for the purpose of passing property, by any intention, however definite, on the part of one of the parties to the contract, or by any process of approval of the quality of the material by the surveyor of another party. For appropriation I think there must be some definite act, such as the affixing of the property to the vessel itself, or some definite agreement between the parties, which amounts to an assent to the property in the materials passing from the builders to the purchasers. A B

In addition to the cases which have been referred to in the judgments already delivered, I should like to refer to *Wait v. Baker* (6). There, there was a contract for the sale of from 400 to 500 quarters of barley which were to be shipped at Kingsbridge and delivered at Bristol, and the vendor kept the purchaser informed of the chartering of the vessel and of the loading of the proper number of quarters of barley on board the vessel, and in one letter he says: C

"I now send you copy of charterparty of the *Emerald*, which vessel will sail for the port of loading to-day or to-morrow. . . . The *Emerald* will commence loading to-day. . . . I hope to be able to send you invoice and bill of lading of *Emerald*." D

Later, he wrote:

"The *Emerald* is nearly loaded; expect the bill of lading to-day or to-morrow. I expect to be in Exeter on Friday, when it is very likely I shall run down and see you." E

Two days afterwards the vendor, Lethbridge, called on the defendant at Bristol and left the invoice and unendorsed bill of lading at his counting-house. Later in the day, Lethbridge again called upon the defendant, when the defendant raised some objections to the quality of the cargo, and asserted that it was inferior to the samples; he also threatened he would take the cargo, but sue Lethbridge for eight shillings a quarter difference. After some dispute upon the matter, the defendant offered Lethbridge the amount of the cargo in money, and said that he accepted the cargo. Lethbridge declined, sold the cargo to another purchaser, and it was held that the other purchaser acquired a good title. Every step was taken towards an appropriation short of the final step of the definite assent between the two persons, the vendor and the purchaser, as to those particular quarters of barley being the quarters of barley which had been agreed to be sold. Here, to my mind, the mere fact that the shipbuilders brought appropriate materials on to their yard and had them fashioned and made ready to be affixed to the vessel was not appropriation in the legal sense, and that although the quality had been approved of by the surveyor of the shipowners. It seems to me that if the shipbuilders had had a similar vessel being built in an adjoining slip and had desired for certain reasons of urgency to apply the materials they had collected for the ship now in question to the other vessel, they would have been entitled to do so, and that the property would not have passed from them so as to prevent their applying these materials for that purpose. F G H

I was oppressed at one time by the fact that in cl. 6 there is the use of the words: "The vessel and all materials and things appropriated for her." I thought that the vessel *prima facie* would mean the vessel in its various stages of construction, and that if in order to pass the property in these materials it was necessary to have the materials affixed those words, "all materials and things appropriated for her," might be taken as superfluous but I think there are two answers to that. In the first place, I think that the words would include materials or things which, although not actually fixed, had by the common consent of the builders and the owners been agreed to be affixed to the vessel; and, in the second place, it seems to me that the word "vessel" here is used in a loose way and I

- A** does not necessarily comprehend the whole structure of the vessel in every detail as it is being completed. Rather it looks to me as if the vessel here means the general structure of the vessel, and the words "all materials and things appropriated for her" may very well apply to all sorts of fittings and matters of that kind which do not really constitute the general structure of the vessel. That appears to me to be borne out very much by the clause as to insurance, where it
- B** is provided that the builders shall at their own expense insure the vessel and all materials and things built into the vessel. It is clear there, at any rate, that the word "vessel" is looked on as comprising something short of everything which is affixed to the structure of the vessel, and is used in an even narrower sense than it appears to be used in cl. 6. On the whole I have come to the conclusion, though the agreement is not an easy one to construe logically throughout, that
- C** the decision of the learned judge was right, and that there was not here sufficient to pass to the shipowners the property in the materials in question.

Appeal dismissed.

- Solicitors: *Maples, Teesdale & Co.*, for *Bramwell, Clayton & Clayton*, Newcastle-upon-Tyne; *Field, Roscoe & Co.*, for *Wilkinson & Marshall*, Newcastle-upon-Tyne.

[*Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.*]

E

NATIONAL SAILORS' AND FIREMEN'S UNION OF GREAT BRITAIN AND IRELAND *v.* REED

- F** [CHANCERY DIVISION (Astbury, J.), May 11, 1926]

[*Reported* [1926] Ch. 536; 95 L.J.Ch. 192; 135 L.T. 103;
42 T.L.R. 513]

- Trade Union—Strike—Illegal strike—Strike in industry in which no dispute between employers and employed exists—Support for workers engaged in dispute in another industry—Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 1.*

- G** In May, 1926, the General Council of the Trades Union Congress called, in support of workers in the mining industry between whom and their employers a dispute existed, a strike by members of unions affiliated to the Congress between whom and their employers no dispute existed.

- H** **Held:** (i) a strike by workers in an industry in which no trade dispute existed was illegal at common law and acts done in pursuance of such a strike were not protected by s. 1 of the Trade Disputes Act, 1906, but were unlawful, and an injunction would be granted restraining the officials of a union in such an industry from calling on the members of the union to leave their employment; (ii) trade union funds were held in a fiduciary capacity and could not legally be used to pay strike pay to any member who illegally ceased work.

- I** **Notes.** By the Trade Disputes and Trade Unions Act, 1927, s. 1 (1) (a), a strike was made illegal if it had any object other than or in addition to the furtherance of a trade dispute within the trade or industry in which the strikers were engaged and was designed or calculated to coerce the government either directly or by inflicting hardship on the community, but that Act was repealed by the Trade Disputes and Trade Unions Act, 1946. The law, therefore, remains as it was at the date of the present decision, which, it has been suggested, is not

altogether consistent with observations of LORD LOREBURN, L.C., in *Conway v. Wade*, [1909] A.C. 506: see 32 HALSBURY'S LAWS (2nd Edn.) 528. For cases see 43 DIGEST 120 et seq.

Motion by the National Sailors' and Firemen's Union of Great Britain and Ireland for an injunction to restrain George Reed, the secretary of the Tower Hill branch of the union, and six other persons, officials of that branch, from calling upon members of the union in the name of the union to leave their employment, without the authority of the executive council of the union. The matter arose in consequence of the "general strike" which was called on May 3, 1926, by the General Council of the Trades Union Congress to which the plaintiff union was affiliated.

Luxmoore, K.C., and *R. F. Roxburgh* for the plaintiffs.

The defendants appeared in person.

ASTBURY, J.—This is a motion in an action brought by the National Sailors' and Firemen's Union of Great Britain and Ireland against a number of defendants, who are officers or officials of a branch in London of the union, seeking an injunction to restrain the defendants, putting it shortly, as branch secretary or officials of the union, or in the name of the union, from calling members of the union out on strike or calling upon members of the union to leave their employment without the authority of the executive council of the union.

A serious crisis has arisen in the country with regard to the dispute in the mining industry. The General Council of the Trades Union Congress have assumed control of this dispute, and have called upon all unions affiliated to the Trades Union Congress to cease work, if required by the council. The council has called a so-called general strike, and the defendants have explained to me the nature of that strike. A large number of trade unionists throughout the country, in railway, transport and other trades, have been called upon by the council to come out on strike. The defendants are the branch secretary and delegates of the Tower Hill branch of the plaintiff union, and they intend to take instructions from the General Council of the Trades Union Congress, and not from the executive council of their own union, in relation to the matter in question. The Tower Hill branch of the plaintiff union has, without the authority of that union, passed a resolution endorsing the action of the Trades Union Congress in calling a general strike, and that resolution is in these terms:

"We, the members of the Tower Hill branch of the National Sailors' and Firemen's Union, endorse the action of the Trades Union Congress General Council in calling the general strike, and pledge ourselves to do all in our power to help them, and we call on the branch secretary and officials to notify all members to cease work immediately."

In pursuance of the above resolution the defendant Stuart issued the following notice on the plaintiff union's paper:

"All members of the Sailors' and Firemen's Union, except men on articles of agreement, are to come out in support of the Trades Union Council's policy, and are to picket their jobs."

I have been told that the policy therein referred to is the policy of the Trades Union Congress in trying to induce and promote a general strike throughout the country. In addition to the resolution of the Tower Hill branch which I have already read, they passed a further one as follows:

"We, the members of the Tower Hill branch, express our confidence in the secretary and officials of this branch and we support them in carrying out the instructions of the Trades Union Congress General Council."

I have been informed by the defendant that those instructions are to come out on strike. The general president of the plaintiff union, Mr. Havelock Wilson,

A has made an affidavit in which he has proved a number of the matters to which I have referred, and in it he says: "Having regard to the present emergency the attitude of the above-named defendants is one of national importance, inasmuch as, beyond it causing a breach of agreements with shipowners, it is an interference with the food supply on which the nation is dependent."

B According to the rules of the plaintiff union certain trade union benefits are given to members of the union on certain conditions. One of those conditions is that without the consent of a two-thirds majority assured no general strike—that means no strike in the union itself—shall be proclaimed, and I see in r. 66 (3) that there is a provision referring to members "wilfully and persistently doing or suffering any act or thing in contravention of any of these rules or of any lawful resolution of the executive council." According to the evidence before C me, certain members of the plaintiff union have been misled and compelled by the defendants and their pickets to leave their ships, and to suffer serious loss and damage, and have been placed in doubt as to their position as members of this union. These acts on the part of the defendants have been done without the authority of the plaintiff union, and contrary to its rules and orders, and, lastly, no strike has been called by the plaintiff union, and no ballot of its members, D as provided for by its rules, has been completed. In these circumstances the plaintiff union seeks the injunction which I have referred to, and the learned counsel who has appeared for the union bases his right to claim this injunction on two grounds: One, that the defendants have acted in breach of the rules and orders of the union and are liable to be restrained as prayed, and, secondly, that they have acted contrary to the common law of this country.

E I will endeavour now to state what I apprehend is the law upon this matter. In the first place, it is evident from the facts above mentioned and from the rest of the evidence which has been filed, that members of the plaintiff union have been placed in a position of doubt and danger, and it is my duty, as I have been requested by the plaintiffs and defendants to do, to state shortly their rights and those of their union. The defendants have very frankly admitted that they desire F that the members of their union shall be told their rights in the unfortunate circumstances which have arisen. The so-called general strike called by the Trades Union Congress is illegal and contrary to law, and those persons inciting to or taking part in it are not protected by the Trade Disputes Act, 1906. No trade dispute has been alleged or shown to exist in any of the unions affected, except in the miners' case, and no trade dispute does or can exist between the G Trades Union Congress on the one hand and the government and the nation on the other. The orders of the Council of the Trades Union Congress above referred to are, therefore, unlawful, and the defendants are acting illegally in obeying them, and can be restrained by their own union from doing so. The plaintiffs' counsel have contended that, if members of the plaintiff union stay in their jobs and refuse to strike, they cannot be deprived of their trade union benefits, and the H defendants who have appeared before me have stated, and stated very properly, that it is important to them that their members should know their rights in this respect.

The law upon that matter is as follows. No member of the plaintiff union or any other trade unionist in this country can lose his trade union benefits by refusing to obey unlawful orders, and the orders of the General Council of the I Trade Union Congress and the unions who are acting in obedience thereto in bringing about the so-called general strike are unlawful orders, and the plaintiff union is entitled to have this fact made clear and brought to the attention of its members. Counsel for the plaintiffs has further contended that those members of the plaintiffs' union who obey this order will not be entitled during the continuance of the strike to receive any strike pay from their union, and the defendants have, again very properly, and, I think, very fairly, stated that it is their desire that they should know, and that their members should know, their rights in this respect. Trade union funds in this country are held in a fiduciary

capacity, and cannot legally be used for, or depleted by, paying strike pay to any member who illegally ceases to work, and breaks his contract without justification in pursuance of orders which are unlawful, and this fact also is one which the plaintiff union is entitled and bound to make clear to its members in the difficult position in which they have been placed. With regard to the second ground upon which the plaintiff union seeks to obtain this injunction the matter is beyond question. The defendants, in addition to acting, as above said, in defiance of the law, have acted contrary to the rules and orders of their own union, and are on this ground also liable at the suit of that union to be restrained by injunction from continuing to do so.

The result is that there must be an injunction until the trial or further order substantially in the terms of the notice of motion, which can be settled later, or the defendants may, if they prefer it, give an undertaking in those terms until the trial or further order. I was desirous of assisting the defendants as far as I was able to do so, in coming to a conclusion whether they would prefer to give this undertaking or be restrained by injunction. They agreed with me that they would like to know their rights before deciding which course to adopt. I have done my best to explain their rights as I understand them. [The defendants elected to have an injunction granted, and ASTBURY, J., thereupon granted an injunction until judgment or further order, restraining the defendant Reed, as branch secretary, and the other defendants, as officials of the plaintiff union, or—as to all the defendants—in the name of the plaintiff union, calling upon members of the plaintiff union to leave their employment without the authority of the executive council of the plaintiff union or contrary to its rules.]

Solicitors: *Vizard, Oldham, Crowder & Cash.*

[Reported by E. K. CORRIE, Esq., Barrister-at-Law.]

Re THAIN. THAIN v. TAYLOR

[COURT OF APPEAL (Lord Hanworth, M.R., Warrington and Sargant, L.JJ.), April 23, 1926]

[Reported [1926] Ch. 676; 95 L.J.Ch. 292; 135 L.T. 99; 70 Sol. Jo. 634]

Infant—Custody—Rights of father—Welfare of infant—Discretion of court—Guardianship of Infants Act, 1925 (15 & 16, Geo. 5, c. 45), s. 1.

An infant, who was now nearly seven years old, had from earliest infancy lived with Mrs. J., her deceased mother's sister, and the latter's husband, Mr. J. Her father, a man of high character whose conduct throughout was free from blame, remained a widower during that period and so would only have been able to provide strangers to care for the infant if Mr. and Mrs. J. had not taken her. The father, having married again, wished the child to live with him and his second wife, but Mr. and Mrs. J. declined to surrender the child and sought an order giving them custody of her. EVE, J., refused their application and made an order giving the custody of the infant to the father. On appeal,

Held: while in such a matter the welfare of the infant was the first and paramount consideration it was not the sole consideration, and in the present case it was important and for the welfare of the infant that without further delay she should have the opportunity of winning the affection of her father

A and be brought for that purpose into intimate connection with him; the question was pre-eminently one which depended on the exercise by the judge of first instance of his discretion, and the Court of Appeal would not interfere unless satisfied that the discretion had been wrongly exercised, or that some principle had been neglected by the judge, or that there was some other defect; in the present case the judge had exercised his discretion rightly, and
B the appeal would be dismissed.

Notes. Considered: *Re Crichton* (1935), 79 Sol. Jo. 181. Distinguished: *Re Collins (an infant)*, [1950] 1 All E.R. 1057. Referred to: *Re Carroll (No. 2)*, [1930] All E.R.Rep. 192; *Lough v. Ward*, [1945] 2 All E.R. 338; *McKee v. McKee*, [1951] 1 All E.R. 942.

C As to custody of infants, see 21 HALSBURY'S LAWS (3rd Edn.) 191 et seq.; and for cases see 28 DIGEST (Repl.) 606 et seq. For Guardianship of Infants Act, 1925, see 12 HALSBURY'S STATUTES (2nd Edn.) 954.

Appeal from an order of EVE, J., made on an originating summons for an order for the custody of Mary Louise Thain, an infant. The application, which was made by Mr. and Mrs. Llewellyn Jones, with whom the infant had lived for some seven years since infancy, was refused by EVE, J., who made an order giving the custody of the infant to her father, the defendant, William Arthur Thain. The applicants appealed. The facts appear in the judgments.

F. H. Maugham, K.C., and *D. D. Robertson* for the applicants.

J. M. Gover, K.C., and *L. W. Bryne*, for the infant's father, were not called upon to argue.

E **LORD HANWORTH, M.R.**—This is an appeal from an order made by EVE, J., upon a summons before him. The order he made was that the custody of an infant should be committed to her father, the defendant. The question is whether or not EVE, J., was right in that order which was made by him in exercise of his discretion. Was that discretion rightly and judicially exercised? These
F orders which are made with reference to the custody of infants are largely matters of discretion, and this court should be very careful before varying the exercise of the discretion by a judge, particularly so in the case of a judge so experienced as EVE, J., is in these matters. It is right that I should give a few dates in order to show how the matter came before us. The defendant, William Arthur Thain, married a sister of Mrs. Jones, and on April 29, 1919, a child, who is the
G infant in question here, was born. Mrs. Thain then suffered considerably and she and the child were brought when the child was a month old to the home of Mr. and Mrs. Jones, where the defendant, the husband, also went. They lived there for several months when on December 3 of that year the mother died, and she left property of the value of £11,800 to her husband as tenant for life so long as he remained a widower and then to the child on her attaining twenty-one. In January, 1920, the husband left the house of Mr. and Mrs. Jones as
H he was engaged on important duties under the Air Ministry, but he accepted the offer of the Jones' that the child should remain with them, and, therefore, the child has never known another home, being brought up with the children of Mr. and Mrs. Jones. To help the husband, then a widower, Mr. and Mrs. Jones took the custody of the child, and they have carried out their duties creditably. The father from time to time has paid visits to see his daughter and contributed to her upkeep at the rate of 12s. 6d. a week, having in the four years ending in December, 1924, paid altogether £366 in that behalf. It is clear that originally and for some time the father was contemplating that this arrangement should continue, as, he being a widower, it was difficult for him to deal with a child so young. On July 25, 1922, Mr. Thain married again and there were no children of that marriage. His second wife was of a different branch of the Church from that of Mr. Thain and Mr. and Mrs. Jones, but there exists no
I evidence to show that that would constitute any barrier. In February, 1925, the

father demanded that his child should be handed over to him. Mr. and Mrs. Jones, having grown fond of the child, regretted that she should have to leave them, and the result was that proceedings were taken. An application was made for a writ of habeas corpus, and TALBOT, J., made an order for the delivery up of the child to her father, but on July 25, 1925, a Divisional Court reversed that order. The Lord Chief Justice made it plain in his judgment that this decision was only with reference to the application then made. He said:

"I desire to say nothing at all which might even be thought in one direction or in any other direction to prejudice or to speculate about the future. This court has a present and, indeed, an immediate task to perform. The question is whether the order made is to stand or not to stand. Limiting myself strictly to that task and deliberately avoiding any words which might encourage or discourage any future action, I am bound to say that I have come to the conclusion that this order should be set aside."

SHEARMAN, J., agreed. EVE, J.'s decision does not conflict with that order of the Divisional Court, nor by affirming him do we differ from that order of the Divisional Court at the time it was made. There was an appeal lodged to the Court of Appeal against the order of the Divisional Court, but it was ordered to stand over until after the hearing of the summons for the custody of the child to be heard by EVE, J.

We have been referred to cases and the Acts of Parliament. I agree with WARRINGTON, L.J., in disagreeing with AVORY, J., when he said that there was evidence here which made s. 3 of the Custody of Children Act, 1891, applicable. That section enacted:

"Where a parent has—(a) abandoned or deserted his child; or (b) allowed his child to be brought up by another person at that person's expense . . . for such a length of time and under such circumstances as to satisfy the court that the parent was unmindful of his parental duties, the court shall not make an order for the delivery of the child to the parent, unless the parent has satisfied the court that, having regard to the welfare of the child, he was a fit person to have the custody of the child."

That section does not touch the facts of this case. The father intended to leave the arrangement made with the Jones' without a limit as to time, but his conduct was not that of allowing his child to be brought up at another's expense and unmindful of parental duties. Another statute is the Guardianship of Infants Act, 1925, which by s. 1 provides that the court should, in deciding any such question as we have here,

"regard the welfare of the infant as the first and paramount consideration. . . ."

That section declares no new law, and the welfare referred to there must be taken in its large significance—the infant's welfare as a whole must be considered. It is not merely a question whether the child would be happier in one place or another, but one of her general well-being. The section merely stated the law which had hitherto been acted upon by the Chancery Division. Mrs. Jones may be distressed to part from her niece, and no doubt has a warm affection for the child, and there is abundant evidence that the Jones' have done all they could to make this child happy, but Mr. Thain is the father of the child and is now in a position to offer a home where the child can have a woman's care, and he asks that the child should come into his custody. I appreciate the skill of counsel for the applicants in their presentment of the case and their care of the feelings of the husband and the parties in this appeal. It is said that the child is now with her maternal aunt and that the present wife of her father has not had touch with the child. At some time, however, the father and his daughter ought to be brought in touch together, so that the happy relationship of father and daughter may be established. Counsel for the applicants has clearly stated

A that he does not disregard the rights of the father to the custody of the infant at some time. At what time? Is the child to be left with the Jones' until she becomes more and more accustomed to her aunt and uncle? Both sides are of the highest moral character; but I think that the child ought to be brought into contact with her father, and in the interests of the child that should be now, at the present time, and the child be given an opportunity of coming to her rightful home. I agree with the judgment of EVE, J., and see no reason to disturb it. The true interests of the child are that she should be guided to feelings of love and respect towards her father, with gratitude to the Jones'—and I hope that the parties will be careful to put no impediment in the way of this, so that the child may have, in effect, two happy homes that will be to her true advantage.

C **WARRINGTON, L.J.**—This is an appeal from an order of EVE, J., committing to the father the custody of a girl of seven years of age. The applicants, who are the aunt and uncle by marriage of the child, say that the order is wrong and that the court should hold its hand for the present and make no order which would remove the child from their custody, which began within a week or two of the child's birth and continued till now, leaving it to a future time to review again the state of things. I concur with what the Master of the Rolls has said as to the moderate way in which the applicants' case has been dealt with before this court, but, on the other hand, that very moderation is fatal to the applicants. It is said that the father has precluded himself from insisting on any right, as he should have undertaken the duties of looking after his child himself before now, but I think EVE, J., was right to conclude that the father is not precluded from changing his mind, and, in the present altered circumstances, from insisting on his position as a father. This question was pre-eminently one which depended on the exercise by the judge of his discretion and with that this court will not interfere unless satisfied that the discretion was wrongly exercised, or that some principle has been neglected by the judge, or that there is some other defect. But here he has correctly stated the principles on which such orders ought to be made—that the welfare of the child is the first and paramount consideration; but that is only one among several other considerations, the most important of which it seems to me is that the child should have the opportunity of winning the affection of its parent and be brought for that purpose into intimate connection with the parent. The judge bore these matters in his mind, and, therefore, he was right in coming to the conclusion that the father was entitled to, and it was for the welfare of the child that he should, be allowed to take over the duties and enjoy the natural privileges of a father. EVE, J., said:

H “It was said that the little girl would be greatly distressed at parting from Mr. and Mrs. Jones. I can quite understand it may be so, but at her age one knows from experience how mercifully transient are the effects of partings and other sorrows, and how soon the novelty of fresh surroundings and new associations effaces the recollection of former days and kind friends, and I cannot attach much weight to this aspect of the case.”

I He spoke from experience, and what he said appeals to the common sense of human nature, and the parting now would not affect the child so much as it would in later life if we decided to postpone giving the custody to the father. The judge has rightly exercised his discretion, and the applicants have shown no ground for any interference with the order he made. I should have made the same order.

SARGANT, L.J.—It is not necessary for me to say more than that the Guardian-ship of Infants Act, 1925, does not affect what was and is the law that the first and paramount consideration is the welfare of the child. And it is very much for this child's welfare that she should be in the custody and living in the house of her father rather than with the aunt and uncle, however affectionate and kind they may be, especially in a case such as this, when the father has done nothing

worthy of blame. There would be peculiarity in a child always living with its aunt and uncle rather than with its father. Undoubtedly, it will be a great wrench to the aunt and uncle parting with the child, but the wrench will be slighter than if the parting were to take place two or three years hence. There is no reason for saying that the judge has exercised his discretion on any wrong principle, and I agree with WARRINGTON, L.J., that I should have come to the same conclusion myself if the case had been before me in the first instance. There is nothing which will warrant this court interfering with the order made by Eve, J.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, for *D. Roger, Evans & Jones*, Newport; *Tiddeman & Marshall*.

[Reported by G. P. LANGWORTHY, ESQ., Barrister-at-Law.]

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD. v. SEDGWICK, COLLINS & CO., LTD.

[HOUSE OF LORDS (Viscount Cave, L.C., Lord Shaw, Lord Sumner, Lord Parmoor and Lord Blanesburgh), June 10, 11, July 29, 1926]

[Reported [1927] A.C. 95; 95 L.J.K.B. 1015; 136 L.T. 72;
42 T.L.R. 749]

Execution—Garnishee order—Refusal—Risk of garnishee having to pay debt twice—Need of risk to be "real and substantial"—Setting aside judgment—Application by person not party to action.

Company—Foreign company—Service of writ on company—Service on person registered as authorised to accept service—Prior repudiation of authority—Company nationalised abroad—Submission to jurisdiction.

Conflict of Laws—Recognition of English judgment abroad—Submission to jurisdiction—Judgment against non-resident foreign defendant—No appearance by defendant.

For some years before 1917 a Russian company had done, through a branch in London, insurance and reinsurance business in England, one C. being registered under s. 274 (1) (c) of the Companies (Consolidation) Act, 1908, as being authorised to accept on behalf of the company service of process and any notices required to be served on the company. After the revolution in Russia the Soviet legislature made decrees putting all Russian insurance companies into liquidation and nationalising their property. In March, 1923, C.'s solicitor wrote to the Registrar of Companies stating (which was incorrect: see *infra*) that the company, having been nationalised, had ceased to exist as a separate entity, and asking that that letter should be placed on the file. On May 31, 1923, the respondents commenced an action in the High Court against the Russian company, claiming payment in respect of insurance transactions of some £4,500. The writ was served on C., who demurred to accepting it and did not enter an appearance on behalf of the company. On June 12, 1923, the respondents signed judgment against the company for £4,515. At that time certain sums in respect of reinsurance transactions were owing by the appellants to the company, and on Dec. 20, 1924, the respondents obtained a garnishee order nisi attaching all debts owing or accruing due from the appellants to the company.

A **Held:** had it been proved that the writ was not duly served and, accordingly, that the judgment was liable to be set aside, the court might well, in the exercise of its discretion, refuse to treat the judgment as a sufficient foundation for a garnishee order, for it would be inequitable to put the garnishee to a real and substantial risk of having the proceedings set aside and being called on to pay the judgment debt over again, but C.'s name was

B still on the file as representing the Russian company when the writ was served, and the letter of March, 1923, from his solicitor was not sufficient to relieve him from his position as representative of the company under s. 274

C (1) (c), and, therefore, the writ was regularly served on him; the rule that a judgment obtained against a foreign defendant not resident or present in this country in an action in which he had not appeared need not be recognised by the courts of his own country did not apply where the defendant had expressedly or impliedly agreed to submit to the jurisdiction of the court by which the judgment was pronounced, and here the company, by putting on the file C.'s name as that of a person authorised to accept on its behalf service of any process, had submitted to the jurisdiction of the English courts and was bound by the judgment obtained therein; and, therefore, the service of

D the writ and the judgment were good and the garnishee order nisi would be made absolute.

So **held** by VISCOUNT CAVE, L.C., LORD SHAW, LORD SUMNER and LORD PARMOOR, LORD BLANESBURGH dissenting on the ground that there was nothing in s. 274 which left the provision in sub-s. 1 (c) for service on the named person operative where that person had, by notification to the registrar, made it plain that his authority from the foreign company was gone.

E Per LORD SUMNER: This being a judgment to which the appellants were not parties, they were not competent to ask that it should be set aside: *Jacques v. Harrison* (1) (1884), 12 Q.B.D. 165, approved and adopted. . . . The provisions of s. 274 (1) (c) cannot be regarded as a mere contract by which, in consideration of such a registration and other matters, freedom of trading is enjoyed. They are mandatory, and in the case of an alien within the realm are binding, and disobedience is an offence. . . . The risk to the garnishee to which it is inequitable to expose him under a garnishee order absolute must be a real risk. A mere speculative or theoretical hazard will not do.

F Per LORD BLANESBURGH: All aid from the view, erroneous as I think, which strongly influenced at least BANKES, L.J. [in the Court of Appeal: see 133 L.T. 809], must be disclaimed, viz., that s. 274 is entitled to special respect extra-territorially by reason of the idea that upon its terms alone does a foreign corporation "secure a business footing in this country."

G Per **Curiam**: The decrees nationalising insurance companies in Russia, like those nationalising the banks which were under consideration in *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse* (2), [1925] A.C. 112, did not have the effect of dissolving the companies, but merely put them into liquidation, and, therefore, they retained their corporate existence and were liable to be sued.

H **Notes.** Section 274 of the Companies (Consolidation) Act, 1908, has been replaced by s. 407 of the Companies Act, 1948: see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

I Applied: *Sabatier v. Trading Co.*, [1927] 1 Ch. 495. Considered: *Lazard Bros. & Co. v. Midland Bank, Ltd.*, [1932] All E.R.Rep. 571. Referred to: *The Jupiter* (No. 3), [1927] All E.R.Rep. 287; *First Russian Insurance Co. v. London and Lancashire Insurance Co., Ltd.*, [1928] Ch. 922; *Re Vocalion (Foreign), Ltd.*, [1932] All E.R.Rep. 519; *Re Russian Bank for Foreign Trade*, [1933] All E.R.Rep. 754; *The Madrid*, [1937] 1 All E.R. 216; *Lorentzen v. Lydden & Co.*, [1942] 2 K.B. 202; *A/S Tallinna Laevandisus v. Tallinn Shipping Co.* (1946), 175 L.T. 285; *Frankfurter v. Exner, Ltd.*, [1947] Ch. 629; *Bank Voor Handel en Scheepvaart v.*

Slatford, [1951] 2 All E.R. 779; *Re Banque des Marchands de Moscou (Koupetschesky) Royal Exchange Assurance v. The Liquidator, Re Banque des Marchands de Moscou (Koupetschesky), Wilenkin v. The Liquidator*, [1952] 1 All E.R. 1269; *Jabbour v. Custodian of Israeli Absentee Property*, [1954] 1 All E.R. 145; *Deverall v. Grant Advertising Inc.*, [1954] 3 All E.R. 389.

As to garnishee proceedings, see 16 HALSBURY'S LAWS (3rd Edn.) 79 et seq.; as to service on foreign companies, see *ibid.*, vol. 6, pp. 842, 843. For cases see 21 DIGEST 617 et seq., and 10 DIGEST (Repl.) 1297 et seq.

Cases referred to:

- (1) *Jacques v. Harrison* (1884), 12 Q.B.D. 165; 53 L.J.Q.B. 137; 50 L.T. 246; 32 W.R. 470, C.A.; 21 Digest 590, 1704.
- (2) *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse*, [1925] A.C. 112; 93 L.J.K.B. 1098; 132 L.T. 99; 40 T.L.R. 897; 68 Sol. Jo. 841, H.L.; 10 Digest (Repl.) 1297, 9151.
- (3) *Martin v. Nadel*, [1906] 2 K.B. 26; 75 L.J.K.B. 620; 95 L.T. 16; 54 W.R. 525; 22 T.L.R. 561, C.A.; 21 Digest 637, 2169.
- (4) *Vallée v. Dumergue* (1849), 4 Exch. 290; 18 L.J.Ex. 398; 14 L.T.O.S. 108; 154 E.R. 1221; 11 Digest (Repl.) 508, 1245.
- (5) *Bank of Australasia v. Harding* (1850), 9 C.B. 661; 19 L.J.C.P. 345; 14 Jur. 1094; 137 E.R. 1052; 11 Digest (Repl.) 521, 1350.
- (6) *Sea Insurance Co. v. Russia Insurance Co. of Petrograd* (1924), 20 Lloyd, L.R. 308.
- (7) *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A.C. 670; 10 T.L.R. 62; 11 R. 340, P.C.; 11 Digest (Repl.) 322, 3.
- (8) *Emanuel v. Symon*, [1908] 1 K.B. 302; 77 L.J.K.B. 180; 98 L.T. 304; 24 T.L.R. 85, C.A.; 11 Digest (Repl.) 505, 1224.
- (9) *Rousillon v. Rousillon* (1880), 14 Ch.D. 351; 49 L.J.Ch. 338; 42 L.T. 679; 44 J.P. 663; 28 W.R. 623; 11 Digest (Repl.) 443, 842.
- (10) *Swiss Bank Corpn. v. Boehmische Industrial Bank*, [1923] 1 K.B. 673; 92 L.J.K.B. 600; 128 L.T. 809; 39 T.L.R. 179; 67 Sol. Jo. 423, C.A.; 11 Digest (Repl.) 540, 1502.
- (11) *Logan v. Bank of Scotland*, [1904] 2 K.B. 495; 73 L.J.K.B. 794; 91 L.T. 252; 53 W.R. 39; 20 T.L.R. 640; 48 Sol. Jo. 603, C.A.; 13 Digest (Repl.) 354, 1616.
- (12) *Haggin v. Comptoir d'Escompte de Paris, Mason and Barry v. Same* (1889), 23 Q.B.D. 519; 58 L.J.Q.B. 508; 61 L.T. 748; 37 W.R. 703; 5 T.L.R. 606, C.A.; 13 Digest (Repl.) 350, 1582.
- (13) *Newby v. Van Oppen* (1872), L.R. 7 Q.B. 293; 41 L.J.Q.B. 148; 26 L.T. 164; 20 W.R. 383; 13 Digest (Repl.) 349, 1581.
- (14) *Dunlop Pneumatic Tyre Co. v. Actien Gesellschaft für Motor und Motorfahrzeugbau vorm. Cudell & Co.*, [1902] 1 K.B. 342; 71 L.J.K.B. 284; 86 L.T. 472; 50 W.R. 226, C.A.; 13 Digest (Repl.) 351, 1587.
- (15) *Wright v. Horton* (1887), 12 App. Cas. 371; 56 L.J.Ch. 873; 56 L.T. 782; 52 J.P. 179; 36 W.R. 17, H.L.; 10 Digest (Repl.) 811, 5261.
- (16) *H. E. Randall, Ltd. v. British and American Shoe Co.*, [1902] 2 Ch. 354; 71 L.J.Ch. 683; 87 L.T. 442; 50 W.R. 697; 18 T.L.R. 611; 10 Mans. 109; 9 Digest (Repl.) 69, 266.

Appeal from an order of the Court of Appeal (BANKES and SARGANT, L.JJ., SCRUTTON, L.J., dissenting) reported 133 L.T. 808, made on appeals from two orders made by FRASER, J., in chambers.

On June 12, 1923, Sedgwick Collins & Co., Ltd., an English company, signed judgment in an action against the Russia Insurance Co., of Petrograd, for £4,513 in default of appearance. Service of the writ had been effected by leaving a true copy of the writ of summons with A. J. Collins, the person authorised by registration in England to accept service on behalf of the defendants under s. 274 of the Companies (Consolidation) Act, 1908 [see now s. 407 of Companies Act,

A 1948]. The company had been liquidated in Russia, but no account was taken in the liquidation of the accounts due to the Russia company by English debtors or by the Russia company to English creditors. An order was subsequently made to wind-up the company in England, but the official receiver, who was acting as the official liquidator, stated that he did not intend to challenge the judgment. On Dec. 20, 1924, the judgment creditors obtained a garnishee order nisi attaching money due from the Employers' Liability Assurance Corporation to the Russia company. Two applications were then made, the one by the garnishees to set aside the judgment obtained by the judgment creditors, and the other by the judgment creditors to make the garnishee order absolute. Both applications came before MASTER BALL, who refused to set aside the judgment and discharged the order nisi. FRASER, J., at chambers affirmed the master on both appeals. The Court of Appeal held (SCRUTTON, L.J., dissenting) that the judgment creditors were entitled to a garnishee order absolute attaching any moneys due from the Employers' Liability Assurance Corporation to the Russia company, and directed an issue. The corporation appealed.

D Sir John Simon, K.C., Jowitt, K.C., and Thomas Carthew for the appellants. Rayner Goddard, K.C., and S. O. Henn Collins for the respondents, the judgment creditors.

The House took time for consideration.

July 29. The following opinions were read.

E VISCOUNT CAVE, L.C.—This case arises out of the confiscatory legislation of the government of Soviet Russia. A company incorporated by Russian charter and called the Russia Insurance Co. had its principal office in Petrograd and a branch office in London. Under s. 274 of the Companies (Consolidation) Act, 1908, the Russia company filed with the registrar the name of Mr. Collins as that of a person who was authorised to accept on behalf of the company service of process and of any notices required to be served on the company. The company carried on insurance transactions with the respondents, and became indebted to them. The company also transacted re-insurance business with the appellants and is alleged to have become entitled to a large payment from them. After the second Russian revolution (the Bolshevik revolution) the legislature of Soviet Russia passed a series of decrees by which it purported (to put it shortly) to put the Russia company and all other insurance companies in Russia into liquidation, to appropriate their property to the Soviet government without compensation and without any obligation to pay their debts, and to annul their shares. On Mar. 22, 1923, the solicitor for Mr. Collins wrote a letter to the Registrar of Joint Stock Companies in the following terms:

H "I have further considered the cases which have been decided, and it seems that, the British government having recognised the Soviet government in Russia, the above company has been nationalised with all similar institutions, and has therefore ceased to exist as a separate entity. Following your suggestion, I shall be glad if you will place this letter on the company's file."

The letter was, accordingly, placed on the file.

I On May 31, 1923, the respondents commenced an action in the High Court against the Russia company, describing them on the writ as "the Russia Insurance Co. of Petrograd" and claiming payment in respect of the insurance transactions of £4,505 12s. 6d. and interest. The writ was served on Mr. Collins. Mr. Collins did not enter an appearance on behalf of the Russia company, and on June 12, 1923, the respondents signed judgment against the company for £4,515 and costs. On Dec. 20, 1924, the respondents obtained in this action a garnishee order nisi attaching all debts owing or accruing due from the appellants to the Russia company to answer the judgment obtained against that company by the respondents, but MASTER BALL, after hearing the evidence, refused to make the garnishee order absolute, on the ground that he had a discretion in the matter and that he was

not satisfied that, if the order were made absolute and the amount of the judgment debt paid by the appellants to the respondents, the Soviet government might not decline to recognise the judgment and compel the appellants to pay the amount over again. The decision of the master was affirmed by FRASER, J., but on appeal to the Court of Appeal that court set aside the order of FRASER, J., and, the appellants denying that they owed anything to the Rossia company, directed an issue to be tried on that point. At the same time the Court of Appeal affirmed an order of FRASER, J., refusing to set aside the judgment. It is against these orders of the Court of Appeal that the present appeal is brought.

The first point made on behalf of the appellants is that, when the respondents issued their writ and obtained judgment against the Rossia company, that company had by virtue of the decrees of the Soviet government ceased to exist, and, accordingly, that no judgment could be obtained against that company upon which to found garnishee proceedings. In my opinion, this point is disposed of by the decision of this House in the case relating to the Russian banks: *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse* (2), in which it was held that the parallel decrees of the Russian legislature affecting the banking companies in Russia had not the effect of dissolving those companies, but only put them into liquidation. The difference between an order for the liquidation of a company and an order for its dissolution is familiar to all lawyers, and is fully recognised in the affidavit made in this action by M. Krougliakoff (a Russian lawyer) on behalf of the appellants. A company which has been dissolved no longer exists as a corporate entity capable of holding property or of being sued in any court, but a company in liquidation, although the administration of its affairs has passed to the liquidator, retains its corporate existence. If the liquidation should be annulled, the company will revive and resume its powers; and in the meantime it retains its title to any property not taken away from it—including (in the present case) the property and rights of the company in countries foreign to Russia, which are not effectively taken from it by the Russian legislation. In my opinion, the decrees for nationalising insurance companies in Russia which have been put in evidence in this action are at least not stronger than the decrees for nationalising the banking companies which were considered in the case of the banks; and, accordingly, the insurance companies, like the banking companies, have not been dissolved.

But it is said that, assuming this to be so, the judgment is still defective as having been obtained under a writ served upon Mr. Collins after the Rossia company had ceased to carry on business in this country, and after his notice of Mar. 22, 1923, had been sent to the registrar and entered on the file, and accordingly that a garnishee order obtained under that judgment is open to attack. I do not doubt that, if it were proved that the writ was not duly served and accordingly that the judgment was liable to be set aside at any time, the court might well, in the exercise of its discretion, refuse to treat the judgment as a sufficient foundation for a garnishee order, for it would be inequitable to put the garnishee to a real and substantial risk of having the proceedings set aside and being called upon to pay the judgment debt over again: see *Martin v. Nadel* (3). But it appears to me that there are two answers to the argument put forward on behalf of the appellants.

In the first place, Mr. Collins's name remained upon the file as representing the Rossia company at the time when the writ was served upon him. Whether any proceeding was open to him by which he could without the concurrence of the Rossia company have removed his name from the file, it is unnecessary now to consider; for neither he nor the Rossia company took any proceeding for that purpose, and he contented himself with serving a notice which, though, no doubt, given in good faith, was incorrect, namely, that the company had ceased to exist. Further, there is evidence that, long after the Rossia company had ceased to carry on business in this country and had been put into liquidation, Mr. Collins was conducting a correspondence on behalf of that company. In these circum-

A stances I do not think that the notice given by Mr. Collins was sufficient to relieve him from his position as the representative of the Russia company for the purposes of the Act or to nullify the nomination of that gentleman as the person to receive service of process on behalf of the Russia company.

But there is a further answer to the appellants' argument. An order to wind-up the Russia company has now been made under the Companies Act, and the liquidator on inquiry being made of him by the direction of the Court of Appeal informed that court that he had fully investigated the matter and did not propose to contest the validity of the judgment obtained by the respondents against the Russia company. In view of this statement it appears to me that the validity of the judgment in this country is established beyond controversy. It is said that this is not enough to free the appellants from risk; that it is conceivable that at some future time they may desire to set up business in Russia and may require property there; that in that event the Russian government, refusing to recognise the judgment and garnishee order as valid, may require the amount paid under the garnishee order to be paid over again, or at least that, if the appellants should seek to recover from the Russian government any moneys owing to them from other insurance companies which have been nationalised, the Russian government may seek to set off against those claims the amount of the judgment debt. I do not think that this supposed risk, which rests upon a series of hypotheses, is a real and substantial danger. It must be assumed that the Russian government will be prepared to act in accordance with the rules of international law; and it appears to me that those rules would require the Russian government to recognise the judgment as effective. No doubt, it is the general rule that a judgment obtained against a foreign defendant not resident or present in this country in an action in which he has not appeared need not be recognised by the courts of his own country; but this rule does not apply where the defendant has expressly or impliedly agreed to submit to the jurisdiction of the court by which the judgment was pronounced. A good instance of such submission is to be found in *Vallée v. Dumergue* (4), in which it was held that a defendant who was a shareholder in a French company and had under compulsion of French law elected a domicile in France, at which proceedings relative to the company might be served upon him, was bound by service at that address and by a judgment obtained in his absence after such service. In like manner it appears to me that the Russia company, having, in accordance with the Companies (Consolidation) Act, 1908, put upon the file the name of a person authorised to accept on its behalf service of any process, thereby submitted to the jurisdiction of the English courts and is bound by the judgment obtained in those courts. There is this further consideration. The order made in this country for the winding-up of the Russia company is undoubtedly effective so far as the English assets are concerned; and this being so, the liquidator, who might have given a receipt or discharge for the appellants' debts, was at liberty to admit the validity of the judgment and of the garnishee proceedings. In effect he has done so, and no foreign court has the right to go behind that admission.

For these reasons I think that the appeal against the order of the Court of Appeal directing an issue in the garnishee proceedings fails. As regards the appeal against the refusal to set aside the judgment, this appears to me to fail also. Apart from the objection that the Russia company had not been served with this application, the appellants have no such direct interest as to entitle them to apply to set aside the judgment. The liquidator does not attack it, and no reason is shown why it should be set aside. Of course it will be open to the appellants in the garnishee proceedings to argue that nothing is due from them to the Russia company which can be attached; but if this argument should fail the not undesirable result of the proceedings will be that a sum due in England from an English company to a Russian corporation will be appropriated to the payment of a debt owing in England by that corporation to another English company. On these grounds I am of opinion that the Court of Appeal came to

the right conclusion in this case, and accordingly I move your Lordships that this appeal be dismissed with costs. A

LORD SHAW.—I agree.

LORD SUMNER.—The two orders made in chambers form the subject of this appeal. The first dismissed the present appellants' summons to set aside a judgment recovered by the present respondents against a third party, the Russia Insurance Co. This being a judgment to which the appellants were not parties, it has been held on the authority of *Jacques v. Harrison* (1) that they were not competent to ask that it should be set aside. *Jacques v. Harrison* (1) is a decision of the Court of Appeal on a point of practice, and it has been followed without question for over forty years. It would require strong grounds indeed to induce your Lordships to disapprove it now. For my part I think that it is correct, and, accordingly, that the summons to set aside this judgment was rightly dismissed. C
The second order was one refusing to make absolute a garnishee order, obtained by the present respondents as judgment creditors against the appellants, who are indebted to the Russia Insurance Co. The Court of Appeal made the order absolute. The present appeal is mainly supported on grounds relating to the discretion, which is exercisable in garnishee proceedings, but in one respect at least reliance is rightly placed on matters, which would have also gone to the merits of the application to set the judgment aside. The appellants say that the Russia Insurance Co. has been dissolved, and that, accordingly, they owe it no debt. Whether or not the money formerly due to it is now due to the Crown as bona vacantia, the Crown is not a claimant or a party to these proceedings. Upon the question of discretion it is said that the judgment was obtained in such a manner that foreign courts would not, and would not be bound to, respect it, and that, accordingly, it was a wrong exercise of discretion to make the garnishee order absolute and so expose the appellants to the risk of being compelled by a foreign tribunal to pay over again. D E

The main question is whether the judgment is one to which, according to the current of English decisions, foreign courts of justice may be expected to give effect. The expectation is not one of fact depending on the probable conduct of the courts of this or that country, but is one of law, based upon the consideration for the judicial proceedings of other countries, which legal administration, wherever situated, ought to adopt and observe in the interest of justice generally. F
The respondents are judgment creditors of the Russia Insurance Co. in virtue of proceedings in the High Court commenced by service of the writ on the person whose name was placed and is still to be found on the companies' register pursuant to s. 274 of the Companies (Consolidation) Act, 1908 [see now s. 407 of Companies Act, 1948]. No appearance having been entered after this service, judgment was in due course signed. It is regular under the practice of the High Court, but to a foreign court it would in itself be a judgment in absentem against a defendant company not incorporated in His Majesty's dominions. The question whether the company was resident in the United Kingdom down to and at the time of service has not been raised. The question argued was this: Was the registration of Mr. Collins's name, continuing as it is to the present time, a submission to the jurisdiction of the High Court on the part of the Russia Insurance Co. at the time of the service of the writ? Prior to Dec. 13, 1917, the Russia Insurance Co. had done reinsurance business in London under treaties with the appellants, and it may be with other underwriters, and more recently it had undertaken the business of underwriting original insurance risks on its own account. For both classes of business it employed Mr. Collins as its agent, under the title first of secretary and then of manager, and it had an office in the city of London, where the business thus established was carried on in its name. To satisfy the requirements of s. 274 Mr. Collins registered his name on Dec. 13, 1917. I think that in itself this act constituted a complete submission to the jurisdiction of the High Court, revocable only by the company's own act in G H I

- A establishing its place of business in this country. With the doubts that have been raised as to the authority of Mr. Collins and to the continuance of this submission on other grounds I will deal presently. The section is legislation of a character which has long been recognised as valid in English law: *Bank of Australasia v. Harding* (5), and it deals with the case of a company incorporated outside the United Kingdom as the *Rossia Insurance Co.* was, but establishing a
- B place of business inside the United Kingdom, as it had recently done. It imposes [by s. 274 (1) (c), now s. 407 (1) (c) of Companies Act, 1948] on such a company sundry "requirements," as follows:

- C "To file with the registrar of companies the names and addresses of some one or more persons resident in the United Kingdom authorised to accept on behalf of the company service of process and any notices required to be served on the company . . . and in the event of any alteration being made . . . in the names or addresses of any such persons as aforesaid, the company shall within the prescribed time file with the registrar a notice of the alteration."

- D Compliance with these requirements is secured by fines, which in case of the continuance of the offences are heavy and may be inflicted not only on the company but on its officers. It was suggested that the company was not bound to comply with the requirement as to registration, and that, if it chose to run the risk of a fine, it could do so, being incorporated abroad and free from any duty to comply with English company legislation. If this were so, it would only make the voluntary character of the registration, which took place, more
- E manifest, but I think that it is impossible to regard these provisions as anything but obligatory. The foreign company is not at liberty to continue business without registering a person to accept service for it, nor is payment of the prescribed sum the price of exemption. Again, the provisions cannot be regarded as a mere contract, by which, in consideration of such a registration and other matters, freedom of trading is enjoyed. They are mandatory, and in the case of
- F an alien within the realm are binding, and disobedience is an offence. The plain object of the provision is to protect the company's British creditors by obtaining for them ab initio the means of serving process in this country, free from the inconveniences of seeking out the foreign company in its country of incorporation. I think further that, having submitted to the jurisdiction at the commencement of the proceedings, the company must be deemed in the absence of any
- G provision to the contrary to continue to submit to the jurisdiction throughout, and that this judgment, signed after due service in default of appearance, is one which is binding on the foreign company and ought to be so regarded in all foreign civil jurisdictions.

- H The appellants challenge this conclusion on three special grounds—first, that, before Mr. Collins registered his name, the *Rossia Insurance Co.* had been effectively dissolved; second, that, before he registered his name, his entire authority to do anything on behalf of the *Rossia Insurance Co.* had determined; and, thirdly, that before the respondents' writ was served on him, he had revoked his own consent to act on behalf of the *Rossia Insurance Co.*, and, having done what he could to nullify the appearance of his name on the register, was no longer a
- I person "authorised" to accept service on behalf of the company within the section. Accordingly, it is said, the service of the writ on him by the respondents did not affect the company or found proceedings that could result in an effective judgment against it. Your Lordships decided last year that the decrees of the Soviet government of Russia, which then were textually before you, did not in the case of banking companies dissolve the companies themselves, but only stripped them of their assets and destroyed their goodwill by making banking a State monopoly, while at the same time they deprived the shareholders of their shares. In these decrees not only the word "dissolution," but the thing itself

was carefully avoided, I have no doubt for solid practical reasons. The corresponding decrees relating to insurance companies are now before your Lordships, and they prove to differ from the others in words only. The substance and effect are the same, and the *Rossia Insurance Co.*, accordingly, is still in being. A

M. Krougliakoff, the only Russian lawyer who made an affidavit, says that the power of attorney given to Mr. Collins in 1912 expired, according to pre-revolutionary law, in 1915. He does not say that authority could not be legally conferred upon or continued to Mr. Collins otherwise than by the renewal of the power of attorney. Mr. Collins himself was clearly unaware down to 1923 that his authority to act for the *Rossia Insurance Co.* had come to an end. For three or four years he acted as agent for the company and was in regular communication with it and he continued to do such business as there was to be done and maintained some relations with the superior officials of the company as opportunity offered after the revolutions of 1917. I do not think it is proved that by Russian law, whether pre-revolutionary or post-revolutionary, he had no authority all this time to do on the company's behalf all that he ostensibly did for it, nor do I see any reason why the question of his authority to carry on in London the business established here by the company should not be determined by English law. I think that down to the service of the writ he was in fact, as he purported on the companies' register to be, the Russian company's agent, authorised among other things to accept on its behalf service of process issued at the suit of English creditors. B C D

Early in 1923 Mr. Collins was served with a writ on behalf of a creditor of the *Rossia Insurance Co.* other than the respondents and then consulted his solicitor upon the question, whether he had still any right in fact to represent the *Rossia Insurance Co.* The ground of doubt, as appears from a letter written by his solicitor to the registrar of companies on Mar. 5, 1923, was the above-mentioned Russian decrees, which were then supposed to have dissolved the *Rossia Insurance Co.* The practical question was whether Mr. Collins could or could not enter an appearance for that company, or whether steps should be taken to remove his name from the register, where it still stood as their representative. Eventually, for what it might be worth, another letter, written by his solicitor on March 22, was placed on the companies' file, stating that the *Rossia Insurance Co.* had ceased to exist as a separate entity. That it is now clear was an error. No other reason was ever given for Mr. Collins's desire to have his name removed. It is evident that, if the *Rossia Insurance Co.* still existed, he had no objection to continue to represent it as before. In any case there his name was and the *Rossia Insurance Co.* had made no alteration in the register such as s. 274 (1) provides for. Such was the condition of affairs as regards Mr. Collins, when the respondents' writ was served. I think the service was valid and that Mr. Collins had authority to enter an appearance, which, if he had been otherwise advised, he could and would have validly exercised. Furthermore I notice that Mr. Collins has not proved when the business of the *Rossia Insurance Co.* in London actually ended. Its reinsurance treaties were kept on foot till the end of and in 1921. Mr. Collins wrote as its manager from its address in London to the registrar of companies, saying that when its general manager came to London in February, as he was expected to do, steps would be taken to furnish the balance-sheet required. His solicitor repeated this assurance in April, adding that it was now possible to renew business negotiations with Russia. Even when the respondents' writ was served on Mr. Collins and was returned by his solicitor, the ground taken was only the dissolution of the *Rossia Insurance Co.* by the Soviet government's decrees, not the de facto winding-up of its English branch and all its operations. All the solicitor could say as to this was: "I must think the problem out." As the evidence stands the English branch of the company's business was still living and established in London, though no doubt it chiefly lived in hope. E F G H I

A MASTER BALL stated in writing his reasons for refusing to make absolute the garnishee order nisi. FRASER, J., affirmed his order without any formal judgment. I agree with the Court of Appeal that the learned judge must be deemed to have adopted the learned master's reasons, and, as those reasons were reasons of law and were erroneous, because he had misapprehended the effect of the decision in *Sea Insurance Co. v. Russia Insurance Co.* (6), and thought wrongly
B that it was on all fours with the present case, the Court of Appeal were right in holding that no question arose of interfering with the discretion of the judge at chambers. Thereupon the court made the order now appealed from, and it is contended that in so doing they exercised their discretion wrongly, for, in the circumstances, such an order was inequitable, since it exposed the appellants to the risk of being compelled to pay a second time whatever they might pay to the
C garnishees here under the order of the Court of Appeal.

This question of risk is presented in two different ways. The affidavits for the appellants virtually say: "if we go to Russia, what will happen to us there, when this garnishee order has been made absolute?" SCRUTTON, L.J., in a dissentient judgment, virtually says: "No such order should be made, for we cannot be sure that the courts of Russia, or, indeed, foreign courts generally, will
D take the same view as we do of the binding effect of this judgment, which has been signed here in default of appearance." To these objections I think that two answers may be made. The first is that, so far as Russia is concerned, the risk would be self-sought; the second is that, for any practicable purpose, it cannot be estimated and may well be non-existent. The business of the appellant company is confined, as far as I have gathered, to insurance. For the present,
E insurance business is in Russia a government monopoly. The appellants cannot re-establish themselves in that business in Russia, so as to be exposed to proceedings there in respect of this debt, until the Russian government has abandoned or at least has altered its law relating to the insurance monopoly. When it does so, other charges may occur at the same time, which may remove all the risk which the appellants apprehend. It may be that debts are due to the appel-
F lants in Russia, which they would fain collect there, and that the risk of having the debt, due from them to the Russia Insurance Co., enforced by the Russian courts is a risk, which in that case they would have to run. I notice, however, that M. Krougliakoff, though he argues learnedly and with skill the case for dissolution of the company and determination of all its agencies, does not say that the rules of law, which he invokes, are rules which are or would be enforced
G or recognised in courts of civil jurisdiction in Russia at the present time, or even that there are any such courts at all.

As for the view that foreign courts generally cannot be expected to recognise judgments obtained here under specific legislation and in particular circumstances that raise an arguable doubt as to their validity, I do not think that this is a
H ground for a discretionary refusal to make the garnishee order absolute, when once it has been decided here that such judgments have been regularly obtained after an affective submission to the jurisdiction by the defendants. In that case foreign courts ought to recognise the judgments, and we must presume that they will do so. It is not justice to the garnishor to deny him his regular remedy for fear that, somehow or other, the garnishee, having passed beyond the jurisdiction
I of the courts of this country and the protection which the garnishee order will always here afford him, might find himself caught in some foreign court or country less willing to recognise than should be the case those obligations, which arise under the so-called comity of nations. The risk to the garnishee to which it is inequitable to expose him under a garnishee order absolute must be a real risk: *Sea Insurance Co. v. Russia Insurance Co.* (6). A mere speculative or theoretical hazard will not do. I will only add that the issue, which the Court of Appeal directed to be tried, in my opinion, sufficiently protects the appellants and that their appeal should be dismissed.

LORD PARMOOR (read by LORD SHAW).—A Russian company, known as the A
Rossia Insurance Co., started an insurance business in Russia in the year 1881,
and carried it on, under a series of Russian charters, of which the most recent is
dated 1915. In the year 1912 the Rossia company opened a branch in England,
and consequently came under the obligation, imposed by s. 274 of the Companies
(Consolidation) Act, 1908, to file with the Registrar of Companies the names and B
addresses of some one or more persons resident in the United Kingdom, author-
ised to accept on behalf of the company service of process and any notices
required to be served on the company. On Dec. 17, 1917, the name of A. J.
Collins was registered under s. 274 of the Companies Act, 1908, as a person
authorised to accept, on behalf of the Rossia company, service of process, and
any notices required to be served on that company. A specially endorsed writ
was regularly served on Collins and the respondents, in default of appearance, C
obtained judgment for £4,513. In the course of their business in this country,
the Rossia company had entered into a number of reinsurance treaties with the
appellants. Any sums due from the appellants, under these treaties, were pay-
able in England. On Dec. 20, 1924, the respondents obtained a garnishee order
nisi attaching debts due from the appellants in respect of business transactions
under the reinsurance treaties. The respondents, as judgment creditors, applied D
to make the garnishee order absolute, and the appellants, as garnishees, applied
to set aside the order nisi. Their applications came on for hearing before MASTER
BALL in chambers on Feb. 25, 1925. He refused to set aside the garnishee order.
This decision was confirmed by the judge in chambers and the Court of Appeal.
The accuracy of this decision was not seriously disputed before their Lordships.
There is no ground for interfering, under this head, with the decision of the E
courts below.

The application on behalf of the judgment creditors, to have the garnishee order
nisi made absolute, was dismissed by the master, and his order was confirmed
by the learned judge in chambers. The making of a garnishee order is dis-
cretionary (*Martin v. Nadel* (3)), and in an ordinary case the Court of Appeal does
not interfere with this discretionary power; but, as stated in the judgment of F
BANKES, L.J., there appears to be an all-important distinction between the present
case and that of *Sea Insurance Co. v. Rossia Insurance Co.* (6), which the master
thought he ought to follow, as applicable to the present case. In the former cases
the service was effected out of the jurisdiction, whereas in the present case it was
effected within the jurisdiction under the provisions of s. 274 of the Companies G
(Consolidation) Act, 1908. To use the words of BANKES, L.J., this is a difference
of overriding importance. In the case of actions in personam, in which a writ
has been regularly served on foreigners or foreign corporations when present in
this country, and a judgment has been obtained, it seems to be clear, as a general
rule, that, under the obligations of that branch of international law which governs
the application of foreign judgments, other countries, whose governments have
been recognised de jure and de facto by the government of this country, will H
accept the jurisdiction of the courts of this country and regard their judgments
as valid. In the case of such actions, it may also be stated negatively that,
where a writ cannot be served on a defendant foreigner, or foreign corporation,
when in this country, and no submission to jurisdiction is proved, any conse-
quent judgment has no validity in any other country, on the ground that the
courts of this country have no jurisdiction under international law over the I
person or an absent foreign defendant. In other words, the right to serve a writ
in an action in personam, on a foreign defendant, only becomes effective as a
source of jurisdiction, to be recognised in other countries when, at the date of
service, such defendant is within the territorial jurisdiction of the English courts.
The Privy Council decided in *Sirdar Gurdial Singh v. Rajah of Faridkote* (7)
that no territorial legislation can give jurisdiction in a personal action which any
foreign court should recognise against absent foreigners owing no allegiance or

A obedience to the power which so legislates. LORD SELBORNE in delivering judgment says:

"In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced in absentem by a foreign court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the courts of every nation except (when authorised by special local legislation) in the country of the forum by which it was pronounced":

B cf. *Emanuel v. Symon* (8), *Rousillon v. Rousillon* (9). The Russia company was for the purpose of the service of a writ within the jurisdiction of the English courts when the writ in question was served, seeing that it was regularly served on Collins, a person registered under s. 274 of the Companies (Consolidation) Act, 1908, as a person authorised to accept on behalf of the Russia company service of process, and any notices required to be served on that company. The main object of s. 274 is to take away any difficulty in the service of a writ on foreign corporations carrying on business in this country, and in effect to place a foreign corporation for this purpose on the same footing as an English company, and liable to the service of a writ under a similar form of procedure. There is an additional reason which brought the Russia company within the territorial jurisdiction of the English courts at the time when the writ was served. The Russia company, by filing with the Registrar of Companies the name and address of Collins, submitted voluntarily to the jurisdiction of the English courts, and, on this account, cannot subsequently be heard to object to such jurisdiction.

The appellants raised two points as either displacing the principles stated above, or at least throwing a doubt on the regularity of the service in this case. It was said that although Collins was registered under s. 274 of the Companies (Consolidation) Act, 1908, his name was only retained on the register against his will, and in default of any effective method of removal. Collins did attempt, without success, to disclaim his position as representing the Russia company in this country, but so long as his name remained on the register, a service on him was equivalent to a service on the Russia company, and the Russia company remained liable to the territorial jurisdiction of the English court. It was suggested that there might be some risk that a foreign court would not feel itself bound by the English decision, and that it was inequitable that the appellants should run the risk of being liable to a double payment. It cannot be assumed that the Russian or any other recognised government will not accept the validity of the service of the writ served on Collins, or that it will not, as a matter of international comity and in accordance with international principle, observe the obligation, that, where a national has taken advantage of the municipal law in order to secure a business footing in this country, the government of the State of which such national is a member will not recognise the conditions upon which alone the national obtains that advantage. An order has been made by ROMER, J., to wind-up the Russia company. The service in this case was on Collins, and the Court of Appeal postponed judgment until after the official receiver had had an opportunity to determine what he would do. The Court of Appeal were informed that the official receiver and the solicitor went carefully into the effect of the judgment, and came to the conclusion that they could not attack it. There appears, therefore, to be no reason to doubt that the judgment was properly obtained. In English law it cannot be disputed that a creditor, who has obtained a garnishee order in respect of a debt owing to a company prior to the date of its liquidation, has a security in priority to the general creditors. The effect, therefore, of dismissing the appeal of the garnishees would not prevent the respondents claiming in the liquidation proceedings, but would only operate to deprive them of the opportunity of becoming secured creditors. Since the government of this country has recognised the present government of Russia, both

de facto and de jure, there appears to be no difference in principle between the present case and *Swiss Bank Corpn. v. Boehmische Industrial Bank* (10). In my opinion, the appeal should be dismissed with costs. A

LORD BLANESBURGH.—The enactment contained in s. 274 of the Companies (Consolidation) Act, 1908—extended, if not already applicable, to foreign assurance companies by s. 19 of the Assurance Companies Act, 1904—is of comparatively recent origin. It appeared first as s. 35 of the Companies Act, 1907. For many generations before that, of course, foreign companies in great number had been established in this country. And such companies were liable to be sued here like any other resident, whether the cause of action did or did not accrue within the jurisdiction: *Logan v. Bank of Scotland* (11), *Haggin v. Comptoir d'Escompte de Paris* (12). Service of the writ on the principal officer of the English branch was sufficient service on the company; service of process at the head office abroad was unnecessary: *Newby v. Van Oppen* (13). It was essential that business for a substantial time should have been carried on here at a fixed place, and through some person who conducted it as the company's representative. These conditions fulfilled, the company was for that period treated as resident within the jurisdiction for the purpose of service of a writ: *Dunlop Pneumatic Tyre Co. v. Actien Gesellschaft für Motor und Motorfahrzeugbau vorm. Cudell & Co.* (14) ([1902] 1 K.B. at p. 349), and Ord. 9, r. 8, which designates in such a case the proper officer to be served applies "in the absence of any statutory provision regulating service of process" as much since the Act of 1907 as before it. B C D

The outstanding characteristic of these requirements is that any authorised service has to be made upon an officer—a head officer—whose knowledge will presumably be that of the company he represents—a very necessary qualification if a default judgment following upon a service, which necessarily can never be personal, is to have any extra-territorial recognition. The requirement, however, is based on a principle of much higher sanction. All provisions with reference to service of process upon artificial persons are adequate only to the extent to which in their effect they approximate to that produced upon an individual by service personally made upon himself. If they are without such effect they have failed of their purpose and might as well never have been fulfilled. I do not find that these very reasonable requirements of the ordinary law with reference to the service of process on foreign companies carrying on business in this country were an occasion of stumbling or embarrassment to intending plaintiffs. Section 35 of the Act of 1907 did not, so far as I can find, emanate from the mercantile community. Much more probable is it that the section as a whole was the work of the income tax authorities, and that when the position in this country of these foreign companies was being surveyed for other purposes the occasion was taken to select as a proper person for service of process on such a company one whom the company was itself required to designate for that purpose. The selection was well made. In the general case such service would or should be effective to achieve the purpose of all such service. In few cases would it be legitimate for any company to complain if it had in the result been ineffective. But enough has been said to justify the doubt whether Parliament ever intended to authorise as sufficient service in every case one which in a particular set of circumstances would be no more than an idle ceremony. And if, in any case, such appears to be the proper description of a literal compliance with the section and a fortiori to the knowledge of plaintiffs, who effected the so-called service, it may become very necessary to inquire whether to such a case the section on its true construction has any application, and whether, if it has, its provisions as applied to the case are entitled, on well-recognised principles, to any extra-territorial recognition. E F G H I

At the outset one thing with reference to s. 274 requires, I think, to be said. The purpose of the section, or, more properly of s. 35 of the Act of 1907, was not, for the first time, to lay down the conditions on which a foreign company might establish itself for business purposes here. I notice that SARGANT, L.J., in his

A judgment describes the Rossia Insurance Co. as one which, being desirous of carrying on business in this country, was "precluded from doing so by the Companies (Consolidation) Act, 1908, except upon the terms or complying with s. 274 of that Act." BANKES, L.J., expresses the same idea in another way. He says (133 L.T. 809):

B "As a matter of international comity, I imagine that any civilised nation whose national takes advantage of our municipal law in order to secure a business footing in this country will observe and recognise the conditions upon which alone the national obtains that advantage."

With unfeigned respect, I cannot agree that these are true views of the section, and I feel very strongly that if they be not excluded from influence the proper construction of its provisions is likely to be endangered. Section 274 is in truth one of many scattered all over the Act which impose a prescribed duty or obligation and secure the observance or performance of it by the imposition of penalties in case of default. Since *Wright v. Horton* (15) the effect of these provisions of the Act has been free from doubt. Liability to the prescribed penalty is the only consequence of breach. If a limited company omits to keep a register of mortgages as required by s. 100 of the Act, the effect is not, as was before *Wright v. Horton* (15), wrongly supposed to make the unregistered debenture even of a director invalid as a debenture. To take another instance, a limited company may acquire a right to protection of a trade name used separately from its corporate name although such user is in contravention of s. 63, which requires every such company to paint or affix its name on the outside of every office or place

D in which the business of the company is carried on: *H. E. Randall, Ltd. v. British and American Shoe Co.* (16). If a company, again a case even nearer the present, fails to have a registered office to which all communications and notices may be addressed or fails to give to the registrar notice of its situation and of any change therein, all as required by s. 62, another form of service than that prescribed by s. 116, which presupposes a registered office, will be permissible—a useful fact to remember in connection with the present case. But the company will not, as a consequence, be restricted in the exercise of any lawful activity or hindered in the vindication of any of its rights. In all these cases—and there are many others—the company itself or its cognisant directors or managers or other officers or all of them are exposed to penalties, and usually for every day during which the particular default continues. But that is all.

G Where non-compliance with any such requirement is to have further consequences, the section is careful to say so—as for instance where mortgages or charges created by a company registered in England or Ireland are not registered with the registrar within the time prescribed by s. 93. In that case not only are the company and every director, manager, secretary, or other person knowingly a party to the default made liable for penalties under s. 99, but the mortgages or charges are by s. 93 made void, as charges, against the liquidator and any creditor of the company. It will be seen that there is no such provision to be found in s. 274, which is well within the principle of *Wright v. Horton* (15). And, indeed, its limited effect upon the status in this country of the foreign companies to which it applies is well illustrated by the English history as disclosed in these proceedings of the Rossia company itself.

I That company has never failed to be in default under the section. It commenced business in this country in 1912, but no registration of any kind was made until December, 1917. Even then the registration was not complete. Never has there been filed a certified copy of the company's charter as required by sub-s. (1) (a), nor, I gather, a list of its directors under sub-s. (1) (b), nor, at least since 1915, any statement in the form of a balance-sheet as required by sub-s. (3) of s. 274. It appears, moreover, that certainly some, and it may be most or all, of the transactions which resulted in the present claims by the respondents against the company, and by the company against the appellants, were entered into when

there was no registration at all. Certainly all of them were entered into when there was no sufficient registration. Yet no one suggests that these claims are for that reason unenforceable in this country, either against or by the company. Someone is liable for penalties in respect of this matter. There it ends. For myself, in the determination of this difficult case—for so I regard it—I think that all aid from the view, erroneous as I think, which strongly influenced at least BANKES, L.J., must be disclaimed, viz., that s. 274 is entitled to special respect extra-territorially by reason of the idea that upon its terms alone does a foreign corporation “secure a business footing in this country.”

There is not now, I think, any doubt as to the real issue between the parties to this appeal. Garnishee proceedings are a form of execution, and an order absolute will not be made if the proceedings are based upon a judgment so open to question that any payment made by the garnishee to the judgment creditor would leave him exposed to a real and substantial risk of seeing, in this country, the judgment set aside, or in another country, of finding it not recognised, with the result in either eventuality that payment under the garnishee proceedings might be no discharge of his own debt. Leaving for separate consideration the effect upon the whole case of the English winding-up order which had not been made when this matter was before the learned master and the learned judge, that issue in the present case must, I think, depend upon the question whether the default judgment signed by the respondents in their action is one which on accepted principles of private international law would be recognised as valid by the courts of any other country applying these principles. The relevant facts are simple. At the date of the writ in the action Mr. Collins's name placed there by himself acting on behalf and with the authority at the time of the Russia company appeared on the file of the company at Somerset House as that of the person authorised to accept on behalf of the company service of process, as prescribed by sub-s. (1) (c) of s. 274. But the evidence, whatever else it may prove, does, to my mind, show that at the date of the writ Mr. Collins had neither *de facto* nor *de jure* any authority to represent the Russia company as then constituted for any purpose whatever. And although he gave what according to the English view of the situation was a wrong reason for it there was on the file a statement by his solicitor equivalent of effect. But the consideration which is, I think, more important still, is that the respondents before they proceeded to judgment were informed of what, as I think, has been shown to be the true position as between Mr. Collins and the Russia company. Notified by letter of June 6, 1923, from Mr. Collins's solicitor that, for the reasons there given, Mr. Collins had no authority to represent the Russia company, and that, accordingly, he returned the copy writ which had been sent to him by post, the respondents' solicitors on June 7 sent back the copy writ with the statement that they noted all that had been said and that in due course the Russia company would look after their other interests. To this, on June 8, Mr. Collins' solicitor replied:

“Mr. Collins is advised that he has no power or right at the present juncture to act for the Russia Insurance Co. of Petrograd under the circumstances detailed in my letter to you of the 6th inst. I, therefore, return your copy writ and must, of course, leave you to take whatever steps you deem advisable.”

To which on June 11 there was this final reply: Mr. Collins

“was the person nominated under the Companies Act to be served with process against the Russia Insurance Co. and was, therefore, served by us with the copy writ. We, therefore, do not wish to have the copy writ and return it to you and we must leave you to do what you like with it provided you do not return it to us.”

On the very next day the respondents signed judgment in default of appearance. Such being the judgment on which these garnishee proceedings are based, the present question is whether any court outside this Kingdom is required by the

A comity of nations and on proof of these facts to recognise it. I cannot myself think so. Indeed, I am not entirely satisfied that the judgment would even here be held to have any validity if effective steps were taken to set it aside. It is, I think, clear that all the terms of s. 274 must not be taken literally. Suppose, for example, that the person named by a foreign company under sub-s. (1) (c) had died before issue of a writ against the company, but that that writ had
 B been served by being "addressed to" him "and sent by post to the address which has been so filed." Such service would be within the letter of the section. Would any court in this country regard it as being within its intendment? I cannot think so. And what if the plaintiffs further knew that the person to whom they had addressed the writ was in fact dead? Is the present case materially different, where the respondents in full knowledge of the position above
 C stated signed judgment at a date when no kind of notice of the proceedings was or could to their knowledge have been given to anyone really representing the company?

Ignoring any case of fraud or trickery, the courts are strong enough to deal with any such case when it arises. I can myself see nothing in the statute which leaves the provision for service on the named person operative where that person
 D himself, by notification to the registrar, makes it sufficiently plain that all his authority derived from the company is gone. Nor can I find anything in the statute to import that a name once placed on the file can only be superseded by the substitution of another name. This, as I have already suggested, cannot be the case where the named person dies. Again, I can find nothing in the statute which prevented Mr. Collins, who, when duly authorised for that purpose, placed
 E his own name on the file, from notifying with effect when his authority came to an end that his name must be withdrawn. If, as I believe, the form of service authorised by the section was intended to be effective service it is easier to imply these matters than to exclude them. The service upon the named person permitted by s. 274 (3) is facultative; it is not obligatory or exclusive, and if the true result of a breach of s. 274 is merely that which I have already suggested,
 F then, just as the mode of service prescribed for foreign companies before the Act of 1907 remains applicable to those companies which do not comply with the section at all, so it is, as it seems to me, more in accord with principle, so soon as it is made apparent that the "name" is no longer an effective name for the purpose for which it was filed, to hold that service on the company must be effected as if the obligation now broken had never been performed at all, rather
 G than to hold that a form of service known to the plaintiffs before judgment to be entirely ineffective as a service on the company, must be supported as being authorised by the section. But if, contrary to this view, the terms of the statute are such as to justify such a service, and if in this country it must be recognised as valid, then, just as I think no such service on an English company in a foreign country would in like circumstances be recognised here if based upon a foreign
 H statute to the like effect, so it cannot in consequence be expected that any such service, if challenged by the company, would be recognised in a foreign country, whether Russia or another. I cannot myself hold, or expect that it would by a foreign court be held, that the placing of Mr. Collins's name on the file, as circumstances then were, amounted to an agreement or submission by the company to be bound by service upon him in the circumstances with regard to the company and himself and the respondents as these existed and were known when the writ here was served and this default judgment was signed. Accordingly, if the case stood there I should be in agreement as to the proper result of this appeal
 I with SCRUTTON, L.J., FRASER, J., and MASTER BALL.

The balance is, however, to my mind turned in favour of the respondents by the order of ROMER, J., winding-up the Rossia company, followed as it has been by the inquiry into the respondents' judgment debt made by the official receiver as liquidator and by his decision to take no steps to set it aside or question its propriety. The entire position is thereby, in my judgment, fundamentally

changed. It is said that the petition to wind-up was served on Mr. Collins just as was the writ in the respondents' action, and that the winding-up order can have no greater validity than the judgment, either in this country or abroad. I do not agree. As might be expected from their nature the permissible powers of the court with reference to the service of winding-up proceedings, leading to an administration under the court of a company's property, are wider than those in relation to the services of process leading to a judgment at the instance of an individual. Rule 28 of the Companies (Winding-up) Rules, 1909, will show the extent of the court's powers in this matter. I cannot myself doubt that ROMER, J., was completely satisfied as to his power to make the winding-up order, and that the consequential proceedings at least as to all assets locally situate, and among these is included the garnishee's debt, are not only completely regular in this country but that they would, at least to the extent just stated, be recognised everywhere as regular also. It is, I think, in the interest of the general body of British creditors, regrettable that the respondents did not themselves proceed by winding-up petition rather than adopt the course which they did. In the result and in view of the attitude of the official receiver, I think that any payment made by the appellants in the garnishee proceedings would be the equivalent of a payment made to the liquidator himself, and, in my judgment, the risk of such a payment being successfully questioned by any court anywhere is too remote to be entitled to judicial consideration. On this ground, therefore, I am as to the order absolute in accord with the motion which has been made from the Woolsack. As to the other order appealed from, I am in entire agreement with the rest of your Lordships.

Appeals dismissed.

Solicitors: *Watson, Sons & Room; Thomas Cooper & Co.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

MELZAK v. LILIENFELD AND ANOTHER

[CHANCERY DIVISION (Tomlin, J.), February 25, 26, 1926]

[Reported [1926] 1 Ch. 480; 95 L.J.Ch. 305; 135 L.T. 145;
42 T.L.R. 364; 70 Sol. Jo. 487]

Landlord and Tenant—Underlease—Agreement for grant—Agreement for sale of lease—Implied covenants—Notice of head lease—Grantee not specifically informed of terms of head lease.

Although, speaking generally, if a purchaser has notice of a particular document, he must be taken to have notice of its contents, yet in a contract for the sale of a lease or the grant of a sublease out of a leasehold interest, in each of which cases the proposed grantee has notice of the lease, the law is that, in the absence of any term in the contract to the contrary, and in the absence of any evidence that the proposed grantee has been made acquainted with the actual terms of the lease, the contract must be construed as, in the one case, a contract for the assignment of a lease containing the usual covenants, and, in the other case, as a contract for the grant of a sublease out of a leasehold interest containing the usual covenants.

Notes. As to contracts for underleases and the assignment of leases, see 23 HALSBURY'S LAWS (3rd Edn.) 448 et seq., 642 et seq.; and for cases see 30 DIGEST (Repl.) 516, 517, 31 DIGEST (Repl.) 408 et seq.

A Cases referred to:

(1) *Propert v. Parker* (1832), 3 My. & K. 280; 40 E.R. 107; 31 Digest (Repl.) 162, 2982.

(2) *Reeve v. Berridge* (1888), 20 Q.B.D. 523; 57 L.J.Q.B. 265; 58 L.T. 836; 52 J.P. 549; 36 W.R. 517, C.A.; 40 Digest (Repl.) 144, 1102.

(3) *Hyde v. Warden* (1877), 3 Ex.D. 72; 47 L.J.Q.B. 121; 37 L.T. 567; 26 W.R. 201, C.A.; 30 Digest (Repl.) 511, 1515.

B

(4) *Long v. Millar* (1879), 4 C.P.D. 450; 48 L.J.Q.B. 596; 41 L.T. 306; 43 J.P. 797; 27 W.R. 720, C.A.; 40 Digest (Repl.) 25, 113.

(5) *Morris v. Baron & Co.*, [1918] A.C. 1; 87 L.J.K.B. 145; 118 L.T. 34, H.L.; 12 Digest (Repl.) 499, 3744.

C

(6) *Lord Darnley v. London, Chatham and Dover Rail. Co.* (1867), L.R. 2 H.L. 43; 36 L.J.Ch. 404; 16 L.T. 217; 15 W.R. 817, H.L.; 12 Digest (Repl.) 491, 3691.

(7) *Molyneux v. Hawtrey*, [1903] 2 K.B. 487; 72 L.J.K.B. 873; 89 L.T. 350; 52 W.R. 23, C.A.; 40 Digest (Repl.) 145, 1112.

(8) *Cosser v. Collinge* (1832), 3 My. & K. 283; 1 L.J.Ch. 130; 40 E.R. 108; 30 Digest (Repl.) 511, 1514.

D

(9) *Grosvenor v. Green* (1858), 28 L.J.Ch. 173; 32 L.T.O.S. 252; 5 Jur.N.S. 117; 7 W.R. 140; 40 Digest (Repl.) 167, 1291.

Witness Action in which the plaintiff claimed a declaration that he was entitled to the grant to him of an underlease of certain premises and damages for breach of an agreement that he should have such grant. The defendants denied that the whole contract was contained in the document put forward, and sought to incorporate therein certain other memoranda.

E

By an agreement in writing dated June 16, 1925, it was provided:

"Mr. and Mrs. W. H. and L. Lilienfeld, of 167 Maida Vale, W.9, [the defendants] agree to let, and Mr. Anatole Melzak, of 21 Taviten Street, W.C.1, [the plaintiff] agrees to take the first floor flat at 167 Maida Vale, W.9, of seven rooms (including bathroom and W.C.) for a period of five years and twelve weeks commencing from July 15, 1925, and Mr. Melzak agrees to purchase the fittings as per schedule for £55, and has paid a deposit herewith of £20, and will pay the balance of purchase price together with one quarter's rent at £160 per annum inclusive, on July 15, 1925."

F

Subsequently, the defendants requested the plaintiff to sign an agreement for the grant of an underlease containing a number of restrictive covenants to correspond with the covenants of the head lease of the whole house, which the defendants held. The plaintiff's solicitor then wrote to the defendants' solicitor saying that under the agreement of June 16 the defendants were entitled to require the plaintiff to give only technically "usual" covenants, and he had, therefore, deleted from the draft lease covenants that were not of that character. After some negotiation the defendants refused to accept the plaintiff as tenant, and the plaintiff began his action.

H

Spens, K.C., and *H. S. G. Buckmaster* for the plaintiff: This is an open contract for the grant of an underlease to the plaintiff, and in such a case a vendor cannot force upon the purchaser any unusual covenants. A contract to grant an underlease simpliciter means a contract to grant an underlease subject only to the usual covenants.

I

They referred to *Propert v. Parker* (1), *Reeve v. Berridge* (2), *Hyde v. Warden* (3), *Long v. Millar* (4).

Galbraith, K.C., and *Swords* for the defendant: The plaintiff must be deemed to have known that the defendant could not possibly grant any underlease not subject to the covenants of the head lease, whether such covenants were usual or unusual.

They referred to *Morris v. Baron & Co.* (5) and *Lord Darnley v. London, A Chatham, and Dover Rail. Co.* (6).

TOMLIN, J., referred to *Molyneux v. Hawtrey* (7).

TOMLIN, J.—The question is: What are the rights of the parties in the terms of the contract? It raises a point of some difficulty. I am satisfied, as a matter of fact, that the document of June 16 was entered into with knowledge that the defendants only held a lease, and, that being so, I think the contract must be read as a contract for an underlease. But the question arises whether, treating it as a contract for an underlease, it must be treated as a contract for an underlease with covenants appropriate to the covenants of the head lease, or whether it ought to be considered as a contract for an underlease granted out of a lease with usual covenants. The precise point seems never to have been determined. It was propounded by SIR JOHN LEACH, M.R., in *Proper v. Parker* (1). He, unfortunately, propounded the problem, but he did not proceed to the solution of it. In that case there was a contract for a lease with nothing shown on the face of it as to whether the grantor was the owner of the freehold or had only a leasehold interest, and the Master of the Rolls held that the proposed lessee had no knowledge that the grantor's title was less than freehold. But he says this:

"If the defendant had been apprised at the time of the agreement that the plaintiff had only a leasehold interest, the question would then have arisen whether, inasmuch as the lease to be granted to the defendant must necessarily have been subject to the covenants which bound the plaintiff, it was not, on the part of the defendant, such a want of reasonable diligence to neglect to inform himself of the nature of those covenants as in the consideration of a court of equity would amount to implied notice of the covenants; or whether the defendant, not inquiring into those covenants, was entitled to take it for granted that the lease to the plaintiff contained only what are termed usual covenants. That question, however, does not arise in this case."

It is, I think, plain that a contract for the sale of a lease must be treated as a contract for the sale of a lease with usual covenants, unless the grantee has been given full opportunity of ascertaining what the covenants in the lease are, and has been made acquainted, in fact, with the existence of any unusual restrictive covenants. The question in the present case is whether this contract should be considered as a contract for an underlease in accordance with the terms of the covenants of the head lease, or as a contract for an underlease granted out of a head lease with usual covenants. It was said by FRY, L.J., in delivering the judgment of the Court of Appeal in *Reeve v. Berridge* (2) (20 Q.B.D. at p. 527), an action on a contract for the purchase of a lease, that the question was how far the mere notice of the lease in the contract went when there was no opportunity of inspecting it, whether the agreement for a lease affected the purchaser with notice of all the contents of the lease. He continued:

"This question appears to be really covered by the authority of *Hyde v. Warden* (3). The questions were whether taking possession of property agreed to be underleased with notice of the existence of the lease was a waiver of all objections based on the terms of the lease. The question, therefore, so far as regards the question of notice, was the same as in the present case, and the court was pressed to decide that notice of the lease was notice of its contents; and that on the authority of various cases, including *Cosser v. Collinge* (8). The court rejected the argument, and said (3 Ex.D. at p. 80):

'We think it may be considered that the principle of that case can only be applied where (as indeed was the case in *Cosser v. Collinge* (8)) the defendant had a fair opportunity of ascertaining for himself the provisions of the original lease.'

A It was argued before us that the question in *Hyde v. Warden* (3) arose on a contract for a sub-lease, whilst in the present instance the question arises with relation to a contract for the assignment of a lease. But we are of opinion that there is no substance in such a distinction, because in both cases alike the purchaser must know that his vendor can confer on him no interest except one subject to the covenants contained in the lease, and the effect of

B notice must therefore be alike in both cases. Criticisms on *Hyde v. Warden* (3) were also addressed to us and in particular we were asked to hold it inconsistent with *Grosvenor v. Green* (9), which was decided by LORD HATHERLEY when Vice-Chancellor. But in this court we are bound by the authority of *Hyde v. Warden* (3), and we cannot but observe that there is great practical convenience in requiring the vendor, who knows his own title, to disclose all

C that is necessary to protect himself, rather than in requiring the purchaser to demand an inspection of the vendor's title deed before entering into a contract, a demand which the owners of property would in some cases be unwilling to concede, and which is not, in our opinion, in accordance with the usual course of business in sales by private contract."

D I think the effect of all that is really as follows. Although, speaking generally, if a purchaser has notice of a particular document, he must be taken to have notice of its contents, yet in a contract for the sale of a lease or the grant of a sub-lease out of a leasehold interest, in each of which cases the proposed grantee has notice of the lease, the law is that, in the absence of any term in the contract to the contrary, and in the absence of any evidence that the proposed grantee has been made acquainted with the actual terms of the lease, the contract must be

E construed as, in the one case, a contract for the assignment of a lease containing the usual covenants, and, in the other case, as a contract for the grant of a sub-lease out of a leasehold interest containing the usual covenants. Applying that principle, if it be right, to this case, I come to the conclusion that on construction the document of June 16, 1925, is a contract for the grant of a sub-lease out of a leasehold interest which was subject only to the usual covenants.

F The question then remains whether there was notice in fact to the plaintiff of the existence of unusual covenants in the head lease. I am unable to say upon any evidence that I have heard that the actual covenants contained in the lease, or the nature of them, were ever brought to the attention of the plaintiff, and, however usual it may be in London houses to have restrictions of this kind, I do

G not think it is possible to hold that anyone who deals with property in London is in a different position from one who deals with property elsewhere, or that he must be supposed to be on the special look-out for restrictive covenants. I hold as a fact that there was no notice to the plaintiff of the existence of unusual covenants in the head lease, what follows from all that? It seems to me quite plain that from start to finish the plaintiff was insisting upon the contract which he had entered into as being in fact a binding contract. The contract of June 16

H being what it was, and the plaintiff insisting on it, the defendants made it plain that they were not in a position to perform it. It seems to me, therefore, that the plaintiff has established a contract which has been broken by the defendants. That being so, the action must succeed, and there must be an inquiry as to damages. There will be a declaration that on the true construction of the contract the plaintiff is entitled to the grant to him of an underlease of the first-floor flat at 167 Maida Vale, not subject to any unusual covenant, and that the defendants have failed to perform the contract.

I

Solicitors: *J. Prag; H. J. Shepard.*

[*Reported by L. MORGAN MAY, Esq., Barrister-at-Law.*]

LESLIE & CO., LTD. v. CUMMINGS AND OTHERS

[KING'S BENCH DIVISION (Roche and MacKinnon, JJ.), April 27, May 7, 1926]

[Reported [1926] 2 K.B. 417; 95 L.J.K.B. 1007; 135 L.T. 443;
42 T.L.R. 504; 70 Sol. Jo. 738; 24 L.G.R. 315]

Rent Restriction—Possession—Whole premises sublet furnished—Occupation resumed by statutory tenant before claim for possession—Effect of sub-letting furnished part of premises—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 12 (2) (i).

An entire dwelling-house within the protection of the Rent Restriction Acts was let to a tenant, who on the expiration of his lease remained in possession as a statutory tenant. On two occasions, for periods of about a year each, he sublet the entire house furnished, but he resumed possession after each sub-letting. On a later occasion he sublet two rooms furnished, and, while these rooms remained so sublet, the landlords brought an action claiming possession of the entire house, on the ground that the effect of s. 12 (2) (i) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, was that both the earlier sub-lettings furnished of the entire house and the later sub-letting furnished of the two rooms put the house outside the protection of the Rent Restriction Acts.

Held: the landlords were not entitled to succeed as (a) in the case of the earlier sub-lettings, the time at which one had to consider whether or not a dwelling-house was subject to the protection of the Rent Restriction Acts was the date of the writ or plaint in which possession was claimed, and at that date in the present case the periods during which the house had been sublet furnished had expired, and the statutory tenant had resumed occupation before the action was brought; (b) in the case of the later sub-letting, part only of the house was sublet furnished, and while the landlords might have recovered possession of that part, they had claimed possession of the whole and not of the part.

Prout v. Hunter (1), [1924] 2 K.B. 736, distinguished.

Notes. Section 12 (2) of the Act of 1920 does not apply to houses controlled by the Rent and Mortgage Interest Restrictions Act, 1939. As to control under that Act, see s. 3 thereof; and as to release from control of dwelling-houses of the higher rateable values, see Rent Act, 1957, s. 11.

Considered: *Fordree v. Barrell*, [1931] 2 K.B. 257; *Baker v. Turner*, [1950] 1 All E.R. 834. Referred to: *Thompson v. Rolls*, ante, p. 257; *Ebner v. Lascelles*, [1928] 2 K.B. 486; *Hutchinson v. Jauncery*, [1950] 1 All E.R. 165; *John M. Brown, Ltd. v. Bestwick*, [1950] 2 All E.R. 338; *Francis Jackson Developments, Ltd. v. Hall*, [1951] 2 K.B. 488.

As to control ceasing to apply to premises by reason of their changed user, see 23 HALSBURY'S LAWS (3rd Edn.) 808, 809; and for cases see 31 DIGEST (Repl.) 639, 640. For Rent Restriction Acts, 1920 and 1939, see 13 HALSBURY'S STATUTES (2nd Edn.) 981, 1077.

Cases referred to:

- (1) *Prout v. Hunter*, [1924] 2 K.B. 736; 93 L.J.K.B. 993; 132 L.T. 193; 40 T.L.R. 868; 69 Sol. Jo. 49; 22 L.G.R. 746, C.A.; 31 Digest (Repl.) 639, 7467.
- (2) *Phillips v. Barnett*, [1922] 1 K.B. 222; 91 L.J.K.B. 198; 126 L.T. 173; 38 T.L.R. 39; 66 Sol. Jo. 124; 20 L.G.R. 1, C.A.; 31 Digest (Repl.) 674, 7695.
- (3) *Williams v. Perry*, [1924] 1 K.B. 936; 93 L.J.K.B. 521; 131 L.T. 471; 40 T.L.R. 539; 68 Sol. Jo. 617; 22 L.G.R. 471, D.C.; 31 Digest (Repl.) 649, 7528.

- A** (4) *Gidden v. Mills*, [1925] 2 K.B. 713; 95 L.J.K.B. 1; 134 L.T. 21; 24 L.G.R. 27, D.C.; 31 Digest (Repl.) 649, 7530.
- (5) *Phillips v. Hallahan*, [1925] 1 K.B. 756; 94 L.J.K.B. 694; 133 L.T. 236; 41 T.L.R. 407; 69 Sol. Jo. 444; 23 L.G.R. 440, D.C.; 31 Digest (Repl.) 649, 7529.

B **Appeal** from West London County Court.

By a written agreement, dated Nov. 23, 1918, the plaintiffs let to the defendant, R. C. Cummings, a flat at West Kensington at a yearly rent of £65 for three years from Michaelmas, 1918. There was a covenant in the agreement that the defendant would not assign, underlet, or part with possession of the flat or any part thereof without the plaintiffs' consent in writing first previously had, and the usual proviso that there was to be no vexatious withholding of consent in the case of a desirable tenant for the whole flat. The three years' term expired at Michaelmas, 1921, but the defendant remained in possession, and either at that date or at Michaelmas, 1923, when a notice to quit expired, he became a statutory tenant under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. On Aug. 29, 1921, under the provisions of the Act the rent was increased to £98 odd. In August, 1922, the whole flat was let furnished by the defendant to a Mr. Moore for a year. The consent of the plaintiffs was not previously obtained, but they gave their consent in writing on Dec. 1, 1922. In October, 1923, the defendant again let the whole flat furnished to a Mrs. Willcocks. Again the consent of the plaintiffs was not previously obtained, but it was given in writing on Aug. 29, 1924. In October, 1922, the defendant, owing to bad health, had left London for Glasgow to go to a home or institution. Thereafter he was not physically present at the flat, but his furniture remained there, and his two daughters, who were made defendants in the action, resided there, except during the sub-letting to Mr. Moore and Mrs. Willcocks. In May, 1925, the defendant's daughters, acting on his behalf, let two rooms in the flat furnished to a Mr. Samad at a rent of £2 10s. a week for the rooms and attendance. Thereupon the parties were in correspondence from May 29 to July 22. The complaint made in the correspondence on behalf of the plaintiff company was that the sub-letting was a breach of the agreement and entitled the plaintiff company to demand possession. Possession was refused. On Nov. 2, 1925, the plaintiff company issued the plaint in these proceedings claiming possession of the whole premises. At some date between the date of the plaint and before the hearing of the action, which took place on Dec. 2, 1925, Mr. Samad left the flat and ceased to be in occupation of the two furnished rooms. The learned county court judge entered judgment for the defendants, holding that the premises were subject to the Rent Restrictions Act and that, the matter being one for his discretion, it was a case in which he did not think it was reasonable to make an order for possession. The plaintiffs, the landlords, appealed.

H By the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (2):

"This Act shall apply to a house or part of a house let as a separate dwelling, where . . . the rateable value does not exceed (a) in the Metropolitan Police District . . . £105 . . . and every such house or part of a house shall be deemed to be a dwelling-house to which this Act applies. Provided that—(i) This Act shall not, save as otherwise expressly provided, apply to a dwelling-house bona fide let at a rent which includes payments in respect of board, attendance, or use of furniture. . . ."

I *Gilbert Stone*, for the plaintiffs, referred to *Prout v. Hunter* (1).

The defendants did not appear.

Cur. adv. vult.

May 7. The following judgments were read.

ROCHE, J.—This is the appeal of the plaintiff company from a judgment of the learned judge of the West London County Court. The action was by the

plaintiffs as landlords for possession, and the result was that judgment was entered for the defendants. The ground of such decision in the defendants' favour was that the Rent Restrictions Acts applied to the case and premises. [His Lordship stated the facts and continued:] On the appeal the defendants did not appear. Our task in deciding such a case would obviously have been lightened if we had had assistance from counsel for the defendants. It was for this reason that we took time to consider the matter further. The grounds of appeal are threefold: (i) That upon the facts the defendant Cummings had not retained possession of the demised premises within the meaning of s. 15 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920; (ii) that upon the facts the premises had ceased to be within the protection of the Rent Restrictions Acts, 1920 and 1923, because they had ceased by reason of the furnished sub-letting to be premises to which the Acts apply: see proviso (i) of s. 12 (2) of the Act of 1920; and (iii) that in any case the learned judge ought not to have exercised his discretion in favour of the defendants and should have made an order in the plaintiffs' favour.

The first and third of these points seem to present no difficulty. The defendant Robert Charles Cummings was not physically present in the flat after October, 1922, but elsewhere for reasons connected with his health. His furniture and family were there and there was evidence that, if the health of Robert Cummings improved, he intended to return. Clearly, therefore, there was evidence on which the learned judge could find, as he did find, that the defendant Robert Cummings was in possession at the material time, and was therefore entitled within the meaning of s. 15 of the Act of 1920 to the benefit and protection of the Act. On the third point, that is the point of discretion, it cannot, in my judgment, be said that there were no grounds on which if the premises were within the protection of the Act, the learned judge could not reasonably think he ought to refuse to make an order for possession. With the exercise of his discretion, it is not for this court to interfere.

The second point is less simple. Counsel contended that the premises ceased to be a dwelling-house to which the Acts applied, first by reason of the letting of the whole flat furnished to Mr. Moore and Mrs. Willcocks, or, secondly, by reason of the letting of the two rooms furnished to Mr. Samad. In support of his contention he relied upon *Prout v. Hunter* (1). In that case the whole of the demised premises had been let furnished and were in occupation of the person who had so taken them at the date of the writ. In the present case, so far as the whole of the demised premises are concerned, they had been let furnished to Mr. Moore and Mrs. Willcocks, but their terms of occupation had ended long before the date of the proceedings. I do not think that the effect of the letting of the whole premises furnished to Mr. Moore and Mrs. Willcocks (with, it is to be noted, the consent of the plaintiffs) was that the premises both became and continued for all time to be premises to which the Acts of 1920 and 1923 did not apply; at any rate, in my opinion, from the termination of those sub-tenancies Robert Cummings was in possession. His tenancy was a statutory one, and the premises were not let furnished. *Phillips v. Barnett* (2) and *Williams v. Perry* (3), which were cited to us, no doubt show that a change of structure of a permanent kind or a particular user of premises continuing until action brought may take the premises out of the protection of the Acts. They are not authorities for the proposition that if a tenant is a statutory tenant of premises let unfurnished those premises are not protected because at some period which has expired they were let furnished.

As regards the letting furnished to Mr. Samad, this was in existence at the date on which these proceedings began, and if the whole premises had been let to Mr. Samad, *Prout v. Hunter* (1) might have been invoked as showing that the Act no longer applied to the premises. In this case only part, namely, two rooms, were let furnished to Mr. Samad. The plaintiffs' claim is for possession, not of those two rooms, but of the whole premises. By s. 12 (2) of the Act of 1920 it is

A provided that the Act shall apply to a house or part of a house let as a separate dwelling, and, after the addition of certain other words immaterial for the present purpose, it goes on: "and every such house or part of a house shall be deemed to be a dwelling-house to which the Act applies." Then occurs the proviso as to furnished letting. The contention here is that the application of the Act to the whole of these demised premises is excluded by this proviso as to furnished letting. But the whole of these demised premises were not let furnished, only two rooms were so let. It may be that in accordance with the reasoning in *Gidden v. Mills* (4) which follows and applies *Prout v. Hunter* (1) and *Phillips v. Hallahan* (5), the plaintiffs, if they had claimed possession of the two rooms let to Mr. Samad, might have succeeded. It is, however, unnecessary to decide that point. The plaintiffs' claim was for possession of the whole premises, and it does not appear to have been suggested in the court below, and it certainly was not suggested in this court, that the plaintiffs either desired or claimed possession of the part formerly let to Mr. Samad without the rest of the flat.

C For the reasons I have given, in my opinion, the contention of the plaintiff company in regard to the premises taken as a whole fails, and the county court judge was right on this point also. I think this appeal should be dismissed with costs.

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MACKINNON, J.—I agree. If one analyses the position, I think it is this. The plaintiffs say that they are the freeholders of these premises and they claim possession; they say that the persons who are in occupation have no right to be there. The defendants' answer is that they had an agreement of lease which expired by effluxion of time in 1921; that under s. 12 (2) (a), of the Rent Restrictions Act, 1920, the house is a house in the Metropolitan Police District of less than £105 a year value, and, therefore, by s. 5 (1) of the Act no order for the possession of that dwelling-house should be made. The plaintiffs, in rebutting that contention, seek to rely upon the proviso to s. 12 (2) of the Act of 1920, which provides that, notwithstanding that enactment, the Act shall not apply to a dwelling-house, bona fide let furnished, and a dwelling-house in that proviso must mean, by virtue of the definition which immediately precedes it, a dwelling-house or part of a house let as a separate dwelling. In order to show that these premises come within that proviso as regards being let furnished, the plaintiffs rely upon *Prout v. Hunter* (1) in relation to either the letting to Mr. Samad or the letting to Mrs. Willcocks or Mr. Moore.

G As regards the letting to Mr. Samad, I agree with what has been said by ROCHE, J., that the plaintiffs do not succeed because they are claiming possession of the dwelling-house which is the whole house and not of the dwelling-house constituted by part of the house being let separately. As regards the previous letting to Mrs. Willcocks and Mr. Moore, whose occupation had come to an end long before proceedings had been taken in this action, I agree that the time at which one has to consider whether a dwelling-house is a dwelling-house subject to the protection of the Acts is the date of the writ or, in this case, the plaint in the county court. I do not suppose that counsel would have sought to argue that *Prout v. Hunter* (1) went as far as to apply in a case where the dwelling-house had been let furnished during the currency of the original lease, that is to say, perhaps in 1919 or 1920; but he does seek to say that a letting furnished for however short a period after the tenant became a statutory tenant took the house out of the category of a protected house and put it into the category of an unprotected house. It is only necessary to consider what startling results that would have, to suggest that that argument must be wrong. For instance, if there be, as there may well be, a person in occupation of a house at Henley in the position of what is called a statutory tenant and supposing the owner of that house now discovered that the statutory tenant let the premises furnished for the Regatta week in 1922, would he now by virtue of that use of the house for a week four years ago come to the court and demand possession because by virtue

of that act so long ago the premises cease to be protected? I am far from saying that, because one finds that some contention under these Acts leads to an extraordinary result, therefore that cannot be the effect of the Act, for the Acts are so worded that extraordinary results of one kind and another do follow; but I think that those considerations are of assistance in leading to the conclusion with which I agree—namely, that the fact that a house has been let furnished for a period which has expired before proceedings are commenced cannot be relied upon as taking the house out of the protection of the Act in the way which is suggested.

For these reasons I entirely agree with my Lord. I think the appeal fails and should be dismissed with costs.

Appeal dismissed.

Solicitors: *Shepherds, Walters & Bingley.*

[Reported by T. R. FITZWALTER BUTLER, ESQ., Barrister-at-Law.]

WILSON v. WALTERS

[KING'S BENCH DIVISION (Scrutton and Sargant, L.JJ., sitting as additional judges), February 18, 19, 1926]

[Reported [1926] 1 K.B. 511; 95 L.J.K.B. 624; 134 L.T. 597]

Costs—Taxation—Claim and counterclaim—Judgment for defendant on claim—Judgment for plaintiff on counterclaim—Principle of taxation to be applied.

Where a claim and counterclaim, arising out of one transaction, and involving substantially one issue, have both failed, the principle to be applied in the taxation of costs is to award to the defendant the costs of resisting the plaintiff's claim, and to award to the plaintiff only such additional costs as he has incurred in defeating the defendant's counterclaim. The rule that there should be apportionment of the costs of every item common to both claim and counterclaim applies only to cases where a separate and substantial question is raised by the counterclaim.

Notes. Approved and followed: *Medway Oil and Storage Co., Ltd. v. Continental Contractors, Ltd.*, [1929] A.C. 88. Considered: *The Stentor*, [1934] All E.R.Rep. 545. Referred to: *Amsterdamsche Lucifersfabrieken v. H. and H. Trading Agencies, Ltd.*, [1940] 1 All E.R. 587; *Cinema Press, Ltd. v. Pictures and Pleasures, Ltd.*, [1945] 1 All E.R. 440.

As to costs where there is a claim and a counterclaim, see 29 HALSBURY'S LAWS (2nd Edn.) 518-520; and for cases see 40 DIGEST (Repl.) 470-474.

Cases referred to:

(1) *Christie v. Platt*, [1921] 2 K.B. 17; 90 L.J.K.B. 555; 124 L.T. 649, C.A.; 40 Digest (Repl.) 472, 571.

(2) *Saner v. Bilton* (1879), 11 Ch.D. 416; 48 L.J.Ch. 545; 40 L.T. 314; 27 W.R. 472; 40 Digest (Repl.) 473, 572.

(3) *Mason v. Brentini* (1880), 15 Ch.D. 287; 43 L.T. 557; 29 W.R. 126, C.A.; 40 Digest (Repl.) 473, 573.

(4) *Atlas Metal Co. v. Miller*, [1898] 2 Q.B. 500; 67 L.J.Q.B. 815; 79 L.T. 5; 46 W.R. 657; 42 Sol. Jo. 653, C.A.; 40 Digest (Repl.) 473, 577.

(5) *Crean & Son, Ltd. v. M'Millan*, [1922] 2 I.R. 105; 40 Digest (Repl.) 474, *536.

(6) *Samuel v. Burnham* (1907), 42 I.L.T. 24.

- A (7) *Coulter v. Crangle* (1903), 37 I.L.T. 79.
 (8) *Duffy v. O'Meara* (1899), 5 Ir.W.L.R.

Appeal from Reading County Court.

B A collision occurred at a cross-roads between two motor-cars, and the plaintiff claimed £46 17s. damages from the defendant for damage to his car arising from the negligence of the defendant in the driving of his car. The defendant denied that he had been guilty of any negligence, and alternatively alleged contributory negligence on the part of the plaintiff. He further counterclaimed for £43 11s. 6d. damages from the plaintiff for damage to his car arising from the plaintiff's negligent driving. In the result, the judge found for the defendant on the claim and for the plaintiff on the counterclaim. When the costs came before the registrar for taxation, he awarded the defendant the costs of resisting the plaintiff's claim, and on the counterclaim he awarded the plaintiff such extra costs as he had incurred in defeating the defendant's counterclaim. When he came to an item already considered on the claim, he gave the plaintiff nothing on that item in the counterclaim. The plaintiff appealed to the county court judge against this order, and he ordered that the bills were to be taxed on the principle of apportioning the costs in each of the bills to the claim and counterclaim. From this order the defendant appealed to the Divisional Court.

Ralph Thomas for the appellant.

The respondent did not appear.

E **SCRUTTON, L.J.**—This appeal raises a question of some little interest and some little difficulty as to the taxation of costs. Two motor-cars collided with each other at cross-roads. The owner of one brought an action against the owner of the other, and the other counterclaimed. As, I think, is usual in cases of collisions at cross-roads, each contended that the other was to blame, and in the result the defendant succeeded on the claim, and the plaintiff succeeded on the counterclaim. Then came the question how the costs were to be taxed. The registrar taxed them on this principle: He first took the claim, and gave the defendant the costs of resisting the claim. He then proceeded with the counterclaim, and he gave the plaintiff such extra costs as he had incurred by defeating the counterclaim. If, in the course of the plaintiff defeating the counterclaim, he came to an item which had been already considered on the claim, he did not give the plaintiff anything on the counterclaim because he had already dealt with those costs in the defendant's costs in defeating the claim. I should state that the registrar was acting in accordance with certain decisions of the Court of Appeal, if they applied. There was an appeal then to the county court judge, and he came to the conclusion that the matter fell within another decision of the Court of Appeal, *Christie v. Platt* (1), which he thought applied, and he, whenever there was an item which was, as he thought, common to both the claim and counterclaim, apportioned the costs. Thereupon there was an appeal by the defendant to this court.

H There have been, I think, five or six decisions in the English Court of Appeal, and there has been one which, in my view, is a very interesting decision in the Irish Court of Appeal. The matter stands in this way: There is *Saner v. Bilton* (2), which came before FRY, J., as he then was, on a question of taxation of a claim and counterclaim, and before giving his decision FRY, J., took the opinions of the taxing masters in Chancery, who consulted the common law taxing masters, and their report was this:

I "I, [that is, the taxing master concerned] however, after much consideration, considered that where the plaintiff succeeds in all that he claims, he is, notwithstanding that the defendant succeeds on the counterclaim, entitled to his full costs, except in so far as they are occasioned or increased by the counterclaim, and so, if the plaintiff's action is dismissed with the costs, the defendant is entitled to full costs against the plaintiff, except such additional costs as

are occasioned by the counterclaim. The plaintiff commences litigation, and it seems to me his costs should depend upon his failure or success. The defendant, under the power given by the Act, superadds a claim of his own, and I think the additional costs occasioned thereby should abide the event. I consulted the common law masters, who agreed in this view, but it is only a matter of opinion, there having been no decision."

Thereupon FRY, J., stated the principle (11 Ch.D. at p. 418):

"The proper course will be this: The plaintiff in the original action shall pay the general costs of action, and the defendant, who is to pay the costs of the counterclaim, shall only pay the costs of the proceedings so far as they have been increased by reason of that counterclaim. The principal reason which leads me to that conclusion is this, that the plaintiff in the original action is the person who first commences litigation. The plaintiff in the action first lets out the waters of litigation, and it is impossible to say how far counterclaim ever would have been agitated if he had not begun that litigation. That appears to me to furnish a reason why, as a general rule, the action should be treated as if it stood by itself, and the counterclaim should only bear the amount by which the costs of the proceedings are increased by it."

That decision of FRY, J., was approved by the Court of Appeal in *Mason v. Brentini* (3), where SIR GEORGE JESSEL, M.R., giving judgment, says 15 Ch.D. at p. 289):

"I entirely agree with the decision of FRY, J., in *Saner v. Bilton* (2), and for the reasons which he has given; and am of opinion that his judgment is to be considered as expressing the rule of the court."

The case also came before the Court of Appeal in the *Atlas Metal Co. v. Miller* (4), where the claim and counterclaim were two libels, and LINDLEY, L.J., giving the judgment of the court, practically acted on the rule which had been laid down by FRY, J., and gave an exposition of the reasons why he thought such a rule should be followed. It became clear, however, that that rule did not cover ordinary justice in all the cases which might arise; and a case which illustrated that some distinction must be drawn came before the Court of Appeal, sitting in interlocutory matters, in *Christie v. Platt* (1). There a landlord claimed against the tenant for rent. The tenant pleaded as a defence that there was an implied term that the premises should be inhabitable, and pleaded as a counterclaim that there was an implied warranty that the premises should be inhabitable, and claimed damages. It was tolerably clear that the defence was no defence to the claim for rent, so the plaintiff succeeded, but, after a prolonged fight on the counterclaim, the tenant succeeded, and, although all the fight had been concentrated on the issue on the counterclaim whether the premises were inhabitable, the taxing master carrying out, as he thought, the decision of the Court of Appeal in *Atlas Metal Co. v. Miller* (4), gave the plaintiff £214 5s. as her costs, and gave the defendant the magnificent sum of £3 0s. 5d. as costs, which, as the members of the Court of Appeal said, looked wrong, and must be wrong, and they said the common costs should be apportioned.

Having read the judgments in those cases to which I have referred, and in three other cases to which I have not referred, where LORD ESHER contributed some obiter dicta to the discussion, I was not at all clear on those cases what the line of distinction was; but, speaking for myself, I personally have had the great advantage of reading a very elaborate and careful discussion of the matter in the Irish case of *Crean & Son, Ltd. v. M'Millan* (5). That case went through four courts altogether, and there are very elaborate judgments by three lords justices, the Lord Chancellor, and the Irish Master of the Rolls. There was one dissentient (RONAN, L.J.), but the other four agreed, and O'CONNOR, L.J., in the last court but one, gives what to my mind is an extremely instructive judgment, going through the cases, and ([1922] 2 I.R. at p. 114) going through every item which

A would ordinarily occur in a taxed bill of costs, and stating his view as to it. I will refer again in a moment to the judgment of O'CONNOR, L.J., which was accepted by the final court, but in the judgments in the final court a test was laid down for distinguishing between cases where one would apply the *Saner v. Bilton* (2) rules, and where one would apply the procedure in *Christie v. Platt* (1). The Lord Chancellor says this, after referring to two Irish cases ([1922] 2 I.R. at p. 130):

C "In these last two cases we get to the root of the matter, and are able to get a principle that will guide the taxing master. Wherever there is a separate and substantial question raised by the counterclaim there must be substantial costs paid in relation to the counterclaim, and it follows that there must be an apportionment of the costs. But, on the other hand, where the subject-matter of the counterclaim is identical with the defence or part of the defence, in that case the taxing master should not apportion, but simply allow such extra costs as have been incurred by reason of the counterclaim. This view seems to me to be the foundation of the decision in *Christie v. Platt* (1), and is consistent with almost all the decisions in England or here. I do not say that it quite agrees with all this language of the learned judges in arriving at these decisions"

D —a remark with which I entirely agree. ANDREWS, L.J., in the same court, formulates the principle in this way (ibid., at p. 135):

E "Whether the common items in the costs (i.e., the items which contain something apparently common to both claim and counterclaim) should be allowed in full to the successful party on the original claim, or should be apportioned as between the claim and counterclaim, depends in each case upon whether such costs were in truth and in fact occasioned solely by the claim, or partly by the claim and partly by the counterclaim. Such costs are regarded as being occasioned solely by the claim and are, accordingly, allowed in full to the party who succeeds in the claim, when the counterclaim is a counterclaim in form only, and is in reality in the nature of a set-off (*Samuel v. Burnham* (6)), or where it is really a defence in disguise (*Coulter v. Crangle* (7)), or where both claim and counterclaim arise out of the one transaction and, in effect, raise the same issue: *Duffy v. O'Meara* (8)."

G Now *Duffy v. O'Meara* (8) was a characteristically Irish case. There was a fight which terminated in a law suit. The plaintiff brought an action, saying that the defendant had assaulted him, and the defendant counterclaimed, saying that the plaintiff had assaulted him; and it is satisfactory to know that both claims failed, but that is given by ANDREWS, L.J., as an example of the case where the claim and counterclaim arise out of the one transaction and the same issue. When I turn back to the judgment of O'CONNOR, L.J., I find that he takes this very case as an example of an action and counterclaim arising out of the same transaction, and he says this ([1922] 2 I.R. at p. 124):

I "Let me take a case where there is an action for negligence and a counterclaim for negligence arising out of the same transaction, and both claim and counterclaim are dismissed. The defendant's costs of action are first taxed, 95 per cent. of the brief is taken up with matter that affords a defence to the action, though it is equally relevant to the counterclaim. Shutting his eyes to the existence of the counterclaim, the taxing master gives the entire brief and practically all (if not all) the fees to the defendant as costs of the action. The taxing master now comes to tax the plaintiff's costs of counterclaim. Shutting his eyes to the existence of the action, he finds 95 per cent. of the costs are conversant with the happening of the accident, and therefore attributable to the counterclaim, and he allows practically all the plaintiff's brief and fees to the counterclaim. If this system is adopted, the plaintiff's costs in such a case will equal, if they do not amount to more than, the

defendant's, though it is the plaintiff who, in the words of Fry, J., has let loose the waters of litigation. In my view the taxing master should have found by what amount the plaintiff's costs were increased by the counterclaim; he would then allow him, not 95 per cent. of the brief, but 5 per cent.'

That is to say that, where it is the same transaction that the parties are fighting about, and what they are fighting about is the negligence of the two parties in the transaction, the rule as laid down in *Saner v. Bilton* (2) applies, and it is not a case for apportionment.

It seems to me that that principle stated by the Lord Chancellor and ANDREWS, L.J., and illustrated by O'CONNOR, L.J., covers this case. It appears to me in this case that the question who was negligent, which is really what is to be settled in the claim, is also to be settled in the counterclaim. Each side begins by saying: You, the other, were negligent, and the other says, No, it was you who were negligent, and the relevant matter is the same in both claim and counterclaim; that being so, the case seems to me to fall within the principle as stated in the Irish case and to come within the rule laid down by Fry, J., and adopted by the Court of Appeal in *Atlas Metal Co. v. Miller* (4), from which it follows that the principle adopted by the registrar was right, and that the learned county court judge, who relied on *Christie v. Platt* (1), ought not to have disturbed it. There is no dispute whether the registrar correctly applied the principle to the individual items, but the question is whether he started with the right principle. To any taxing master or judge who has to deal with the items, I venture to think that the very careful analysis of the various items in the judgment of O'CONNOR, L.J., beginning with the writ and going up to the trial, will be found of very great use and assistance. For these reasons I think the appeal should be allowed and the taxing master's taxation adopted.

SARGANT, L.J.—I am of the same opinion. In this case the claim has failed and the counterclaim has failed, and the natural result is that the plaintiff should pay the defendant the costs of the claim and, on the other hand, that the defendant should pay the plaintiff the costs of the counterclaim; and that is in accordance with the view of Fry, J., in *Saner v. Bilton* (2), and of the Court of Appeal in *Atlas Metal Co. v. Miller* (4). But then comes the question, what are the costs of the counterclaim? In this case, if the matter had been treated solely as a claim and a defence, it would have been necessary for the plaintiff to show negligence on the part of the defendant, and for the plaintiff also to defeat the defence of the defendant that there was negligence, or contributory negligence, on the part of the plaintiff, and for the purposes of the counterclaim it would be necessary for the defendant to show that the plaintiff had been guilty of negligence, and to defeat the defence that the defendant had been guilty of negligence, and, therefore, it seems to me that the issues on the claim and the counterclaim are precisely the same. In that state of things, what were the costs of the claim? The costs of the claim were the costs dealing with those two questions of negligence between the two parties. That being so, the defendant is, *prima facie*, entitled to the whole of the costs of determining those issues. What, on the other hand, are the costs of the counterclaim? With regard to that, LINDLEY, M.R., says this ([1898] 2 Q.B. at p. 505):

'Next, as to the counterclaim, the defendant has to pay the costs of this, and the counterclaim is to be treated as an independent cause of action, and, to use LORD ESHER's words, as if the claim did not exist. This last expression, however, is calculated to mislead if not explained and properly understood. What are costs of a counterclaim? The answer must be the costs occasioned by it. No costs not incurred by reason of the counterclaim can be the costs of the counterclaim. The fact that if there had been no action the costs of the counterclaim would have been larger, because the defendant would then

A have had to issue a writ and take other proceedings, does not make costs not incurred costs incurred, and in considering what the costs of a counterclaim really have been in any particular case, the costs saved by not bringing a cross-action cannot be treated as costs incurred,"

B and, accordingly, he held that the only costs to be allowed on the counterclaim were such extra costs as represented the costs due to the existence of the counterclaim.

C I will not go into the Irish case, to which my Lord has referred, because, although I quite agree with his remarks as to the value of that case, it dealt with a great number of propositions which are not necessary for the decision of this particular case. Here it seems to me quite clear on the finding of the county court judge that neither party had any right against the other. No litigation ought to have ensued, but the plaintiff, who has certain advantages by having the right to begin and so forth, begins his proceedings, and fails in those proceedings, and for those proceedings he ought to pay. On the other hand, the defendant, who might very probably never have commenced any proceedings unless attacked, on being attacked puts in a counterclaim. It seems to me the costs he ought to pay were only those extra costs occasioned by the counterclaim which he put in in reply to the claim; and only to the extent to which the costs of the claim have been increased by the putting in of the counterclaim. I agree that the decision of the registrar was correct, and that this appeal should be allowed. We have not had the advantage of any argument on the part of the respondent, but the whole series of cases was so carefully put before us by counsel for the appellant, that I think we are in almost as good a position as if we had had the advantage of the argument on the other side.

Appeal allowed.

Solicitors: *Rooke & Sons*, for *Brain & Brain*, Reading.

[Reported by T. R. F. BUTLER, ESQ., Barrister-at-Law.]

F

G

MOLTHES REDERI AKTIESELSKABET v. ELLERMAN'S WILSON LINE, LTD.

[KING'S BENCH DIVISION (Greer, J.), December 8, 9, 21, 1926]

H

[Reported [1927] 1 K.B. 710; 96 L.J.K.B. 414; 136 L.T. 767;
32 Com. Cas. 106; 17 Asp.M.L.C. 219]

Shipping—Charterparty—Sub-charterparty—Shipowner's lien on freight earned under sub-charter for hire unpaid and due to him—Notice to charterer's agent to collect freight on shipowner's behalf—Right of agent to deduct his disbursements.

I

Where a ship is chartered under a contract which does not amount to a demise and the ship is sub-chartered by the charterers for a single voyage the shipowner has a lien for unpaid hire due to him on the freight earned on such voyage and can intervene and by notice direct the charterers' agent to recover the freight on his behalf. The agent must account to the shipowner for the freight so collected without making any deduction on account of disbursements made on the charterers' behalf.

Tagart, Beaton & Co. v. James Fisher & Sons (1), [1903] 1 K.B. 391, explained.

Notes. Referred to: *Strathlorne Steamship Co. v. Andrew Weir & Co.* (1934), A 39 Com. Cas. 318.

As to a shipowner's lien, see 30 HALSBURY'S LAWS (2nd Edn.) 553 et seq.; and for cases see 41 DIGEST 582 et seq.

Cases referred to:

- (1) *Tagart, Beaton & Co. v. James Fisher & Sons*, [1903] 1 K.B. 391; 72 L.J.K.B. 202; 88 L.T. 451; 51 W.R. 599; 9 Asp.M.L.C. 381; 8 Com. Cas. 133, C.A.; 41 Digest 586, 4094.
- (2) *Wehner v. Dene Steam Shipping Co.*, [1905] 2 K.B. 92; 74 L.J.K.B. 550; 21 T.L.R. 339; 10 Com. Cas. 139; 41 Digest 402, 2496.

Action.

The facts are set out in the judgment of GREER, J.

Sir Robert Aske for the plaintiffs.

Le Quesne, K.C., and *Pritt* for the defendants.

Cur. adv. vult.

Dec. 21. **GREER, J.**, read the following judgment.—The plaintiffs, who were the owners of the steamship *Sproit*, claim against the defendants, who are the well-known shipowners and shipbrokers at Hull, the sum of £199 15s., which they say the defendants received on their behalf, under circumstances which are in some respects unusual. By a charterparty dated Oct. 23, 1924, between the plaintiffs and Maurice Elliff & Co., the plaintiffs agreed to let the *Sproit* to Maurice Elliff & Co. for twelve calendar months, on a printed form of charterparty known as the "Baltic and White Sea Time Charter, 1912." By the charterparty it was provided as follows:

"2. That the owners shall provide and pay for all the provisions and wages, and for the insurance of the steamer and for all deck and engine room stores and maintain her in a thoroughly efficient state in hull and machinery for and during the service. 3. That the charterers shall provide and pay for all the coals, fuel, water for boilers, port charges, pilotages (whether compulsory or not), canal steersmen, boatage, lights, tug assistance, consulages (except consular shipping and discharging fees of the captain, officers, engineer, firemen and crew), canal, dock and other dues and charges (also pay all dock, harbour and tonnage dues at the port of delivery and redelivery unless incurred through cargo carried before delivery or after redelivery), agencies, commissions, expenses of loading, trimming, stowing, unloading, weighing, tallying and delivery of cargoes, surveys on hatches and protests (if relating to cargo), and all other charges and expenses whatsoever, except those above stated. . . . 5. That the said charterers shall pay as hire for the said steamer £410 per calendar month, commencing from the time the steamer is placed at the disposal of charterers and pro rata for any fractional part of a month . . . until her redelivery to owners as herein stipulated. That the payment of the hire shall be made as follows: In London in cash without discount, monthly in advance. . . . 9. That the captain shall prosecute his voyages with the utmost dispatch, and shall render all customary assistance with ship's crew. Although appointed by the owners the captain shall be under the orders and directions of the charterers as regards employment, agency or other arrangements, and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain or officers personally or by agents signing bills of lading or other documents or otherwise complying with such orders, as well as from any irregularity in the steamer's papers or for over-carrying goods. Owners shall not be responsible for shortage, mixture, marks, nor for number of pieces or packages, nor for damage to or claims on cargo caused by bad stowage or otherwise, the stevedore being employed by the charterers. . . . 15. That should the captain require funds for ordinary disbursements for steamer's account at any port, charterers or

A their agents are to advance the same, such advances shall be deducted from
the next hire, but charterers shall in no way be responsible for the applica-
tion of such advance. . . . 21. That the owners have a lien upon all cargoes
and all sub-freights for hire and general average contribution, and for all
expenses and damages due under or for breach of this charter and charterers
to have a lien on the steamer for all moneys paid in advance and not
B earned. . . . 23. That the charterers shall have the option of sub-letting the
steamer, giving due notice to owners, but the original charterers always to
remain responsible to owners for due performance of this charter."

C It seems clear, and it was not disputed at the trial, that this charterparty was
not a demise of the ship, and that the shipowners throughout the charter remained
in possession and control of the ship and its contents. It was, in fact, a carrying
contract, not a lease.

On Jan. 8, 1926, the agents of the charterers sub-chartered the vessel by a
voyage charter in the Scanfin form to carry a cargo of wood goods to Hull. This
charter provided that bills of lading were to be prepared on the form endorsed
on the charter and signed by the master, and that the master or owners were
to have an absolute lien on the cargo for all freight, dead freight and demurrage.
D A cargo was put on board the vessel at Riga in accordance with the sub-charter
and carried to Hull. Bills of lading were issued to the shippers of the cargo.
The freight on a considerable part of the cargo was payable in advance, and was
so paid to the time charterers' agents at the port of shipment, but the freight
on part of the cargo consisting of pit props was not due in advance but was to be
E paid in Hull on right delivery thereof. After a long, troublesome voyage, the
vessel arrived in Hull early in February and began her discharge. A considerable
amount of hire money was in arrear, and Messrs. Sanderson & Co., solicitors, of
Hull, received instructions from the owners through their Protection Club to
collect the freight. In the meantime, the defendants had been appointed by
the charterers as agents to attend to the discharge of the vessel, and collect the
F freight. On the morning of February 10, while the vessel was discharging, but
before any freight had been paid in respect of the pit props, Mr. Sanderson tele-
phoned to the defendants saying that he had been instructed to collect the freights
payable at Hull, and, if necessary, to have a lien placed on the cargo to secure
payment, and asked for an assurance that the defendants would collect the
freights on owners' account. This assurance Mr. Lamb, who received the
G message and dealt with the matter on behalf of the defendants, did not give at
the time, but it was arranged that there should be a further interview later in the
day. Mr. Sanderson then wrote his letter of February 10, confirming what took
place at the morning interview. There is no doubt whatever that at this inter-
view Mr. Sanderson claimed on behalf of the owners the right to collect the freight,
and that, if the defendants had refused to accept their orders in the matter, he
was in a position to give immediate notice to the bill of lading holders to pay
H the freight to him, or any agents named by him on behalf of the owners. There
was a dispute whether Mr. Sanderson's letter was received by the defendants
and read by Mr. Lamb before the interview which took place in the afternoon;
Mr. Lamb stated that he did not in fact see it until the morning of the 11th.
In my view, it is not necessary to decide whether Mr. Lamb is right or wrong
I on this point. In the afternoon an interview took place between Mr. Sanderson
and Mr. Lamb, at which the captain of the vessel was present, and I am satis-
fied that, at this interview, Mr. Sanderson repeated his demand that the defen-
dants should collect the freight on owners' account. There was some discussion
about the amount of the disbursements that had been made by the defendants,
but the evidence failed to satisfy me that Mr. Sanderson agreed that the defen-
dants should have the right to deduct their disbursements from the freight. I do
not think Mr. Sanderson said anything which would justify Mr. Lamb in con-
cluding that he was giving up any of the owners' rights, whatever they might be,

but it may very well be that his mind at the time was not clear on the question whether the defendants would, apart from any agreement by him, have a right to deduct their disbursements from the freight. At the interview Mr. Lamb agreed that the defendants would collect the freight on behalf of the owners and proceeded to confirm the same in writing. This he did by letter of February 10. The greater part of the goods on which freight was payable were discharged from the vessel on February 10. No freight was paid until the morning of February 11. Having received the freight, the defendants wrote the letter of February 11, in which they said the freight would be absorbed by their disbursements, and they refused to discharge the balance of the cargo pending definite instructions from the plaintiffs to discharge at their expense. Instructions to this effect were afterwards reluctantly given.

The plaintiffs claim that they are entitled to the freight, inasmuch as it was received by the defendants after they had received notice of the plaintiffs' claim, and after they had accepted the plaintiffs' instructions to collect it for the plaintiffs, and they rely on *Wehner v. Dene Steam Shipping Co.* (2). The answer of the defendants was (i) that they only received the freight for the plaintiffs subject to a promise by the plaintiffs that they would be entitled to deduct their disbursements; (ii) that the freight could only be effectively claimed by the owners by notice to the persons liable to pay, before payment, and that, therefore, when the money reached their hands it was money of the charterers on which they could exercise a lien, or, in any event, against which they had an effective set-off, and they relied on *Tagart, Beaton & Co. v. James Fisher & Sons* (1); and (iii) that before the intervention of the plaintiffs they themselves had a lien on the freight which was available against the owners.

In my judgment none of the defendants' contentions is entitled to succeed.

(i) As already stated, I find that there was no agreement by Mr. Sanderson that the defendants should be entitled to deduct from the freight the amount of their disbursements.

(ii) It might be sufficient in answer to the defendants' second contention to say that, as they accepted the plaintiffs' instructions to collect the freight for them, and at the time they received it had not given notice to determine their agency, they did in fact receive the money as the plaintiffs' agents, and must account to them for it. But it seems desirable also to consider and answer the question, whether notice from the shipowners to the agents was or was not of itself sufficient to entitle the owners to the money received for freight after receipt of the notice. If the decision in *Wehner v. Dene Steam Shipping Co.* (2) is correct, it follows that, in every case where bill of lading freight is received by the agent nominated by the charterers, the shipowner can intervene and claim the freight in the hands of the agent as his money. That he can intervene successfully before receipt of the freight by the agent seems to me to be the necessary consequence of holding, as CHANNELL, J., did in the case cited, that the bill of lading contract is a contract between the shipowner and the shipper, and not a contract between the charterers and the shipper. If this be so, the legal right to the freight is in the owner and not in the charterer, and the former can intervene at any time before the agent has received the freight, and say to him: "I am no longer content that the charterer should collect the freight; if you collect it all you must collect it for me." If the agent then collects the freight, it follows that the shipowner can sue for it as money had and received. The judgment in *Wehner v. Dene Steam Shipping Co.* (2) goes beyond this, in that it decides that the agent must account for bill of lading freight received by him before notice of the owner's demand that it should be paid to the owner. In so far as the case so decided, it seems difficult to reconcile the decision with that of the Court of Appeal in *Tagart, Beaton & Co. v. James Fisher & Sons* (1). In that case, the plaintiffs, who stood in the shoes of the time charterers, were held entitled to the freight received by the agent appointed by the charterers before they had notice that the owners claimed the freight. The material facts in *Tagart, Beaton*

A & Co. v. *James Fisher & Sons* (1) are distinguishable from the material facts in *Wehner v. Dene Steam Shipping Co.* (2) in one respect only. In *Tagart, Beaton & Co. v. James Fisher & Sons* (1), the bill of lading was made out to the charterers, and as between the charterers and the owners it operated not as a contract but as a receipt for the goods. There was, therefore, no bill of lading contract made on shipment. The only contractual document was the charterparty. The freight

B payable by the consignee was not payable to the shipowner by virtue of a contract to which the latter was a party; he could only become entitled to it under the clause of the charterparty giving him a lien on sub-freights, or by some new contract if such could be found between him and the receiver of the cargo. It would, therefore, be too late for him to exercise his right to a lien after the freight had been received by the charterers personally or by their agents. Though

C CHANNELL, J., bases his judgment in *Wehner v. Dene Steam Shipping Co.* (2) on the fact that the bill of lading contract is with the owner, and, therefore, the owner in claiming the freight was only claiming what was legally his, he still speaks of the owner's rights as arising out of his lien. It is difficult to understand how a shipowner can be said to have a lien on that which, ex hypothesi, is his own property, and which he is entitled to because it is his own. A lien is a claim

D by a person in possession of the property of another who has the right to keep possession until the owner pays the debt in respect of which the possessor is entitled to the lien. It seems a misuse of words to say that a shipowner has a lien on the debt due to him under the contract made with him by the bill of lading. The lien clause in the charterparty is needed to give the owner a lien in those cases where the sub-freight is due to the charterer and not to the owner,

E as where goods are carried on a subcharter without any bill of lading. In such a case, the owner could only become entitled to the sub-freight by virtue of the lien clause, and it would be too late to exercise his lien after the debt had been paid to and received by the charterer personally or through his agent. The actual decision in *Tagart, Beaton & Co. v. James Fisher & Sons* (1) goes no further than this. It only governs a case where the shipowner is bound to rely on a lien, and does not

F affect the case where he can claim the freight as due to him on his bill of lading contract. Whether the owner in the latter event can claim the freight in the hands of an agent of the charterer after it has been received by such agent without notice of claim by the owner is a question which is unnecessary to decide in the present case. CHANNELL, J., based his decision that the shipowner could recover on the ground that the charterer's agent was also, though appointed by the

G charterer, the agent of the shipowner. I do not think he intended by that to hold that, in relation to the discharge, he was the agent of the shipowner, but only that he received the freight as the shipowner's agent as well as the charterer's agent. Be this as it may, I think it is clear that the defendants in this case, in attending to the discharge of the ship, were acting solely for the charterer. In incurring the expenses in respect of which they claim a lien or set-off, they

H were acting as the agents of the charterers. They were doing for the charterers what the charterers had undertaken to do by cl. 3 of the charterparty. It may be that the agent appointed by the charterer is the owner's agent to receive the freight, and is, therefore, accountable to the owner for it until he has paid it over to the charterer. However this may be, he is, in my judgment, accountable to the owner if he has collected the freight after notice by the owner that the

I freight is to be so collected. There is nothing, in my opinion, inconsistent with this view in the decision of the Court of Appeal in *Tagart, Beaton & Co. v. James Fisher & Sons* (1). The present case is distinguishable from the latter case in three respects: (i) notice of claim was received by the agent before collection of the freight; (ii) the agents agreed to collect for the owners; (iii) here there was a bill of lading contract which vested the legal right to the bill of lading freight in the owners. The defendants' second point therefore fails.

(iii) It remains to consider the defendants' third point. In my judgment, this point also fails. The agents' expenses were incurred in carrying out the charterers'

obligations under cl. 3 of the charterparty. Until they stopped the discharge on February 11, their only principals, so far as the discharge was concerned, were the charterers. They had not collected any freight for them, and, if they had any rights of lien, their rights could only affect any property of their principals which came into their possession. They had not reduced the freight into possession, and such rights as they had, if any, to look to the freight to reimburse them for the expenses that had incurred in doing for the charterers that which the charterers had undertaken to do, could give them no lien, equitable or otherwise, on the unpaid freight, the legal right to which was always, according to my finding, in the shipowners. The same considerations prevent them from setting off against the owners' claim the £40 advanced to the captain. This they did on behalf of the charterers. Any advantage arising from that payment accrues to the charterers, and not to their agents. The only legal effect of the payment is to reduce the debt of the charterers to the owners.

The plaintiffs are entitled to judgment for the amount claimed, less the sum of £17 4s. 1d. to which the defendants are admittedly entitled for the expenses incurred in discharging the props that were discharged expressly on behalf of the plaintiffs after the defendants' letter of February 11.

Judgment for plaintiffs.

Solicitors: *Sanderson & Co.*; *Botterell & Roche*, agents for *Hearfield & Lambert*, Hull.

[Reported by R. A. YULE, Esq., Barrister-at-Law.]

Re SHAER

[COURT OF APPEAL (Lord Hanworth, M.R., Warrington and Sargant, L.JJ.), June 21, 1926]

[Reported [1927] 1 Ch. 355; 96 L.J.Ch. 282; 136 L.T. 695;
42 T.L.R. 620; 70 Sol. Jo. 775]

Business Names—Registration—Default—Relief granted by court—Retrospective effect of relief—Registration of Business Names Act, 1916 (6 & 7 Geo. 5, c. 58), s. 8 (1) (a).

A grant of relief by the court under s. 8 (1) (a) of the Registration of Business Names Act, 1916, to a defaulter under the Act puts the defaulter in the same position with regard to the contract in respect of which the relief is granted as if the Act had never been passed and so validates any proceedings which may have been taken on that contract.

After a receiving order had been made on a judgment for a debt to a trader, the petitioning creditor, who was trading under a name other than his real name, but was not registered under the Act, was granted relief under the Act in respect of his disability to sue on the contract under which the debt was due.

Held: the grant of relief validated the writ, the judgment, the bankruptcy petition and the receiving order.

Hawkins v. Duché (1), [1921] 3 K.B. 226, approved as regards the first point there decided.

Notes. Exemption from registration has now been granted where the name has been changed or disused at least twenty years ago: see the Companies Act, 1947, s. 116 (4); 3 HALSBURY'S STATUTES (2nd Edn.) 449.

- A As to registration of business names, see 32 HALSBURY'S LAWS (2nd Edn.) 634-637; and for cases see 43 DIGEST 268-270. For the Registration of Business Names Act, 1916, see 25 HALSBURY'S STATUTES (2nd Edn.) 1146.

Cases referred to :

- (1) *Hawkins v. Duché*, [1921] 3 K.B. 226; 90 L.J.K.B. 913; 125 L.T. 671; 37 T.L.R. 748; [1921] B. & C.R. 173; 43 Digest 269, 1049.
 B (2) *Brown v. Thomas and Burrows* (1922), 39 T.L.R. 132, C.A.; 43 Digest 268, 1044.

Appeal from a refusal to set aside a receiving order in bankruptcy made by Mr. Registrar MELLOR.

- The debtor, Abraham Shaer, a baker, was indebted to the creditor, trading as C Morris Silverman, in the sum of £217 10s. 9d. for flour sold and delivered. The creditor sued the debtor and applied for judgment under Ord. 14. The master ordered that the creditor be at liberty to sign judgment for £120 unless that sum were paid into court within seven days, and remitted the rest of the claim to the Shoreditch County Court. Judgment was signed and the debtor then appealed to FRASER, J., who dismissed the appeal, and at the same time, on the application D of the creditor, granted relief to him from the disability imposed on him in enforcing the contract by reason of the facts that his real name was Moses Silbermann, being an Austrian Pole by origin, and that he was not registered under the Registration of Business Names Act, 1916. In the meantime a receiving order had been made on the judgment on the petition of the creditor. The debtor having appealed against the order, the registrar held that relief could be E granted under the Act after judgment, and refused to set aside the receiving order. The debtor appealed.

- E. C. Morey*, for the debtor, referred to *Hawkins v. Duché* (1), the Common Law Procedure Act, 1852, s. 210, *Brown v. Thomas and Burrows* (2). [LORD HANWORTH, M.R., referred to the Law of Property Act, 1925, s. 146 (2), re-enacting s. 14 (2) of the Conveyancing Act, 1881, as to relief from forfeiture.]
 F *E. H. Coumbe*, for the creditor, was not called on to argue.

- LORD HANWORTH, M.R.**—In this case the appeal must be dismissed, because we agree with the decision to which the registrar has come. [His Lordship stated the facts and the order made by FRASER, J., and continued:] FRASER, J.'s order stands good, and there has been no appeal from it. It was pointed out at the time G before FRASER, J., that s. 8 (1) of the Registration of Business Names Act, 1916, created a disability in the creditor from proceeding in his action, but FRASER, J., made an order which was comprehensive in its terms, because he ordered that relief should be granted to the creditor, the plaintiff, in respect of the contract on which he was suing.

- Section 8 is in wide terms, and gives power to the defaulter to apply for relief, H and power to the court to grant relief, either generally or in respect of any particular contracts on such conditions as the court may impose. FRASER, J., granted relief generally in respect of the contract in question, and that relief got rid of the disability from which the creditor was suffering, because when the relief was granted he ceased any longer to be a defaulter under the Act and his disability was removed. It was said that owing to the non-registration of this I trade name all the proceedings in this case have been abortive, and that inasmuch as judgment has been given in respect of the £120, and as that judgment has been passed and entered, it is not possible for relief to be given and for the creditor to be rehabilitated into the position he would have occupied if he had duly registered. That contention amounts to accepting the Act from one point of view and discarding it from another. In my judgment, the effect of the order made by FRASER, J., granting relief was to prevent the disability imposed by s. 8 of the Act from applying to the creditor at all in respect of this contract, and to enable valid proceedings to be taken and a valid judgment obtained in respect

of the contract. The effect of that relief was to rehabilitate the proceedings from the beginning, and consequently the writ and the order for payment were validated. The result is in accord with the decision of McCARDIE, J., in *Hawkins v. Duché* (1), on the first point which arose in that case. The further point taken in that case does not now arise and I say nothing about it. A

For the reasons I have given, the order of FRASER, J., was effective to rehabilitate all the proceedings on this contract, with the result that the subsequent petition and receiving order in bankruptcy have been made valid. I also agree with the learned registrar that there was no question that the debtor knew who the creditor was with whom he was dealing, and knew also that he owed the money for the goods which were sold and delivered to him. In the circumstances one could have little sympathy for him, and the appeal, which is without merits, must be dismissed. B C

WARRINGTON, L.J.—The question is whether the effect of the order for relief under s. 8 of the Registration of Business Names Act, 1916, is retrospective so as to validate proceedings taken under an order obtained in an action brought by the creditor, the defaulter who had not complied with the requirements of the Act as to registration. D

Section 8 of the Act imposes on every contract made or entered into by or on behalf of the defaulter the peculiar character that the rights of the defaulter under or arising out of that contract shall not be enforceable by action or other legal proceedings either in the business name or otherwise. Then that disability is qualified by a proviso that “the defaulter may apply to the court for relief against the disability imposed by this section, and the court, on being satisfied that the default was accidental”—then follows various other grounds for relief—“may grant such relief either generally or as respects any particular contracts,” on certain conditions. That seems to me to mean that the defaulter may apply to have that character of the contract, which prevents any rights of the defaulter under or arising out of it from being enforceable by action or other legal proceedings, removed so as to replace that contract in the original category of contracts enforceable at law. When you come to see what the proviso entitles the court to do, I think that that view becomes abundantly clear, because the judge is entitled, if he so pleases, to grant the relief “generally,” which is the expression used in the Act. In my opinion, the effect of granting the relief generally is to put the defaulter exactly in the same position with regard to all contracts made by him relating to the business in respect of which he was a defaulter as if the Act had never been passed. As well as granting relief generally, the judge has power to grant relief as respects any particular contract. FRASER, J., has granted relief in respect of the particular contract sued on in the action, but if a judge has granted relief in respect of any particular contract, the nature of the relief is the same as if he had granted it generally, and the result of that is to remove altogether the disability in respect of that particular contract and to restore it to the category of enforceable contracts. To my mind that is the true construction of the section. That being so, the proceedings in the present case—the writ, the proceedings in the action, the judgment and the appeal affirming it—are all rendered effective, and the petition in bankruptcy and the consequent receiving order are validated. E F G H

It is a satisfaction to know that the view which I have expressed accords with the invariable practice of the judges of the King’s Bench Division who have to deal with these matters and have followed it since the passing of the Act. That practice was never questioned until *Hawkins v. Duché* (1), in which McCARDIE, J., affirmed the principle on which this court is now acting. I think that the order against which this appeal has been brought was correct, and that the receiving order was properly made and that this appeal must be dismissed. I

SARGANT, L.J.—I am of the same opinion. This statute must be construed broadly, because there must be many cases in which a technical breach has been

A committed and no hardship has been suffered by the other party, and the present appears to be one of those cases. Any possible hardship to any person so contracting is amply guarded against by the full power given to the court of imposing conditions on the grant of relief. I agree also with WARRINGTON, L.J., that the effect of granting relief is to validate the contract ab initio, and to reinstate the defaulter, as respects the contract, as if he had not been under any original disability.

B In this case it is to be observed that at the time when FRASER, J., granted relief, the judgment in which the master had made an order was under appeal to FRASER, J., so that the action was then before him, and simultaneously with granting relief under s. 8 against the disability, he also affirmed the judgment for payment made by the master. In those circumstances, I doubt whether it is really a case of relief having been granted after judgment had been given.

C

Appeal dismissed.

Solicitor: W. H. Lane; J. Howard Smith.

[Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law.]

D

E

BOOTH v. THOMAS

[COURT OF APPEAL (Lord Hanworth, M.R., Warrington and Sargant, L.JJ.),
January 22, 25, 1926][Reported [1926] Ch. 397; 95 L.J.Ch. 160; 134 L.T. 464;
42 T.L.R. 296; 70 Sol. Jo. 365]**F** *Landlord and Tenant—Covenant—Quiet enjoyment—Breach—Act of omission—Failure to repair culvert—Flooding of adjacent property.*

In 1875 a certain site at Glebeland Place, Merthyr Tydfil, was the property of one D. It consisted of a slag heap running down to the M. brook, which was a natural stream flowing from east to west and was crossed by a footbridge. In 1878 the local board displaced the footbridge, and ran a road over the brook, culverting the brook for the width of the road. In 1879 D. continued the culvert in a westerly direction for a distance of some 12 yards. D.'s site could not have been used for any building purpose unless and until the brook had been culverted throughout the whole length. By Oct. 20, 1886, a building had been erected along the southern edge of D.'s land, and on that date he executed a lease of the land with the building upon it to certain persons for a term of ninety-nine years, the lease containing an express covenant by the lessor for quiet enjoyment. By an indenture dated April 7, 1904, the lease was assigned to William Booth, and it was now vested in the plaintiff. After Nov. 19, 1907, the land through which ran the culverted brook and the reversion to the land held by the plaintiff expectant on the determination of the lease of Oct. 20, 1886, were vested in the defendant.

H

I In the course of time the culvert, owing to the constant weight and friction of the water which it carried, wore away. It was repaired, but at the material time the westerly portion of the culvert was in very bad repair. On the night and morning of Dec. 22–23, 1924, after very heavy rains on the preceding days, a severe storm burst on the locality, so that the culvert, in carrying away the stream, collapsed, with the result that the brook, breaking through the side of the culvert, and churning under the foundation of the building on the plaintiff's land, scoured away the material which lay under its foundations, with the result that the southern wall collapsed. In an action by the

plaintiff claiming damages for, inter alia, breach of the covenant for quiet enjoyment,

Held: in the absence of an explanation which would serve to excuse him from responsibility the defendant must be regarded as responsible for the culvert and its maintenance; a breach of a covenant for quiet enjoyment could be caused by an act of omission as well as by an act of commission; the defendant's failure to repair the culvert and maintain it in good repair was a continuing act of omission, which became a disturbance of the plaintiff's quiet enjoyment when the culvert became incapable of retaining the water; and, therefore, the defendant was in breach of the covenant and the plaintiff was entitled to succeed.

Notes. As to covenants for quiet enjoyment, see 23 HALSBURY'S LAWS (3rd Edn.) 601 et seq.; and for cases see 31 DIGEST (Repl.) 128 et seq.

Cases referred to:

- (1) *Harrison, Ainslie & Co. v. Muncaster*, [1891] 2 Q.B. 680; 61 L.J.Q.B. 102; 65 L.T. 481; 56 J.P. 69; 40 W.R. 102; 7 T.L.R. 688, C.A.; 31 Digest (Repl.) 137, 2754.
- (2) *Malzy v. Eichholz*, [1916] 2 K.B. 308; 85 L.J.K.B. 1132; 115 L.T. 9; 32 T.L.R. 506; 60 Sol. Jo. 511, C.A.; 31 Digest 139, 2769.
- (3) *Anderson v. Oppenheimer* (1880), 5 Q.B.D. 602; 49 L.J.Q.B. 708, C.A.; 31 Digest (Repl.) 144, 2823.
- (4) *Anderson v. Cleland*, [1910] 2 I.R. 334; 31 Digest (Repl.) 386, *1708.
- (5) *Sanderson v. Berwick-upon-Tweed Corpn.* (1884), 13 Q.B.D. 547; 53 L.J.Q.B. 559; 61 L.T. 495; 49 J.P. 6; 33 W.R. 67, C.A.; 31 Digest (Repl.) 141, 2801.
- (6) *Cohen v. Tannar*, [1900] 2 Q.B. 609; 69 L.J.Q.B. 904; 83 L.T. 64; 48 W.R. 642, C.A.; 31 Digest (Repl.) 135, 2744.

Appeal by the defendant from an order of RUSSELL, J., made in a witness action in which the plaintiff claimed from the defendant damages for breach of a covenant for quiet enjoyment contained in a lease and for derogation by the defendant from a grant made in respect of the demised land by his predecessor in title. RUSSELL, J., held that the plaintiff was entitled to succeed on both points and ordered an inquiry as to damages. The defendant appealed.

H. S. Preston, K.C., and *G. D. Johnston*, for the defendant, cited the following cases: *Harrison, Ainslie & Co. v. Muncaster* (1), *Malzy v. Eichholz* (2), *Anderson v. Oppenheimer* (3), *Anderson v. Cleland* (4).

G. B. Hurst, K.C., and *H. S. G. Buckmaster*, for the plaintiff, were not called on to argue.

LORD HANWORTH, M.R.—This is an appeal from a considered judgment of RUSSELL, J., given on Nov. 20, 1925, whereby he held that the defendant was responsible to the plaintiff in respect of the cause of action sued upon, and directed an inquiry for the purpose of ascertaining the damages, or the sum in respect of damages, which the plaintiff would be entitled to receive. The matter arises out of a misfortune which happened in Wales, where, in December, 1924, a culvert gave way. It appears that during that month there had been a very heavy rainfall, and on the night of December 22, or early in the morning of the 23rd, there was a storm which put an additional strain upon the watercourses in the country after they had already been filled, and the nature of the downfall of rain was such that it brought the quantum of water passing through this culvert, which is of cylindrical shape, up to about the centre point of the diameter of it. The learned judge has held, upon the evidence before him, that the downfall of rain did not constitute a vis major, or an act of God, and, indeed, that such a downfall may be anticipated from time to time, and, therefore, that there was no excuse which could be relied upon by the defendant on such a ground.

The plaintiff is the assignee from the original lessees of the lease, dated Oct. 20,

A 1886, of some premises, a hall, at Merthyr. The hall is built upon what is really the side of a spoil-bank. It is a hall for meetings, and the plaintiff holds it for the purpose of meetings of the Salvation Army. By the side of this site is a culvert which carries the water of a stream through it. The defendant, by an assignment made in November, 1907, is the landlord of the premises. The culvert is situated in the land of the defendant, coloured blue on the map attached to the lease, the lessees being granted a right to use or pass over the culvert to gain access to the hall. The words are precisely :

C “And lastly the said lessor hereby covenants with the said lessees that they the lessees may at all times during the said term of ninety-nine years use the piece of land on the south side of the said demised premises and which is coloured blue on the plan drawn on the back of these presents for the purpose of going to and from the vestry under the said demised premises and for which they the lessees shall pay to the lessor the nominal sum of one shilling per year.”

D It is plain, therefore, that no part of the land coloured blue in which the culvert and stream run was demised to the plaintiff or the plaintiff's predecessors. There is a covenant on the part of the lessee that he will

E “effectually and substantially maintain and keep the said premises with their appurtenances and also all buildings now or hereafter to be built thereon and all troughs, party walls, sewers, drains, watercourses, ways and other things not herein specified, or which may be necessary for the proper maintenance thereof, and the said demised buildings and appurtenances so in all things repaired maintained and kept and at the determination of the said term will quietly yield up.”

After considering the argument presented to us, I am quite satisfied that the covenant to maintain and the covenant to yield up do not include the land coloured blue. They are specific in respect of the land coloured pink, which alone was demised to the predecessors of the plaintiffs.

F What happened was this. When this flood occurred at the end of December, it appears that a portion of the culvert gave way, and inasmuch as the wall of the hall had been built upon this spoil heap there was no sufficient restraining power and water escaping from the culvert washed into the, I will not call them foundations, but the spoil heap upon which the footings of the hall stood and scoured them out, with the result that a certain amount of the wall fell and the hall was in part of its side very much injured, large breaches being made in it. The plaintiff brings this action against the defendant and charges the defendant with the responsibility for this misfortune which happened to the hall, and he puts it in several ways. In particular he says: “The defendant has failed and neglected to keep the said culvert under the defendant's land in proper or any repair by reason whereof very serious damage has already occurred to the plaintiff's premises,” and he claims an injunction and consequential relief. The defendant admits that the site on which the culvert is built is his site, but he says that it is impossible to know who built the culvert. There is some indication from a map which has been produced to us that the culvert was built a considerable time ago, in the 'seventies, at a time before the hall was built. The defendant says that no predecessor of his built it, and he is not responsible in any way for it. The learned judge has held, upon the evidence, that this culvert belonged to the defendant, and I think he was right. It appears to me that the defendant, who is the owner of the land or site upon which the culvert is built, in the absence of any explanation which would serve to excuse him from responsibility, must be held responsible for the culvert, and that the construction of the culvert must be attributed to him or his predecessors in title who owned the soil on which the culvert rests.

There is in the lease a covenant for quiet enjoyment. It is in these terms :

"And also that the said lessees, their executors, administrators and assigns well and faithfully paying the said rents hereinbefore reserved and performing the covenants hereinbefore on their part and behalf to be paid and performed shall and may from time to time and at all times hereafter during the said term hereby granted peaceably and quietly have hold and enjoy the said premises hereby demised without interruption or disturbance by the said lessor his heirs or assigns or any other person or persons lawfully or equitably claiming or to claim by through or under them or any of them."

The learned judge in his judgment has come to certain conclusions of fact. It is true, he says, that owing to the constant weight and friction of the water which it carried, the culvert wore away. It had never been repaired, and I am satisfied that at the material time the westerly portion of the culvert, that is the portion of the culvert situate near where the breach occurred in the plaintiff's wall, was in very bad repair. He adds that the downfall of rain made the water rise in the culvert to a point more than, in its emaciated condition, it could bear. There was evidence on which the learned judge could find those facts and use those terms. The learned judge came to some other findings. He said:

"I should myself have been prepared to hold that the omission to keep the culvert in a fit condition involved the omission of a duty to the adjoining landowner, and that it was the duty of the owner of this culvert, which, if neglected, might cause damage to the adjacent property of another, to prevent such damage by taking reasonable precautions."

He quotes authorities in support of that proposition, and he adds:

"If I am right in this view, the plaintiff is entitled to succeed not only on the ground of breach of covenant for quiet enjoyment, but also on the ground of derogation from grant."

Without saying more, it appears to me, and I think it is clear, that the plaintiff is entitled to succeed on the ground of breach of the covenant for quiet enjoyment. The way the answer to that is put is this. It is said, with force, on behalf of the defendant that the defendant did not do anything himself—there was no act on his part; that the covenant for quiet enjoyment is that the lessee shall enjoy, without interruption or disturbance by the lessor; and that if you look at the authorities which have been decided you will find a case in which the omission to do an act or the failure to do an act is treated as an interruption or disturbance. It is in all, if not quite all, the cases some act on the part of the defendant which is found to be a breach of the covenant for quiet enjoyment. I do not think that the authorities go so far as counsel contends. It appears to me that we have got this simple case. The premises of the defendant adjoin and abut upon the plaintiff's; those premises of the defendant carry a culvert for the purpose of allowing a waterway to run in it; the land on which the culvert stands belongs to the defendant; the culvert and the responsibility for maintaining the culvert must lie on the defendant. The defendant has granted to the plaintiff the adjoining premises, and has granted a covenant for quiet enjoyment with them. After the findings of the learned judge it appears clear that there was a failure—a neglect—on the part of the defendant to maintain this culvert. It was in consequence of the ordinary wear and tear that it got into an emaciated condition, to use the word of the learned judge. A culvert of that sort, by the lapse of time, would in the ordinary course perish, and, indeed, the evidence was that it had practically come to its end by reason of wear and tear. If, therefore, something happens in consequence of the culvert coming to its end and ceasing to exist owing to wear and tear, it appears to me that the defendant is responsible for the failure to make good the culvert, as he could have done, upon the evidence, if he had taken the trouble to do so.

There are three cases, I think, and only three, to which I need trouble to refer. In *Sanderson v. Berwick-upon-Tweed Corpn.* (5) the Court of Appeal held that

A there was no responsibility for a breach of covenant for quiet enjoyment in the circumstances of that particular case, but in the judgment which was given by FRY, L.J., he says :

B “But it appears to us to be in every case a question of fact whether the quiet enjoyment of the land has or has not been interrupted; and where the ordinary and lawful enjoyment of the demised land is substantially interfered with by the acts of the lessor, or those lawfully claiming under him, the covenant appears to us to be broken.”

C Counsel for the defendant retorts: “Yes, that proposition may be quite good, but it refers to acts.” There is, however, another case which, to my mind, is a sufficient authority, if authority be needed, that it is not merely acts of omission which are to be considered. Acts of omission may have the same effect. In *Anderson v. Oppenheimer* (3) the negligence on the part of the landlord had been negative. The injury in that case happened by the bursting of a pipe which had been placed in situ by the defendant, the landlord, but the jury found that the landlord had not in any way been negligent, that is to say, that he had in no way omitted what was part of his duty. BRETT, L.J., however, says this :

D “After the lease had been granted, there was no breach of any duty, there was no act of either commission or omission, and no negligence”

—clearly indicating that, in his mind, the case was determined by reason of the full effect which was to be given to the answer of the jury that the defendant had not been guilty of negligence, which he treats as excusing the defendant from any negligence, either of commission or of omission. CORTON, L.J., says :

E “I agree that an act of omission may be tantamount to an act of commission so as to be a breach of the covenant.”

F There seems to be good sense and reason for such a view. The duty on the part of the defendant would be to repair if he had put this culvert upon his land, or was responsible for the culvert which had been put upon his land for the purpose of carrying the water past the site of the hall leased to the plaintiff. There seems no logical reason, or other reason, for putting acts of omission into a different category from those of commission, particularly where you find there was a duty which lay upon the person sought to be made responsible. There is another dictum in the same sense, which is to be found in a later case of *Cohen v. Tannar* (6), where VAUGHAN WILLIAMS, L.J., speaking of the covenant for quiet enjoyment, says this ([1900] 2 Q.B. at p. 614) :

G “There may, no doubt, be a breach of the covenant by an act of omission, but it must be the omission of some duty.”

H There seems, in *Anderson v. Oppenheimer* (3), which was decided in this court, and again in the observations made by VAUGHAN WILLIAMS, L.J., in this court, in *Cohen v. Tannar* (6), to be authority, if authority were needed, binding upon this court, that acts of omission stand in the same position as acts of commission. The learned judge has said that he would be prepared to find that there was an omission to keep the culvert in a fit condition, and that it was the duty of the owner of the culvert which, if neglected, might cause damage to the adjacent property, to prevent such damage by taking reasonable precautions. I agree with that view. It appears to me that that, perhaps, is the most direct way of deciding this case, and I prefer to deal with the case upon that ground, although not in any way differing from what the learned judge has said in addition. It appears to me that the case is one in which the defendant is responsible by his omission to repair and maintain and keep in good repair the culvert, and that in consequence of that failure to repair the stream was able to get at the premises of the plaintiff, and that by that failure or omission the defendant has rendered himself responsible to the plaintiff for a breach of the covenant of quiet enjoyment. On these grounds, I think that the appeal must be dismissed with costs.

WARRINGTON, L.J.—I am of the same opinion. The plaintiff is the lessee by assignment from the original lessees of a piece of land with the building standing thereon now used as a meeting house of the Salvation Army, under the defendant as the successor in title of the original lessor. The lease contained a covenant for quiet enjoyment, reading it shortly, in these terms—that the lessees might peaceably and quietly have, hold and enjoy the premises hereby demised without interruption or disturbance by the said lessor his heirs or assigns or any other person or persons lawfully or equitably claiming or to claim by or through or under them or any of them. A B

The question is really a question of fact: Was what took place an interruption or disturbance by the lessor, the predecessor of the defendant, or any other person lawfully or equitably claiming or to claim by, through or under him, which would cover the present defendant. On the night of Dec. 22 and 23, 1924, there was a violent storm following several days of very heavy rain. The water in the culvert had increased from the normal, I think about 6 in., to a depth of over 3 ft., practically half the capacity of the interior of the culvert. The result was that the culvert burst. The water was thereby allowed to reach a filling of clinker and so forth on which one of the walls of the plaintiff's building had been built, and the wall eventually collapsed. The question is whether that damage can be properly described as a disturbance by the present defendant. The learned judge has decided that what happened was an act done. I will take his exact words: C D

"It can be truly said in this case that there was an act done by the defendant which caused the interruption or disturbance to the lessee's enjoyment, namely, the confinement of the waters of the Morlais Brook in an artificial structure incapable of retaining them." E

The first point that was taken was that there was no such act done by the defendant, because there was no proof that the culvert was constructed by the defendant or his predecessor in title. In my opinion, that contention wholly fails on the facts. It is impossible to suppose that the owner of the land stood by and saw somebody doing what created a new piece of land for his advantage and also to say that there was no evidence that such a thing was done with his consent or by his directions. When you come to the lease you find that the original lessor accepts this as a piece of land, and describes it so in the lease, and gives to the lessee a right of way over it as one of the approaches to the house he is going to build. I should be prepared to find as a fact, and I think the learned judge has so found, that the whole of this culvert was originally built by or under the instructions, or with the consent and approbation, of the defendant's predecessor in title. F G

Having got as far as that, one has to consider this further. An act done before the date of the covenant for quiet enjoyment does not constitute a breach of the covenant. As a general rule, the covenant is in respect to future acts and not in respect of past acts. But what the learned judge has found, and I think he has found as a fact, is that the act of the defendant which caused the flow was not merely the construction of the culvert, but, as he says, it was the confinement of the waters of the Morlais Brook in an artificial structure incapable of retaining them. The confinement of the waters of the brook is a continuing act, and it becomes an act capable of being an interruption or disturbance of the tenant's enjoyment when that culvert becomes incapable of retaining the waters. The learned judge has, I think, quite plainly found that, though in the first instance the culvert may have been capable of retaining the waters of the brook, it had become in the course of time incapable of retaining them, and it was the fact that the culvert was at the time in question incapable of retaining the waters that was the essential characteristic of an act which formed the breach of the covenant. H I

The learned judge said:

"In the course of time, however, the building settled somewhat, which was natural, having regard to the nature of the foundations. In the course of time

- A also the culvert, owing to the constant weight and friction of the water which it carried, wore away. It had never been repaired, and I am satisfied that at the material time the westerly portion of the culvert was in very bad repair. . . . This [the rise of the water in the culvert] was more than the culvert in its emaciated condition could bear at its western end, and it collapsed, and its invert gave way, with the result that the Morlais Brook"
- B undermined the foundations of the plaintiff's house. That seems to me to be a clear finding that the incapacity of the culvert to contain the increased quantity of water in it as the result of the storm came, not through any unforeseen or any extraordinary cause, but from the constant weight and friction of the water carried by the culvert having worn it away. In other words, it was the natural result of the non-repair at any time during forty-seven years which had brought about the disaster.
- C In my opinion, those findings of the learned judge as to the condition of the culvert and the evidence are amply sufficient to support the judge's further finding that the culvert was incapable of retaining the waters of the Morlais Brook, and that the defendant had, therefore, committed the act of confining and keeping confined those waters in a culvert incapable of retaining them, and that that was the cause of the disaster. I agree with the learned judge that on those findings the disaster was an interruption of the enjoyment by the plaintiff of the premises by the defendant which was inevitable, and, in my opinion, that was a correct decision. I think also that, if it had been necessary to decide it, I should have further agreed with the learned judge when he says that he would be prepared to hold
- E "that the omission to keep the culvert in a fit condition involved the omission of a duty to the adjoining landowner, and that it was the duty of the owner of this culvert, which, if neglected, might cause damage to the adjacent property of another, to prevent such damage by taking reasonable precautions."
- F I think on the whole the authorities would support that ground of relief also, but I prefer to put my judgment on the first point, namely, that in the circumstances of this case there was an act such as the learned judge describes which was in itself an interruption or disturbance of the plaintiff's quiet enjoyment. In my opinion, this appeal fails, and must be dismissed.
- G **SARGANT, L.J.**—I am of the same opinion. The covenant on which the learned judge mainly relied is one between the predecessors in title of the plaintiff and the predecessor in title of the defendant respectively. Of course, a covenant for quiet enjoyment runs with the land, and the parties now are in the same position as the original lessors and original lessees would have been in. As regards the questions of fact, I will only say this, that, in my judgment, the
- H learned judge was fully justified in coming to the conclusions that the culvert in question had been constructed by the predecessors in title of the defendant and that the failure of the culvert was due to the neglect of the defendant and his predecessors during a period of forty-seven years to take any step to repair the culvert and make good that necessary wasting of the structure of the culvert which was in the ordinary course of nature.
- I The first point which was taken by counsel for the defendant was that, as the construction of the culvert had been prior to the lease to the plaintiff's predecessors in title and there had been no act on the part of the defendant or his predecessors in title since, there could not be a breach of the covenant for quiet enjoyment. It seems to me that that contention is disposed of by the decision in *Sanderson v. Berwick-upon-Tweed Corpn.* (5). There the corporation had constructed a system of drainage which was for the common benefit of two defendants. They had demised the one tenement to one named Cairns, and had subsequently demised the other tenement to the plaintiff, and through the ordinary use in the

authorised manner by Cairns of the tenement demised to him, together with the drainage system demised to him, a flood had occurred, and the land of the plaintiff had been damaged. There had been no act done by the defendant corporation or by their lessee, Cairns, after the date of the demise to the plaintiff, except to use the drains that had been constructed, just as here there was no act by the defendant or his predecessors in title after the demise to the predecessors in title of the plaintiff except to use the culvert that had then been constructed. But it was held that the plaintiff was entitled to recover from the corporation. It is made clear, I think, by the judgments of the Court of Appeal in *Harrison, Ainslie & Co. v. Muncaster* (1) and *Anderson v. Oppenheimer* (3), that mere omission may, where there is a duty to do something, be sufficient to support an action of this kind. There is a passage in the judgment of BOWEN, L.J., in *Harrison, Ainslie & Co. v. Muncaster* (1):

"I think that an interruption under such a covenant is not caused by the lessor or by those claiming under him, unless it is either a direct act of interruption, or unless it is some act of which it either was foreseen or ought by reasonable care to have been foreseen that the consequence in the particular case would be an interruption."

There is a similar passage in the judgment of LORD ESHER in that case, and again in *Anderson v. Oppenheimer* (3), BRETT, L.J., says:

"After the lease had been granted there was no breach of any duty, there was no act of either commission or omission and no negligence."

He thus recognised that an act of omission might be sufficient. COTTON, L.J., says:

"I agree that an act of omission may be tantamount to an act of commission so as to be a breach of the covenant."

Here the learned judge has found, and I think rightly found, that not only had there been this construction of the culvert by the predecessors in title of the defendant, but there had been an omission to take reasonable steps to keep the culvert in a proper state of repair and adequate to keep the flow of water through it within the bounds of the culvert. In that state of things it seems to me upon the authorities that, notwithstanding that what might be called the actual acts of construction were prior to the demise to the plaintiff, there was such a continuing use of the culvert by the defendant and his predecessors in title, and such an omission on their part to take reasonable steps to keep the culvert in a proper state of repair, that the defendant becomes liable under the proper construction of this covenant.

I agree the appeal should be dismissed.

Solicitors: E. A. Howell, for Simons, Smith & Daniel, Merthyr Tydfil; Ranger, Burton & Frost.

[Reported by G. P. LANGWORTHY, ESQ., Barrister-at-Law.]

**Re WAIT (TRADING AS WAIT AND JAMES). THE TRUSTEE
v. HUMPHRIES AND BOBBETT**

[COURT OF APPEAL (Lord Hanworth, M.R., Atkin and Sargant, L.JJ.),
November 16, 17, 18, 19, December 17, 1926]

[Reported [1927] 1 Ch. 606; 96 L.J.Ch. 179; 136 L.T. 552;
43 T.L.R. 150; 71 Sol. Jo. 56; [1927] B. & C.R. 140]

Sale of Goods—Specific performance of contract—"Specific or ascertained goods"
—Goods part of cargo of specified kind—Shipment within definite period in
definite vessel—Equitable charge on goods in hands of seller—Sale of Goods
Act, 1893 (56 & 57 Vict., c. 71), s. 52.

By a c.i.f. contract dated Nov. 21, 1925, W. sold to the buyers 500 tons of Western White wheat, to be shipped in the motor vessel C. from Oregon, expected to load between Dec. 16 and 31, the wheat being part of a parcel of 1,000 tons bought by W. on the previous day. The wheat was shipped in bulk on Dec. 21. W. sent the invoice to the buyers, and on Feb. 6 they paid for the wheat by a cheque for £5,933. On Feb. 24 W. was adjudicated bankrupt. On Feb. 28 the C. arrived at Avonmouth with the 1,000 tons of wheat in bulk, the 500 tons not having been appropriated to the buyers. The trustee in bankruptcy having refused to deliver the wheat or to refund the £5,933, the buyers moved for specific performance of the contract by the trustee, or, alternatively, for a declaration that they were entitled to an equitable charge upon the wheat for £5,933.

Held: although the 500 tons of wheat was described as part of a cargo of wheat of a specified kind and shipment was stated to be within a definite period in a definite vessel, the agreement was not a "contract to deliver specific or ascertained goods" within s. 52 of the Sale of Goods Act, 1893, nor did it amount to an equitable assignment of the 500 tons which was enforceable against the goods in the hands of the trustee, and, therefore, the buyers were not entitled to an order for specific performance of the contract or to a declaration that it amounted to an equitable assignment enforceable in the manner stated above.

Per ATKIN, L.J.: "Ascertained goods" in s. 52 probably means goods identified in accordance with the agreement after the time when a contract of sale is made.

Notes. Applied: *Shell-Mex v. Elton Cop Dyeing Co.* (1928), 34 Com. Cas. 39.

As to specific performance of a contract for the sale of goods, see 29 HALSBURY'S LAWS (2nd Edn.) 200, 225; and for cases see 39 DIGEST 677. For Sale of Goods Act, 1893, see 22 HALSBURY'S STATUTES (2nd Edn.) 985.

Cases referred to:

- (1) *Brice v. Bannister* (1878), 3 Q.B.D. 569; 47 L.J.Q.B. 722; 38 L.T. 739; 26 W.R. 670, C.A.; 7 Digest 420, 344.
- (2) *Citizen's Bank of Louisiana v. First National Bank of New Orleans* (1873), L.R. 6 H.L. 352; 43 L.J.Ch. 269; 22 W.R. 194, H.L.; 3 Digest 300, 961.
- (3) *Re Clarke, Coombe v. Carter* (1887), 36 Ch.D. 348; 56 L.J.Ch. 981; 57 L.T. 823; 36 W.R. 293; 3 T.L.R. 818; 31 Sol. Jo. 676, C.A.; 12 Digest (Repl.) 22, 8.
- (4) *Collyer v. Isaacs* (1881), 19 Ch.D. 342; 51 L.J.Ch. 14; 45 L.T. 567; 30 W.R. 70, C.A.; 20 Digest 254, 173.
- (5) *Fothergill v. Rowland* (1873), L.R. 17 Eq. 132; 43 L.J.Ch. 252; 29 L.T. 414; 38 J.P. 244; 22 W.R. 42; 39 Digest 679, 2655.
- (6) *Hayman & Sons v. M'Lintock*, 1907 S.C. 936; 44 Sc.L.R. 691; 15 S.L.T. 63; 39 Digest 485, 1049 xii.

- (7) *Hoare v. Dresser* (1859), 7 H.L.Cas. 290; 28 L.J.Ch. 611; 33 L.T.O.S. 63; 5 Jur.N.S. 371; 7 W.R. 374; 11 E.R. 116, H.L.; 39 Digest 678, 2641. A
- (8) *Holroyd v. Marshall* (1862), 10 H.L.Cas. 191; 33 L.J.Ch. 193; 7 L.T. 172; 9 Jur.N.S. 213; 11 W.R. 171; 11 E.R. 999, H.L.; 39 Digest 678, 2642.
- (9) *Howell v. Coupland* (1876), 1 Q.B.D. 258; 46 L.J.Q.B. 147; 33 L.T. 832; 40 J.P. 276; 24 W.R. 470, C.A.; 39 Digest 400, 366.
- (10) *Inglis v. Stock* (1885), 10 App. Cas. 263; 54 L.J.Q.B. 582; 52 L.T. 821; 33 W.R. 877; 5 Asp.M.L.C. 422, H.L.; 39 Digest 530, 1433. B
- (11) *Joseph v. Lyons* (1884), 15 Q.B.D. 280; 54 L.J.Q.B. 1; 51 L.T. 740; 33 W.R. 145; 1 T.L.R. 16, C.A.; 20 Digest 294, 504.
- (12) *James Jones & Sons, Ltd. v. Earl of Tankerville*, [1909] 2 Ch. 440; 78 L.J.Ch. 674; 101 L.T. 202; 25 T.L.R. 714; 39 Digest 679, 2657.
- (13) *Laurie and Morewood v. Dudin & Sons, Ltd.*, [1926] 1 K.B. 223; 95 L.J.K.B. 191; 134 L.T. 309; 42 T.L.R. 149; 31 Com. Cas. 96, C.A.; 39 Digest 522, 1372. C
- (14) *Metcalfe v. Archbishop of York* (1836), 1 My. & Cr. 547; 6 L.J.Ch. 65; 40 E.R. 485, L.C.; 39 Digest 31, 390.
- (15) *Rose v. Watson* (1864), 10 H.L.Cas. 672; 3 New Rep. 673; 33 L.J.Ch. 385; 10 L.T. 106; 10 Jur.N.S. 297; 12 W.R. 585; 11 E.R. 1187, H.L.; 32 Digest 268, 493. D
- (16) *Sterns, Ltd. v. Vickers, Ltd.*, [1923] 1 K.B. 78; 92 L.J.K.B. 331; 128 L.T. 402, C.A.; 39 Digest 529, 1421.
- (17) *Tailby v. Official Receiver* (1888), 13 App. Cas. 523; 58 L.J.Q.B. 75; 60 L.T. 162; 37 W.R. 513; 4 T.L.R. 726, H.L.; 42 Digest 455, 257.
- (18) *Taylor v. Caldwell* (1863), 3 B. & S. 826; 2 New Rep. 198; 32 L.J.Q.B. 164; 8 L.T. 356; 27 J.P. 710; 11 W.R. 726; 122 E.R. 309; 12 Digest (Repl.) 418, 3242. E
- (19) *Thames Sack and Bag Co., Ltd. v. Knowles & Co., Ltd.* (1918), 88 L.J.K.B. 585; 119 L.T. 287; 39 Digest 485, 1053.
- (20) *Wait v. Baker* (1848), 2 Exch. 1; 17 L.J.Ex. 307; 154 E.R. 380; 39 Digest 488, 1075. F
- (21) *Whitehouse v. Frost* (1810), 12 East, 614; 104 E.R. 239; 39 Digest 542, 1531.
- (22) *Whiteley, Ltd. v. Hilt*, [1918] 2 K.B. 808; 87 L.J.K.B. 1058; 119 L.T. 632; 34 T.L.R. 592; 62 Sol. Jo. 717, C.A.; 39 Digest 677, 2635.
- (23) *Pusey v. Pusey* (1684), 1 Vern. 273; 23 E.R. 465; 43 Digest 533, 688.
- (24) *Duke of Somerset v. Cookson* (1735), 3 P.Wms. 390; 24 E.R. 1114; 43 Digest 533, 689. G
- (25) *Field v. Megaw* (1869), L.R. 4 C.P. 660; 8 Digest (Repl.) 583, 306.
- (26) *Snell v. Heighton* (1883), 1 Cab. & El. 95; 39 Digest 487, 1065.
- (27) *Re Condon, Ex parte James* (1874), 9 Ch. App. 609; 43 L.J.Bey. 107; 30 L.T. 773; 22 W.R. 987, L.J.J.; 4 Digest 15, 60.
- (28) *Wright v. Wright* (1750), 1 Ves. Sen. 409; 27 E.R. 1111, L.C.; 8 Digest (Repl.) 560, 134. H
- (29) *Mullins v. Smith* (1860), 1 Drew & Sm. 204; 8 W.R. 739; 62 E.R. 356; 23 Digest (Repl.) 387, 4584.
- (30) *Kirby v. Potter* (1799), 4 Ves. 748; 31 E.R. 387; 44 Digest 297, 1289.
- (31) *Re Hallett's Estate, Knatchbull v. Hallett* (1880), 13 Ch.D. 696; 49 L.J.Ch. 415; 42 L.T. 421; 28 W.R. 732, C.A.; 12 Digest (Repl.) 554, 4195. I
- (32) *Lumley v. Wagner* (1852), 1 De G.M. & G. 604; 21 L.J.Ch. 898; 19 L.T.O.S. 264; 16 Jur. 871; 42 E.R. 687; 42 Digest 915, 107.

Appeal from an order of the Divisional Court in Bankruptcy (ASTBURY and LAWRENCE, JJ.) which held that the buyers of 500 tons of Western White wheat, part of a cargo of 1,000 tons, but not appropriated and the property in which had not passed to them, were entitled to an order for the specific performance of the contract against the trustee in bankruptcy of the seller, who refused either to

A return the purchase money already paid, or to deliver the wheat. The trustee in bankruptcy appealed.

Jowitt, K.C., and Croom-Johnson for the trustee.

Luxmoore, K.C., and Wethered for the buyers.

The following cases were referred to in the course of the arguments: *Brice v. Bannister* (1), *Citizen's Bank of Louisiana v. First National Bank of New Orleans* (2), *Re Clarke, Coombe v. Carter* (3), *Collyer v. Isaacs* (4), *Fothergill v. Rowland* (5), *Hayman & Sons v. M'Lintock* (6), *Hoare v. Dresser* (7), *Holroyd v. Marshall* (8), *Howell v. Coupland* (9), *Inglis v. Stock* (10), *Joseph v. Lyons* (11), *James Jones & Sons, Ltd. v. Earl of Tankerville* (12), *Laurie and Morewood v. Dudin & Sons, Ltd.* (13), *Metcalfe v. Archbishop of York* (14), *Rose v. Watson* (15), *Sterns, Ltd. v. Vickers, Ltd.* (16), *Tailby v. Official Receiver* (17), *Taylor v. Caldwell* (18), *Thames Sack and Bag Co., Ltd. v. Knowles & Co.* (19), *Wait v. Baker* (20), *Whitehouse v. Frost* (21), *Whiteley (W.), Ltd. v. Hilt, Ltd.* (22).

Cur. adv. vult.

Dec. 17. The following judgments were read.

D **LORD HANWORTH, M.R.**—This is an appeal from the Divisional Court sitting in Bankruptcy, which varied an order of the county court judge at Bristol, within whose court the bankruptcy is proceeding.

Wait and James, the firm's name, under which the business of the bankrupt was carried on, were corn dealers. On Nov. 20, 1925, they made a c.i.f. contract, as purchasers, with Balfour, Williamson & Co., of London, as sellers, for 1,000 tons of Western White wheat to arrive at Avonmouth per motor vessel *Challenger*, expected to load between Dec. 16 and 31, 1925, from Oregon and/or Washington. On Nov. 21 Messrs. Humphries and Bobbett made a c.i.f. contract with Wait and James to purchase 500 tons of this Western White wheat to arrive per motor vessel *Challenger*. The wheat was shipped in bulk on the motor vessel *Challenger* by Balfour, Williamson & Co.'s agent at Oregon on Dec. 21, 1925, and a bill of lading of that date for the 1,000 tons was issued. This bill of lading was received by Wait on Jan. 4, 1926, and the purchase price was payable thirty-three days after sight, that is on Feb. 6. On Jan. 5, 1926, Wait delivered to Humphries and Bobbett a provisional invoice for their 500 tons, the price of which, less half freight payable at destination, was £5,933, due on Feb. 6. On Feb. 2 he delivered a confirmatory invoice; on Feb. 5 the sub-purchasers gave him a cheque for the £5,933; and Wait paid this cheque with others, amounting in all to the total sum of £12,168, into his bank to his general account, on which he had an overdraft. On Feb. 17 Wait gave notice of suspension of payment, and on Feb. 24 he was adjudicated a bankrupt on his own petition, and Collins was appointed special manager of the business by the official receiver. By the result of the transactions with the bank which are detailed in the report referred to, there was on Feb. 27 a credit of £5,933 upon the separate account relating to the transaction of the 1,000 tons of wheat which had been established some days after the cheque for £5,933 had been paid into Wait's general account. On Feb. 28 the motor vessel *Challenger* arrived at Avonmouth with the 1,000 tons of wheat in bulk. The sub-purchaser's 500 tons had never been appropriated. On Mar. 5 Collins was appointed trustee.

I By notice of motion dated Mar. 3 Humphries and Bobbett applied to the county court judge sitting in bankruptcy for an order: (i) That the trustee might be ordered to specifically perform the contract of sale of Nov. 21, 1925, by delivering 500 tons of Western White wheat on payment by the buyers of their proportion of freight due in respect of it, (ii) alternatively, that the trustee should repay the above sum of £5,933, (iii) that a declaration should be made that the buyers had a beneficial interest in the wheat arrived upon the motor vessel *Challenger* to the extent of 500 tons and a charge upon the wheat to secure repayment to them of the said sum of £5,933, and an injunction to the trustee from disposing or otherwise dealing with the wheat until that charge had been satisfied by payment; and

(iv) an order for the payment of the £5,933 5s. to the applicants. The county court judge held that Humphries and Bobbett were not entitled to specific performance, but that the trustee was not entitled to retain the money and not give delivery of the goods for which payment had been made, and treated the payment as of a trust fund in the hands of the firm who received it. He, therefore, ordered the money to be repaid. On appeal, the Divisional Court (consisting of ASTBURY and LAWRENCE, JJ.) discharged the order of the county court judge, except as to costs, and declared that the buyers were entitled to have the contract specifically performed on payment to the trustee in bankruptcy of £750 as the aliquot sum for the freight of the 500 tons of wheat. The trustee appeals to this court. At the date of the motion, some of the wheat had been disposed of, but 530 tons were left,, the 500 tons being still unappropriated to the sub-purchasers. The Divisional Court made the order for specific performance on the ground that the 500 tons of wheat were specific goods within s. 52 of the Sale of Goods Act, 1893, and thus that the court could direct that the contract should be performed specifically. This was the point mainly relied upon in this court, for counsel for the buyers did not contend that there was any trust as to the £5,933, or that he could claim to follow the money on the basis or a trust, expressed or implied. His contention was (a) that, although the 500 tons were not identified and agreed upon at the time the contract of sale was made—so as to satisfy the term “specific goods” as interpreted under s. 62 of the Act, yet they were “ascertained goods” within s. 52 after the wheat had been shipped on board the motor vessel *Challenger*, for they could be, and, therefore, ought to be, ascertained from out of the wheat bought from Balfour Williamson, at any rate upon arrival at Avonmouth, and (b) that on payment of the purchase price there was an equitable assignment of so much of the wheat ex motor vessel *Challenger* as was necessary to satisfy the contract to sell 500 tons on which the payment had been made.

The cases mainly relied upon were *Holroyd v. Marshall* (8), *Hoare v. Dresser* (7) and *Howell v. Coupland* (9). It is necessary, therefore, to examine the meaning and effect of s. 52 in relation to the facts of the present case. This section reproduces s. 2 of the Mercantile Law Amendment Act, 1856. By s. 78 of the Common Law Procedure Act, 1854, the common law courts were given power to order the return of specific chattels, a power which the courts of equity had exercised from a very early period, particularly where the chattels were of a peculiar value, as in the case of the horn in *Pusey v. Pusey* (23) and the patera in *Duke of Somerset v. Cookson* (24), the remedy of law being imperfect. For in the action of trover, damages only were recovered, and in detainue the defendant could retain the article sued for upon payment of the value as assessed by the jury, and thus only an ineffective remedy was afforded. By this s. 78 the courts of law at Westminster were empowered to enforce specific delivery “on the application of the plaintiff” where the nature of the case called for such a special remedy. The Mercantile Law Amendment Act, 1856, by s. 2, conferred similar powers in respect of a contract to deliver specific goods for a price in money upon any of the superior courts of common law at Westminster or Dublin or any court of record in England, Wales, or Ireland on the application of the plaintiff. This section has been replaced by s. 52 of the Sale of Goods Act, 1893, and by s. 60 of that Act s. 2 of the Mercantile Law Amendment Act was repealed. Section 78 of the Common Law Procedure Act was repealed by the Statute Law Revision and Civil Procedure Act, 1883, s. 3. But s. 52 remains a section which is to be put in force upon the application of the plaintiff. It provides one of the remedies of the buyer, and it does not give correlative rights to the seller. Its operation remains limited. It is not possible to overlook the original purpose and scope of its predecessors, which was to meet a difficulty and hardship suffered by a buyer in respect of specific goods, and the section reproduces the old law in a codifying statute. It has not changed the law. The section applies to all cases where the goods are specific or ascertained, whether the property has passed to the buyer or not: see *James Jones & Sons, Ltd. v. Earl*

A of *Tankerville* (12). Looking at the history and reason of the matter, I cannot agree with ASTBURY, J., that

"if the property passed, specific performance would not be necessary. It is only in cases where the property does not pass, but the contract is for the delivery of specific goods that specific performance becomes important."

B The problem to be solved comes back to the question: Were the 500 tons specific goods? They were never appropriated, and it is admitted that the legal property has not passed, for these were "future goods" within s. 5 of the Act in respect of which no property passed to the purchaser: see ss. 16, 17, and 18 (5). There was no ascertainment or identification of the 500 tons out of the cargo in bulk of the motor vessel *Challenger*. The bankruptcy of the vendors does not, in my judgment, **C** affect the question, though it may emphasise the hardship to the purchasers, for the question must be determined upon the rights of the parties under the contract upon the arrival of the wheat.

The argument for the buyers depends in no small measure upon the validity of the dictum of LORD WESTBURY in *Holroyd v. Marshall* (8), which—if premature at the date of its utterance—is said now to be law by virtue of s. 52 of the Act. It was this passage from LORD WESTBURY's speech which ASTBURY, J., primarily relied upon. **D** It is not certain what were the words used by LORD WESTBURY in giving his illustration of the sale of a particular parcel of tea. The LAW JOURNAL report runs as follows (33 L.J.Ch. at p. 196):

"A contract for the sale of goods as, for example, of 500 chests of tea, was not a contract which would be specially performed, because it did not relate to any chests of tea in particular, but a contract to sell the 500 chests of a particular kind of tea, which 'are in my warehouse in Gloucester,' was a contract relating to specific property, and which would be specifically performed."

These words appear to indicate clearly specific goods in a specific place, identified and ascertained as the subject-matter of the contract. Before dealing, however, with *Holroyd v. Marshall* (8), I wish to refer to some of the cases to which the notice of the court was directed. In *Wait v. Baker* (20) there was a contract made by the defendant to purchase 400–500 quarters of barley f.o.b. at Kingsbridge. The ship to carry it was chartered, and the charterparty sent to the defendant. The vessel was loaded and the vendor had gone as far as to leave the invoice and the unendorsed bill of lading at the defendant's place of business. A dispute arose. The defendant made, as the jury found, an unconditional tender of the amount of the invoice, but the vendor refused to accept it and took back the bill of lading. **F** It was held that the contract was not for the delivery of specific goods, that no property in them had passed, that there was no appropriation, and no agreement that that specific cargo should become the property of the defendant. In *Hayman & Son v. M'Lintock* (6), the question arose whether the trustee in bankruptcy of a purchaser of flour stored in a warehouse was entitled to claim the flour in priority **G** to the holders of certain store warrants and delivery orders which had been given to the holders on the sale of aliquot portions of the flour by the bankrupts to them. It was held that the trustee's title prevailed. The Lord President (LORD DUNEDIN) said that though there was no question as to the contract of sale of the flour lying in the store, yet the bankruptcy intervened before anything was done in the way of separating the bags, and LORD McLAREN added that, as the sacks were neither **H** numbered, nor marked, nor put into receptacles, nor ascertained in such a way as to distinguish them from other flour in the warehouse, no effectual right of security was constituted by the delivery order given. In *Thames Sack and Bag Co., Ltd. v. Knowles & Co., Ltd.* (19), SANKEY, J., held in the case of a "spot" contract for the sale of ten bales of Hessian bags—which imported that the goods were actually available and ready for immediate delivery—after an invoice had been sent giving the specific marks and numbers of the bales from which the ten were to be taken and stating that the sale was ex wharf, that the goods were not "ascertained" goods **I** within s. 52. It was not contended that they were "specific." He held that

there had been no ascertainment of the individuality of the bags passing under the contract. Lastly, in *Laurie and Morewood v. Dudin & Sons, Ltd.* (13), the Court of Appeal held that when a delivery order for 200 quarters of maize had been given to the buyers and lodged with the warehouseman in whose custody there were 618 quarters of maize, the holders of the delivery order were not entitled to recover the goods named in the delivery order before an appropriation of the 200 quarters had taken place—that there had been no severance of the 200 quarters from the bulk, that no property had passed, and that there had been no ascertainment of the goods. SCRUTTON, L.J., in terms followed LORD DUNEDIN in *Hayman & Sons v. M'Lintock* (6).

In *Fothergill v. Rowland* (5), SIR GEORGE JESSEL discussed the jurisdiction exercised by a court of equity to enforce a contract for the sale and delivery of chattels. The contract in the case was for the sale and delivery of coals, coals got and to be got from the defendants' mine during a period of years. The price of coal rose, the defendants sold elsewhere at a better price, entered into a contract to sell the colliery to defeat the plaintiffs' rights under the contract, and the plaintiffs prayed for an injunction to restrain the sale by the defendants, except subject to the agreement to supply the coals to the plaintiffs. The Master of the Rolls said that it must be assumed that the contract was for the sale of a chattel of a very ordinary description—not alleged to be peculiar coal or coal that cannot be got elsewhere—not distinguishable from an ordinary contract for the sale of goods; and of such a contract he says it was admitted by the counsel for the plaintiffs that one cannot obtain specific performance in a court of equity; and as that remedy could not be granted, he holds, equally, that an injunction cannot be granted to restrain the breach by the defendants of one or more stipulations of the contract, where specific performance would not be granted.

This case shows the limitations of the jurisdiction of the court of equity as there interpreted by SIR GEORGE JESSEL—limitations which were recognised and affirmed in *Re Clarke, Coombe v. Carter* (3). That was a case of a mortgage, inter alia, of all moneys to which the mortgagor might become entitled under a will. The court, without deciding whether the words of a general assignment were too wide, enforced the contract of mortgage of the moneys coming to the mortgagor under the will. Incidentally, COTTON, L.J., said :

"The ordinary application of the doctrine of specific performance is to compel a vendor or purchaser to complete a contract for sale or purchase, a contract which is wholly executory. Where such a contract relates to goods, the court will not in general decree specific performance. Why is this? Because the court considers that, in general, damages are a sufficient remedy and the proper remedy for the breach of a contract to sell or purchase goods : but that does not apply to a breach of contract relating to land."

Considering the facts of the present case in the light of the authorities to which I have called attention, it is, in my judgment, not possible to hold that the 500 tons of wheat, ex motor vessel *Challenger*, were specific or ascertained goods, and thus specific performance would not be ordered as the remedy of the buyer under s. 52 of the Act. I do not read *Holroyd v. Marshall* (8) as conflicting with this view. The first passage relied upon is that in which LORD WESTBURY says :

"A contract for valuable consideration by which it is agreed to make a present transfer of property passes at once the beneficial interest, provided the contract is one of which the court of equity will decree specific performance."

An illustration of what he intended by the above is to be found in *Rose v. Watson* (15), in which he also gave the leading judgment. I think that the illustration which he gives as to a contract for the sale of goods must be taken as reported in the LAW JOURNAL, already referred to, namely, a contract for the sale of specific goods lying in a specific place. Later he adds :

"But all this depends on the contract being such that a court of equity would decree to be specifically performed."

A A condition which he repeats later in his speech; and he says (10 H.L.Cas. at p. 212):

"I have already explained that a contract relating to goods, but not to any specific goods, would not be the subject of a decree for specific performance and that a contract that could not be specifically performed would not avail to transfer any estate or interest."

B LORD CHELMSFORD's speech is to the same effect.

The effect of *Holroyd v. Marshall* (8) was summarised by COTTON, L.J., in *Joseph v. Lyons* (11). He says:

C "In *Holroyd v. Marshall* (8) it was held, with some doubt on the part of some of the Law Lords, that when future acquired property is assigned pursuant to a contract capable of specific performance, that property when it has been sufficiently earmarked and identified may pass to the assignee and become his property; it may be that there was not a valid assignment at law, but where there was a valuable consideration the assignment might be valid in equity."

After speaking of *Holroyd v. Marshall* (8) in *Tailby v. Official Receiver* (17), LORD WATSON says:

D "There is but one condition which must be fulfilled in order to make the assignee's right attach to a future chose in action, which is that on its coming into existence, it shall answer the description in the assignment, or in other words, that it shall be capable of being identified as the thing, or as one of the very things assigned."

E LORD MACNAGHTEN (13 App. Cas. at p. 547) rejects the test apparently suggested—if not actually intended—by LORD WESTBURY in *Holroyd v. Marshall* (8): "Would a court of equity decree specific performance," as a measure of the rights of the parties or as essential to cases of equitable assignment or specific lien; but he adds the important qualification,

F "where nothing remains to be done in order to define the rights of the parties, but the court is merely asked to protect the rights, completely defined, as between the parties to the contract, or to give effect to such rights either by granting an injunction or by appointing a receiver."

So, even if the test as to the right to specific performance is rejected, there remains the requisite that the rights must be completely defined as between the parties to the contract as to "the thing" in respect of which the right of one is to be enforced against the other. In my judgment, there was no such identification of the thing, "the very thing," for the goods were not appropriated nor their individuality ascertained.

G *Hoare v. Dresser* (7) does not, in my judgment, conflict with *Holroyd v. Marshall* (8) or with what was said in *Tailby v. Official Receiver* (17). LORD CHELMSFORD states the problem as being

H "whether there was not a contract for timber which—though general at first, was by the subsequent transaction between the parties rendered specific, so as to enable Dresser to assert an equitable title to it."

I LORD CRANWORTH's words which, as he says, were general, and not directly upon the question that arose in the case, if they conflict with the authorities cited appear too wide and must be considered in the light of the later authority of *Tailby v. Official Receiver* (17), and he concludes the passage referred to by saying:

"But I apprehend that neither in equity, nor in law, can there be any jurisdiction to say, that because there is property of the person who ought to have fulfilled his contract, therefore you can make that property available for the specific performance of the engagement."

The requisite is that the subject-matter of the contract must have become specific. Looking, then, at the present case more particularly from the point of view of

equitable assignment, the buyers cannot fulfil the conditions necessary to give them A
such a right. LORD WENSLEYDALE in *Hoare v. Dresser* (7) says:

"I take it to be perfectly clear that in order to create an equitable assignment,
the obligation must be to deliver a particular chattel—not to deliver any
chattel."

The doctrine of equitable assignment of goods is discussed by LORD SELBORNE in B
Citizen's Bank of Louisiana v. First National Bank of New Orleans (2), in relation
to funds remitted to meet bills of exchange upon the bankruptcy of the drawer.
In that case the evidence was that one of the bills was drawn specially against
funds. LORD SELBORNE asks:

"Is that an equitable assignment? Is that an appropriation of such a kind, C
that from the moment when that transaction took place as between the two
banks, the Citizen's Bank would become purchasers pro tanto to the amount
necessary to answer this bill drawn at sixty days' sight, of previous remittances
made by the drawers to their agents at Liverpool, in order to provide for that
and other bills which they might draw? My Lords, it seems to me that the
transaction is simply one of the most ordinary mercantile kind, and perfectly D
consistent with the ordinary course of dealing between the Liverpool Bank and
the drawers of the bills, which upon the whole of the correspondence and the
evidence plainly was not one of specific trust or appropriation of any particular
funds. The transaction was really of this kind—a person asked to take a bill
wants to know distinctly whether the person who has drawn it has made pro-
vision for its payment. The statement is, we have sent forward to Liverpool E
funds of a much larger amount, which are intended to be used in the payment
of these and other bills. If that be a specific appropriation or an equitable
assignment, it follows that every ordinary transaction in commerce, where any
inquiry whatever is made, would come into the same category."

And see also *Field v. Megaw* (25) (L.R. 4 C.P. at p. 663), where specific appro-
priation is referred to by MONTAGUE SMITH, J., as necessary to bind the fund by F
equitable assignment.

Howell v. Coupland (9) was much insisted upon by the buyers here, but it appears
to me not to be an authority on the point in question. The subject-matter of the
contract was held to be specific upon the same basis as the debts in *Tailby v.*
Official Receiver (17), but the point decided was that on the failure of the crop,
the principle of *Taylor v. Caldwell* (18) applied and performance of the contract G
was excused for the reason that the contract must be interpreted as being subject
to the implied condition that the parties should be excused if before breach per-
formance became impossible from the perishing of the subject-matter of the contract
without default on the part of the seller. LORD COLERIDGE, C.J., said:

"It was not an absolute contract of delivery under all circumstances; but a
contract to deliver so many potatoes, of a particular kind, grown on a specific H
place—if deliverable from that place. On the facts the condition did arise and
the performance excused."

In *Snell v. Heighton* (26) GROVE, J., held that there was no appropriation to a sale
of 60,000 bricks, part of a bulk of 117,000, where the vendor had applied all but
62,000 to other purposes, and had left this balance only out of which he could fulfil
his contract. The cases which decided that a purchaser had an insurable risk, such I
as *Inglis v. Stock* (10) and *Sterns, Ltd. v. Vickers, Ltd.* (16), do not assist in the
present case. In those cases, whether the property had or had not passed, the
risk of loss from something happening to the goods, or from deterioration in their
quality, passed to the purchaser, even though the identification of the goods
remained incomplete, or the portion of the goods sold remained unsevered from
the bulk.

For the reasons I have given and upon the authorities I have referred to, in my
judgment, the appeal must be allowed and the orders of the Divisional Court and

A of the county court judge set aside, and the motion of the buyers of Mar. 3 refused with costs here and below. I desire to add that I much regret to find that I am differing not only from the judges in the Divisional Court, but also from SARGANT, L.J. Naturally, I have reluctance in doing so. My justification must be that I have taken a view of the facts of the cases which differs from that of SARGANT, L.J., and thereupon it has appeared to me that the question for decision was governed
B by the mercantile law, applicable to a not uncommon contract for the sale of goods.

ATKIN, L.J.—This case has resulted in a decision which, if correct, will have far-reaching effects upon commercial transactions. It has the support of the judgments of both learned judges below, and also of SARGANT, L.J., and, therefore, in expressing my opinion that it was wrongly decided I feel bound to examine in
C some detail the facts and contentions relied on by the parties. Both the debtor and the claimant are grain merchants in Bristol. On Nov. 20, 1925, by a written contract on Form 22 of the London Corn Trade Association, W. H. Pim, Junior, & Co., Ltd., acting for Balfour, Williamson & Co., of London, agreed to sell to the debtor 1,000 tons of Western White wheat. Shipment was to be in good condition,
D per motor vessel *Challenger*, expected to leave between Dec. 16 and 31, 1925, from Oregon and/or Washington as per bill or bills of lading to be dated accordingly when the goods were actually on board. The price was 57s. per 480 lb. shipped in bulk and/or bags including freight and insurance to Avonmouth direct or indirect to liners. The terms of payment were cash against documents, or alternatively by
E buyer's acceptance of seller's shipper's draft with documents, attached at thirty days from arrival of bill of lading in London on terms which for present purposes are immaterial. The contract contains the usual stipulations of the London Corn Trade Association in such agreements dealing with policies, delivery, and arbitration. It is an ordinary commercial contract for the sale c.i.f. of grain to be imported to England from the United States of America. It is a contract for the future shipment of grain not at the time ascertained. It is not the sale of a cargo. Apart from some appropriation of the goods to the buyer with his express or implied
F assent at or after shipment, which would, I think, be unusual, the buyer would acquire no property in any grain until he took up the documents in exchange for cash or acceptance. On Nov. 21, 1925, the debtor by a contract in writing agreed to sell to the buyers 500 tons Western White wheat per motor vessel *Challenger*, expected to load between Dec. 16 and 31, 1925, bill of lading to be dated accordingly at 57s. per 480 lb. c.i.f. to Bristol direct or indirect plus one-half of 1 per cent.
G The form of contract ends with the following clause partly printed, partly written :
"The wheat sold as above is part of a parcel bought from Balfour, Williamson & Co. under contract dated Nov. 20, and in the event of their not duly fulfilling the same it is understood that Messrs. Wait and James (the sellers) are not to be held liable to buyers."

H The agreement seems to me to give the buyers no different rights from those of the debtors, the original buyers, against Balfour, Williamson, except that a condition is added which operates solely for the benefit of the sellers under the second contract. Inasmuch as some importance was attached to this clause by the buyers, I may state that, in my opinion, the clause has not the effect for which they contend, though if it had the result would not be affected. It seems to me that the clause is not part of the description of the goods; if it were, then if the name
I of Balfour, Williamson, or the date of the contract with them were wrongly stated the buyers could reject the goods. The statement of name of seller and date of contract is made to define the conditions; so that the sub-seller could not relieve himself of liability unless the named seller under the named contract failed to deliver to him. In my opinion, a tender of documents of wheat of the contract description per motor vessel *Challenger* dated in accordance with the contract would be a good tender however and from whosoever the sub-seller obtained them.

It appears that by other contracts the debtor had agreed with other sellers for the purchase from them of further grain to be shipped per the *Challenger*. He had

a contract for the delivery of a further 500 tons of Western White wheat and 1,500 tons of No. 2 Northern wheat. All this wheat was shipped in the *Challenger* under bills of lading bearing dates that conformed to the contracts of sale. The wheat was shipped in bulk; of the Western White wheat 1,190 tons were shipped in the after hold, and 310 tons in No. 2 hold. On Feb. 28 the *Challenger* arrived at Avonmouth bringing the wheat as described above. Meanwhile, other events material to this decision had occurred. On Dec. 22 the debtors gave the buyers particulars of the date of the bill of lading for motor vessel *Challenger* to satisfy the contract of Nov. 21. On Jan. 4 the bills of lading arrived in this country and were sighted by the consignees making the prompt date under the contract Feb. 6. On the same date the debtors rendered to the buyers a provisional invoice for £5,933 5s., the price of the 500 tons less freight. On Feb. 3 the debtors passed to the buyers a debit note for Western White wheat for £5,933 5s., stating the prompt to be Feb. 6 which was a Saturday with a note appended: "Kindly let us have your cheque for the above amount on Friday morning and oblige." And on Friday, Feb. 5, the buyers gave the debtors a cheque for £5,933 5s. which was paid into the general credit of the debtors' account with the Westminster Bank, Bristol, and credited on that day, the account being then largely overdrawn. An attempt was at one time made to suggest that the cheque was specially appropriated at the time by the bank or the debtors or both to the repayment of an advance made by the bank to take up the bill of lading for 1,000 tons of wheat under which the contract with the buyers was to be fulfilled; and the contention was said to be supported by a letter from the buyers dated Feb. 20. It appeared that the writer expressed an allegation of fact rather in hope than with accuracy, and counsel for the buyers expressly disclaimed any case that any trust was created as to this sum of money. It is obvious that it went into the debtor's account generally and reduced the general balance. The debtor's bank had made advances to enable the debtor to take up bills of lading in question, and at this date held the documents as security against such advances on the terms of hypothecation notes dated Feb. 6. In view of the disclaimer mentioned above I need not refer in great detail to the subsequent book-keeping operation of the bank. On Feb. 23 the debtor, who was in difficulties, called a meeting of his creditors, and on Feb. 24 on his own petition a receiving order was made, and he was adjudicated bankrupt, Collins being appointed special receiver of the estate. On Mar. 5 he was appointed trustee in bankruptcy of the estate. On Feb. 27 Collins took up from the bank the bills of lading giving them a cheque for the full amount less the sum of £5,933 5s. which the bank allowed to be treated as a credit against the advance. Having received the bills of lading he was able to deal with the wheat. Of the 1,500 tons Western White wheat, 830 tons were delivered to Messrs. Spiller and Baker ex ship; some further wheat was delivered to the purchasers; and at the time the motion was launched the trustee had in warehouse 530 tons available for the performance of contract with the claimants; but which was in fact property of the debtor or possibly only of the trustee available for distribution amongst the creditors generally. The trustee, however, would take the property subject to any equity affecting it in favour of these particular creditors; and the question is whether they had any, and if so what.

It will be noticed from the above statement of facts that no 500 tons of wheat have ever been earmarked, identified, or appropriated as the wheat to be delivered to the buyers under the contract. The buyers have never received any bill of lading, warrant, delivery order or any document of title representing the goods. Nor can 500 tons or any less quantity be ascertained by subtracting from the bulk in the trustee's possession known quantities the property of the purchasers. The trustee has in his possession in warehouse 530 tons of Western White wheat. It is not suggested that this is not an ordinary commercial commodity. It is, however, said: (a) That the buyers are entitled to have the contract of sale of Nov. 21 specifically performed by a direction of the trustee to weigh out and deliver 500 tons to the buyers; or (b) that the transactions between the parties have resulted in an

A equitable assignment to the buyers of either the whole bulk of 530 tons or at any rate of 500 tons of it, so as to entitle the buyers to have 500 tons delivered to them, or to have a charge upon the bulk or 500 tons of it to secure the sum of £5,933 5s. the firm paid in advance. I have treated these as separate contentions, because at times in the argument they are treated separately, though at times they appeared to overlap. In any case, however, I am of opinion that the buyers fail, and that

B to grant the relief claimed would violate well-established principles of common law and equity. It would appear to embarrass to a most serious degree the ordinary operations of buying and selling goods, and the banking operations which attend them.

The claim of the buyers to specific performance in their argument in the courts below and before us was based solely on the provisions of s. 52 of the Sale of Goods Act, 1893. That section is a re-enactment in an amended form of s. 2 of the Mercantile Law Amendment Act, 1856, which gave the remedy in all actions for suits for breach of contract to deliver specific goods for a price in money. The present action gives the remedy in any action for breach of contract to deliver specific or ascertained goods. It is not easy to discover the reason for adding the words "or ascertained." It is, however, clear that "specific goods" bear the

D meaning assigned to them in the definition clause "goods identified and agreed upon at the time a contract of sale is made." "Ascertained" probably means identified in accordance with the agreement after the time when a contract of sale is made, and I shall assume that to be the meaning. It seems to be beyond dispute that at the date of this contract there were no goods identified and agreed upon; and I think it equally clear that at no time were there any goods ascertained. For

E the purpose of this case it is unnecessary to consider whether this section was intended to give the purchaser a larger remedy than he had in courts of equity before the section in the Act of 1856 was passed. Speaking generally, courts of equity did not decree specific performance in contracts for the sale of commodities which could be ordinarily obtained in the market where damages were a sufficient remedy. Possibly the statutory remedy was intended to be available even in those

F cases. But the Act of 1893 appears to have the effect that in contracts for the sale of goods the only remedy by way of specific performance is the statutory remedy, and it follows that, as the goods were neither specific nor ascertained, the remedy of specific performance was not open to creditors.

An attempt was made to show that the goods were specific goods by citing the decision of *Howell v. Coupland* (9) and arguing that, as the goods were called

G specific there, the term in the Sale of Goods Act, despite the statutory definition, must be used in the same sense. And it was said that in any case s. 7 of the Act reproduces the decision in *Howell v. Coupland* (9), and as it uses the word "specific" the meaning must differ from the statutory definition. These contentions appear to me to ignore the true use of the code contained in the Act, and to misinterpret *Howell v. Coupland* (9). That case was a claim for damages for

H non-delivery of 120 tons of potatoes under a contract for the purchase of 200 tons of Regent potatoes grown on land belonging to the seller in Whaplode, to be riddled 1½-in. riddle, and delivered at railway station as purchaser may direct, the purchaser to find riddles. The crop had failed and the seller could only deliver 80 tons. It was held that, on the principle of *Taylor v. Caldwell* (18), he was relieved from further performance of the contract. BLACKBURN, J., says it is a contract for the

I delivery at a future time of a specific thing so far as that it is for the delivery of a portion of a specific thing—in other words, the court implied a condition that a particular thing, the crop, should come into existence or remain in existence. This case had no reference to "specific" or "ascertained" for the purpose of passing the property or of specific performance, and I conceive that it would have startled LORD BLACKBURN, if the whole crop had come into existence, to have it contended that 200 tons under the contract had been ascertained before they were both separated and riddled. The case of *Howell v. Coupland* (9) would now be covered either by s. 5 (2) of the Act, or, as is suggested by the learned authors of the last

editions of BENJAMIN ON SALE, by common law principles retained by s. 61 (2) of the Act. A

Inasmuch as we are bound by the plain language of the Act, I do not think that decisions in cases before 1893 are of much value, but I must refer to two cases in which two equity lawyers of great authority have uttered dicta on which the buyers' counsel naturally rely. The first is *Hoare v. Dresser* (7). In that case Dresser, who sold on del credere commission for one Norrbom, a Swedish timber merchant, made advances to Norrbom on assurance that certain cargoes would be shipped consigned to him. In fact, the cargoes were shipped, but the bills of lading were negotiated to Hoare. Dresser claimed an equitable charge over the cargoes to the extent of his advances; but it was held that whatever right he had would not prevail against the legal title which Hoare got from receipt of the bills of lading without notice. So far the case has little to do with the point of specific performance which we are considering. LORD CRANWORTH in his speech uses these words: B

"At law there must be a positive appropriation to give a legal title; that was established in *Wait v. Baker* (20). So that however unjustly a party may be acting who says, I shall send you from abroad some timber by a particular ship, if in truth he sends it so as to make it the legal property of another that legal property must prevail. The differences between law and equity I take to be this; that if there has been an engagement to appropriate a particular cargo, or an engagement to satisfy a contract out of a particular thing, such as to appropriate a part of a larger cargo, in either of those cases equity will interfere, in the one case, to decree what in truth is a specific performance, or something very like a specific performance of the contract to appropriate a particular cargo; and, in the other, to give the purchaser a lien upon the larger cargo, in order to enable him to satisfy himself of the smaller demand. As if a merchant here were to order from the Black Sea a cargo of 100 quarters of wheat, and the correspondent were to say, 'I have sent a cargo containing 500 quarters, with directions out of it to let you have 100 quarters' when the 500 quarters arrive, unless there be some legal or equitable right on the part of the holder to interfere, equity will give the merchant a lien upon the larger cargo, just as it would, out of a large fund of money, give a lien on the appropriation of a smaller sum to any person who was equitably entitled to it. But I apprehend that neither in equity nor in law can there be any jurisdiction to say, that because there is property of the person who ought to have fulfilled his contract, therefore you can make that property available for the specific performance of the engagement. I have thought it necessary to say this much; but that question does not properly arise here, because, in my opinion, if Dresser had taken the proper steps upon the arrival of the cargo, and before any liability had been incurred by Hoare & Co., I strongly incline to think that he had an equitable right upon this timber." C

I confess that I do not fully comprehend, and no one in argument explained, to what particular set of facts the learned Lord was referring when he spoke of an engagement to appropriate a particular cargo. If he meant an agreement to sell a named cargo, there can be no question that the goods would be goods "identified and agreed upon at the time the sale was made" and specific performance might be granted in the terms of the Acts of 1856 and 1893, though the learned Lord does not seem to have had in his mind the rule that specific performance is not usually granted of a contract for the sale of ordinary mercantile commodities. Moreover, in the case he puts, if no more appeared, the property would obviously pass at law as soon as the contract was made, and the same would be true if the engagement was to sell a future named cargo as soon as the cargo was put on board. "The engagement to appropriate part of a larger cargo" which LORD CRANWORTH says would entitle the purchaser to a decree for a lien on the larger cargo in order to enable him to satisfy himself of the smaller demand, is more difficult. If a D

A merchant were to "order" a cargo of 100 quarters of wheat from the Black Sea (a Lilliputian cargo) and the foreign merchant were to send him 100 quarters out of a cargo of 500, with great respect, there would be no assignment. I assume that LORD CRANWORTH had in his mind an agreement for the purchase of 100 quarters followed by a direction by the seller to someone (query the matter or the consignee) to deliver to the purchaser 100 quarters. No doubt such a direction might amount to an equitable assignment of 100 quarters, and if so, equally, no doubt, the assignment could be enforced against the bulk. But in that case the equitable assignment arises, not out of the contract of purchase, but the independent direction to a third person communicated to the buyer. But obiter dicta as to legal relations created by commercial transactions in a world where bills of lading and delivery orders appear to be ignored, do not, I confess, appear to me to afford solid foundation for decision of rights in a different and more real environment.

The other case is *Holroyd v. Marshall* (8). The question in that case concerned the rights created in equity by an agreement to assign after-acquired property. The principles laid down in that case and in *Tailby v. Official Receiver* (17) are perfectly well established, and as far as I know, are not distinguishable by anyone in this case. But LORD WESTBURY in giving judgment is said in the report in *Holroyd v. Marshall* (8) to have used these words (10 H.L.Cas.):

"A contract for the sale of goods, as, for example, of 500 chests of tea, is not a contract which would be specifically performed, because it does not relate to any chests of tea in particular; but a contract to sell 500 chests of the particular kind of tea which is now in my warehouse in Gloucester, is a contract relating to specific property, and which would be specifically performed."

The report in the LAW JOURNAL (33 L.J.Ch. at p. 197) indicates that the former report may be inaccurate; in any case, the criticism of FRY, L.J., on this dictum in his book on SPECIFIC PERFORMANCE, para. 82, seems well founded and weakens its authority.

I now proceed to discuss the suggestion that, apart from the right to specific performance under s. 52 of the Act, there was in this case an equitable assignment to the buyers of 500 tons of flour which entitled the buyers to claim from the trustee delivery of 500 tons out of the 530 tons remaining in his possession, and, indeed, gave the buyers a charge or lien over the whole 1,000 tons to which the debtor was entitled under his contract with Balfour, Williamson & Co. In the view that I have taken of the facts of this case, I have already said that the goods were never so ascertained that specific performance could have been ordered of them. This consideration would appear to defeat the supposed equitable assignment, and I will not repeat the passages referred to by the Master of the Rolls which establish the test. I have already indicated my own view of the buyers' contract of Nov. 21 and suggested that the debtor does not in fact agree to sell to the buyers any aliquot part of the 1,000 tons, which in fact he had agreed to buy from Balfour, Williamson & Co. But even if he had, I do not think that at any time here there was an equitable assignment which ever gave the buyers a beneficial interest in those goods. It has been difficult to elicit the moment of time at which the beneficial interest came into existence. At various times in the argument it has been the moment when the 1,000 tons were shipped, when they were declared to the debtor by Balfour, Williamson & Co. when the bills of lading came into the possession of the bank, when the buyers paid the £5,933 5s. to the debtor, when the goods were taken up by the trustee, when the 530 tons came into the possession of the trustee. The difficulty illustrates the danger of seeking to conduct well-established principles into territory where they are trespassers. Without dividing the point, I think that much may be said for the proposition that an agreement for the sale of goods does not import any agreement to transfer property other than in accordance with the terms of the Act, that is, the intention of the parties to be derived from the terms of the contract, the conduct of the parties, and the circumstances of the case, and, unless a different intention appears, from the rules set

out in s. 18. The Act was passed at a time when the principles of equity and equitable remedies were recognised and given effect to in all our courts, and the particular equitable remedy of specific performance is specially referred to in s. 52. The total sum of legal relations meaning by the word "legal" existing in equity as well as in common law arising out of the contract for the sale of goods may well be regarded as defined by the Act. It would have been futile in a code intended for commercial men to have created an elaborate structure of rules dealing with rights at law if at the same time it was intended to leave, subsisting with the legal rights, equitable rights inconsistent with, more extensive than, and coming into existence earlier than the rights so carefully set out in the various sections of the Act. The rules for transfer of property as between seller and buyer, performance of the contract, rights of the unpaid seller against the goods, unpaid sellers' lien, remedies of the seller, remedies of the buyer, appear to be complete and exclusive statements of the legal relations both in law and equity. They have, of course, no relevance when one is considering rights, legal or equitable, which may come into existence before the contract for sale. A seller or a purchaser may create any equity he pleases by way of charge, equitable assignment, or any other dealing with or disposition of goods, the subject-matter of sale; and he may create such an equity as one of the terms expressed in the contract of sale. But the mere sale or agreement to sell or the acts in pursuance of such a contract mentioned in the Act will only produce the legal effects which the Act states. But without deciding this point we have to apply the words of LORD WESTBURY in *Holroyd v. Marshall* (8) (10 H.L.Cas. at p. 209):

"In equity it is not necessary for the alienation of property that there should be a formal deed of conveyance. A contract for valuable consideration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract is one of which a court of equity will decree specific performance. In the language of LORD HARDWICKE, the vendor becomes a trustee for the vendee; subject, of course, to the contract being one to be specifically performed. And this is true, not only of contracts relating to real estate, but also to contracts relating to personal property, provided that the latter are such as a court of equity would direct to be specifically performed."

It must be remembered that while LORD WESTBURY's proposition that a contract for valuable consideration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract is one of which a court of equity will decree specific performance may be beyond dispute, the converse that when there is a contract of which the court of equity will decree specific performance the beneficial interest has passed is not logically true, and is not the law.

Now is it true that in equity when a man agrees in a contract for the sale of goods to sell part of a specified whole, he agrees to make a transfer of property either present or when the property is in fact acquired? Agreements by a farmer to sell a lamb out of his flock, a ton of potatoes out of his crop grown on his farm, a bushel of apples from his orchard, a gallon of milk from this morning's milking, an egg out of the eggs collected yesterday, seems to me not to amount to an equitable assignment of any of the matters sold, or to give an equitable charge or lien over the whole subject-matter to secure the delivery of the part. The doctrine asserted seems to produce the result that in every case of the sale of future goods, as soon as the goods have become identifiable, the beneficial interest in them passes to the buyer, notwithstanding the provision in the Act that, in the absence of express intention, the property only passes when goods of that description and in a deliverable state are appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, and apparently notwithstanding an express agreement that the property shall not pass except on payment. So to hold would be to defeat the intention of the parties, either express

A or to be implied from their contract being bound by the terms of the Act, and it appears to me not to accord with the principles of equity to impose upon the parties rights which are contrary to their manifest intention. Does it make any difference that the buyers here paid their purchase money in advance of the due date, and in any case before they could get delivery under the contract? I think not, so far as specific performance is concerned the right seems to exist, if at all, independently of whether one party or the other has performed his part of the contract; and I have already dealt with the objections to the demand for specific performance under the provisions of s. 52 of the Act. LORD WESTBURY in *Holroyd v. Marshall* (8) uses wide words in the passage beginning:

C "But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he received the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a court of equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a court of equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract. For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained."

E I cannot help thinking that in his reference to property real or personal, the learned Lord was not directing his mind to contracts for the sale of goods which ordinarily would not be "of that class of which a court of equity would decree the specific performance." I cannot believe he intended that in the cases suggested above the farmer, the seller, would hold the lamb, or the potatoes, or the bushel of apples, F or the egg in trust for the purchaser as soon as they were ascertained, much less as these words are supposed to mean as soon as they were acquired by the seller. Similarly, I fail to see how the payment of the price can convert that which was not an equitable assignment before the payment, into an equitable assignment after the payment. Payment of the price has, no doubt, been material in considering a different question, viz., the right of the purchaser in a contract for the sale of real G property who pays the price or portion of the price before conveyance to be given a lien on the land for his purchase price. The right is correlative to and appears to be derived from the right of the unpaid vendor of real property to claim a lien on the land after conveyance for the unpaid purchase price. But the latter lien, in my judgment, does not exist in the case of an ordinary sale of goods. The remedies are defined, the unpaid vendor has a lien which is a possessory lien and H has a right of stoppage in transitu, but in my experience no one has ever claimed or been given in the countless cases that have arisen of vendors of goods remaining unpaid after delivery, a right to a lien over the goods in the possession of the purchaser. Similarly, the purchaser who in pursuance of the contract of sale has paid the purchase price or part of it before delivery has never claimed or received a lien over the property which is in the hands of the vendor. I am satisfied that I such liens would be quite inconsistent with the provisions of the Act, and do not exist. It is, however, said: Does not common honesty demand that such a beneficial interest should be created? The answer is, I think, that the test of honesty is inadequate; it is too narrow or too wide. The sphere of honesty is not confined to dealings with beneficial interests in property. Many would think that deliberately to break a contract for the sale of future goods, where no question of property at law or in equity could arise, would be dishonest, but the law gives only a remedy in damages. In the simple cases suggested, which I hesitate to repeat, the farmer might be acting dishonestly in parting with the whole of his flock, his

apples, his potatoes or his eggs to a different purchaser, but I venture to think that, if he does, the purchaser, even with notice, acquires a complete title to the property bought.

This brings me to the last subject of this too lengthy judgment. If the contentions put before the court for the buyers be correct and beneficial interests in property are treated as suggested, the whole course of business transactions will be fundamentally affected. Many large business transactions such as this—indeed, nearly all import transactions—are financed by banks or financial houses as this was. It is quite common for the banker to be given information of sub-sales—indeed, he often asks for it, or it is proffered voluntarily as some guarantee of the stability of the bank's customer. Such notice was given here. If notice of the sub-sale under a contract which becomes specific when delivery is made is notice of equitable interest in the sub-purchasers the bank would be affected even though by taking the bills of lading, or other documents, they acquired the legal title. They would have to satisfy themselves on being paid off that the equitable interests were not being defeated, and their own powers of disposition, if their customer made default, would be enormously restricted. Presumably they would have to communicate with each sub-purchaser. The effect of the decision below, when once appreciated, would throw the business world into confusion, for credit would be seriously restricted. The net result of this decision is that the buyer of goods in these circumstances is in no better position in bankruptcy than the seller. If a seller of goods delivers them to the buyers before payment, trusting to receive payment in due course, and the buyer becomes bankrupt, the seller is restricted to a proof, and can assert no beneficial interest in the goods. There seems no particular reason why a different principle should prevail where a buyer hands the price to the seller before delivery of the goods, trusting to receive delivery in due course. In both cases credit is given to the debtor, and the buyer and the seller respectively take the well-known risk of the insolvency of their customer. I regret to differ from the opinion of the judges below and my brother SARGANT. I do not think that there is any difference as to the existence of the principles of equity which are involved. They are well settled and beyond doubt in their own sphere beneficial. The difference has been as to their application to such facts as appear in this case, and I feel bound to repel the disastrous innovations which, in my opinion, the judgments under review would introduce into well-settled commercial relations. I think this appeal should be allowed and the motion dismissed with costs here and below.

SARGANT, L.J.—I am sorry to find myself in disagreement with the majority of the court in this case, and the more so because my disagreement is complete and fundamental. In the circumstances of this case, I am of opinion that there had, prior to the bankruptcy, been created in favour of the buyers equitable rights of the nature of equitable lien or equitable assignment in respect of this wheat, which were enforceable against the bankrupt or his trustee in bankruptcy, and which prevented the wheat vesting in the trustee otherwise than subject to those equitable rights.

The most important document in the transaction is undoubtedly the sold note dated Nov. 21, 1925, which forms the contract between the bankrupt, trading as Wait and James, or as Wait & Co., and the buyers. By this contract the bankrupt agreed to sell the buyers a definite quantity or portion, namely, 500 tons, or one half of a parcel of 1,000 tons of Western White wheat agreed to be bought by the bankrupt from Balfour, Williamson & Co., under a contract of the previous day, that is to say, a parcel of 1,000 tons Western White wheat to be shipped between Dec. 16 and 31, 1925, on board a motor vessel named the *Challenger*. The contract of Nov. 21 was thus obviously not a general contract for the purchase of 500 tons of Western White wheat, but a contract for the purchase of a definite portion of a specific parcel of that wheat to be shipped within a definite period on a named vessel, and the contract would, necessarily, fail of its own inherent force should

A there not be a shipment in accordance with the earlier and larger contract. But to render this additionally plain there was added to the contract a special provision in these terms, namely:

B "The wheat sold as above is part of a parcel bought from Balfour, Williamson & Co. under contract dated Nov. 20, and in the event of their not duly fulfilling same, it is understood that Messrs. Wait and James are not to be held liable to buyers."

C Further, the contract of Nov. 21, 1925, being in respect of not an ascertained parcel or part of an ascertained parcel of wheat, was obviously incapable of transferring the property in that parcel or in any part of it, but operated merely as an executory contract for the sale of a definite portion of that parcel if and when it was ascertained by virtue of its subsequent shipment on board the *Challenger* in accordance with the contract of Nov. 20. There can, I think, be no doubt that this was the effect of such a contract, apart from and independently of the Sale of Goods Act, 1893, and the same result obtains under s. 5 of that Act.

D A parcel of 1,000 tons of Western White wheat was in fact shipped by the agents of Balfour, Williamson & Co. on the *Challenger* on or about Dec. 21, 1925, in accordance with their contract of Nov. 20, 1925, and a bill of lading of Dec. 21 was duly made out and forwarded to the Westminster Bank, who were financing the transaction for the bankrupt. Thenceforward, the general property in the 1,000 tons of this wheat appears to have been in the bankrupt, and the special property in it in the bank. But nothing seems to turn on this. Further, the cargo in the

E *Challenger* also comprised a further 500 tons of Western White wheat shipped to the bankrupt by other vendors, Sanford & Co., under bill of lading of Dec. 22, 1925, and 1,000 tons of another variety of wheat, namely, Northern wheat, also consigned to the bankrupt, both these parcels being financed in the same way by the Westminster Bank. It also appears that the two shipments of Western White wheat were not in fact stowed quite separately, 1,190 tons of this wheat being in the after hold and 310 tons of it being in the top of No. 2 hatch. But no importance seems

F to me to attach to either of these circumstances since these were three distinct shipments, and there was a separate special property and general property in each of the three parcels, namely, the 1,000 tons of Western White wheat, the 500 tons of Western White wheat and the 1,000 tons of Northern wheat under each of the three separate bills of lading relating thereto respectively. On Dec. 22, 1925, the bankrupt informed the buyers that the wheat had been shipped in the *Challenger*

G on the previous day. The price of the wheat was payable in London thirty-three days after sight of documents in London, that is thirty-three days after Jan. 4, 1926, or on Feb. 6, 1926. Just previously to that date the bankrupt forwarded to the buyers a provisional invoice of the wheat which showed that, after deducting a freight of 30s. per ton, which was payable only on arrival at the port of destination, Avonmouth, the price payable was £5,933 5s., and this sum was paid by the

H buyers to the bankrupt by cheque on Feb. 5 or 6. The *Challenger* duly arrived at Avonmouth on Feb. 28, 1926, but before that date, namely, on Feb. 17, the bankrupt committed an act of bankruptcy, and he was adjudicated on Feb. 24, and a Mr. Collins, who was first appointed special manager, and afterwards the trustee of his estate, declined to recognise any title of the respondents to any part of the Western White wheat in question, and left them to prove in bankruptcy for the

I purchase money they had already paid.

In this state of things, the learned county court judge, while holding that the buyers had no specific right entitling them to the 500 tons of wheat on payment of the balance of their purchase money, came to the conclusion that on the principle of *Ex parte James* (27) it would be inequitable to allow the trustee to retain both the purchase money and the wheat, and ordered repayment by the trustee to the buyers of the £5,933 5s. so paid by them. On the other hand, the Divisional Court, while declining to act on the principle of *Ex parte James* (27), decided that the buyers' contract was one for the purchase of specific goods within the Sale of Goods

Act, 1893, and that the buyers were entitled to the 500 tons of wheat or the proceeds thereof on paying the balance of £750 due in respect of freight. It is admitted by the buyers that they cannot rely on the view taken by the learned county court judge, and that they must succeed, if at all, on showing that they had some definite equitable right or lien in respect of the wheat in the *Challenger* entitling them to claim 500 tons of the parcel of 1,000 tons comprised in the bill of lading of Dec. 21, 1925, on payment of the balance of the agreed purchase money, namely £750. The trustee in bankruptcy denies any such right, and says that they were only entitled to the personal obligation of the bankrupt to deliver 500 tons of any Western White wheat, that this was a general obligation sounding in damages only, and that accordingly they are only entitled to prove in the bankruptcy for the breach of this obligation, or, what is substantially the same thing, for the £5,933 5s. paid by them. The question has to be determined on a consideration of the relative positions of the bankrupt and the buyers just before the commencement of the bankruptcy. At this time the wheat contracted to be purchased by the buyers had been definitely ascertained under their contract and notification and invoice, as 500 tons, or one half, of the particular parcel of 1,000 tons then on board the *Challenger*, and comprised in the bill of lading of Dec. 21, 1925. The bankrupt was bound to deliver and the buyers were entitled to receive 500 tons out of that very parcel of 1,000 tons. The bankrupt's obligation could not be discharged by the delivery of 500 tons of Western White wheat derived from any other source, not even by the delivery of the whole or a part of the 500 tons shipped on the *Challenger* by Sandford & Co., under the bill of lading of Dec. 22, 1925, though, no doubt, if the quality of that wheat were the same, as it would seem to have been through its being shipped partly intermixed with the other wheat, the purchasers might have accepted the substituted wheat or any part thereof that was delivered to them as being equivalent to what they had purchased. But as a matter of strict contract the only wheat which was deliverable under the buyers' contract, and which could be forced on them under that contract, was 500 tons of the wheat bought by the bankrupt from Balfour, Williamson & Co., and comprised in the bill of lading of Dec. 21, 1925.

Now, assume that the buyers, instead of agreeing to buy half of the 1,000 tons to be procured from Messrs. Balfour, Williamson & Co., had agreed to buy the whole parcel and had paid the bankrupt the whole purchase money therefor less only the £1,500 for freight. It is clear to my mind in such a case the buyers would have been entitled to something much more precise than a mere personal right against the bankrupt to enforce delivery of the 1,000 tons; they would have been entitled to an equitable interest in and right to the particular parcel of 1,000 tons subject only to the payment of the balance of the purchase money represented by the freight. This right would no doubt be capable of being defeated should the bankrupt sell the 1,000 tons fraudulently to a purchaser for value without notice in such a way as to vest the legal property in the wheat in him. But, subject to that possibility, there would have passed to the buyers the equitable interest in the specific cargo to the extent of the price paid, and they would be entitled to have the 1,000 tons delivered to them upon payment of the balance of £1,500. And if the bankrupt had threatened to sell or otherwise deal with this 1,000 tons cargo in a way inconsistent with the buyers' equitable interest, they would, in my judgment, have been entitled to obtain an injunction against any such sale or other dealing. Is there, then, any real difference in the equitable position of the buyers, because they agreed to buy, not the whole 1,000 tons parcel, but 500 tons or one half only of that parcel? I think not. They became entitled, not to the whole 1,000 tons, but to have made over to them, subject to the payment of £750, 500 tons out of that definite specific cargo of 1,000 tons. It would be a fraud for the bankrupt to sell or deal with the 1,000 tons in any manner that would prevent 500 tons part thereof being left available to satisfy the claim of the respondents. He could not justify the making of three fresh contracts to sell 500 tons of wheat out of his parcel of 1,000 tons by alleging that he was merely making general contracts to sell that amount of wheat. He would be dishonestly purporting to sell the same wheat

A twice over, and, on the threat of any such sale or other dealing, the buyers would be entitled to an injunction to restrain it, if and so far as it would defeat their equitable right. Or, in other words, they had and were entitled to enforce an equitable lien on the 1,000 tons for the purpose of protecting their right to receive out of the 1,000 tons the amount of their purchase, namely, 500 tons. If this is so, no question arises, as was suggested by counsel for the trustee, of the particular

B creditors, the buyers, being paid in priority to the general creditors out of the general assets of the bankrupt, including the 500 tons of wheat agreed to be bought by the buyers. The case is one in which the 1,000 tons of wheat, or such part thereof as had not been sold by the bankrupt to other persons, would vest in the trustee in bankruptcy subject to the equitable right of the buyers to have provided thereout 500 tons upon payment by them of the balance of the purchase price. And

C it is to be observed that the bankrupt here, so far from acting fraudulently or doing anything which might give a superior title to a subsequent purchaser and so prevent the bankrupt from fulfilling his equitable obligation to deliver 500 tons of the specific parcel of 1,000 tons Western White wheat to the buyers, was careful to dispose only of so much of the parcel in question as left a residue of 530 tons of the Western White wheat available to satisfy that equitable obligation.

D I will now proceed to examine the cases, some of them of the highest authority which, in my judgment, establish conclusively the propositions I have stated. But before doing so I desire to dispose of a misapprehension that appeared to me to underlie a good deal of the argument for the trustee, namely, that no equitable right or lien of the kind in question would be given effect to except where a court of equity (and now any court administering equity and bound by statute to recognise the prevalence of equity) would grant a decree of specific performance in the ordinary sense. Courts of equity when enforcing a contract to assign or charge an identified property caused that very property to be assigned or charged, and did not leave the assignee or chargee to his mere right of damages against the assignor when the latter was in a position to assign or charge the property: see LORD

E HARDWICKE's judgment in *Wright v. Wright* (28) (1 Ves. Sen. at p. 412). But in so doing the court acted independently of the doctrine of specific performance in the ordinary sense, and equitable assignments were enforced even where specific performance was impossible: see *Metcalfe v. Archbishop of York* (14); LORD MACNAGHTEN in *Tailby v. Official Receiver* (17), explaining or correcting a phrase of LORD WESTBURY's in *Holroyd v. Marshall* (8); WHITE AND TUDOR, LEADING CASES IN EQUITY (8th Edn.), p. 105; and TUDSBURY ON EQUITABLE ASSIGNMENTS (1912), p. 14. That there would have been a perfectly good equitable assignment to the buyers had their contract been for the whole 1,000 tons of the parcel of Western White wheat ultimately included in the bill of lading of Dec. 21, 1925, is clear from the decisions of the House of Lords in *Holroyd v. Marshall* (8) and *Tailby v. Official Receiver* (17). The fact that the property in question was future and unascertainable at the date of the contract is shown by these cases to be quite immaterial so

H long as it was described so clearly as to be ascertainable when the contract came to be enforced. The words of LORD WESTBURY in the former case, as cited by ASTBURY, J., and as qualified by LORD MACNAGHTEN in *Tailby v. Official Receiver* (17) are decisive of this question, and the fact that the property in the 1,000 tons of Western White wheat in question would not have passed is quite immaterial. Indeed, it is just because the legal property has not passed that in many of these

I cases it is necessary to invoke the aid of equity to make the contract completely effective. The decision of the Court of Appeal in *Re Clarke, Coombe v. Carter* (8), a case distinguishing *Tailby v. Official Receiver* (17) at a time when the decision in the latter case had not been reversed in the House of Lords, states the equitable doctrine very clearly. There BOWEN, L.J., says:

“There is another kind of vagueness which arises from the property not being ascertained at the date of the contract, but if at the time when the contract is sought to be enforced the property has come in esse and is capable of being

identified as that to which the contract refers, I cannot see why there is any such vagueness as to prevent a court of equity from enforcing the contract." A

Then he distinguishes the case, which is not this case, where the contract is merely to supply a given quantity of goods of a particular description. Further, the general position in equity of a purchaser who has paid portions of his purchase money before obtaining a legal title to the property purchased is clearly stated in *Rose v. Watson* (15) which, though dealing with a purchase of real estate, lays down general principles equally applicable to purchasers of personal estate, and recognised that with each payment of purchase money under the contract the purchaser acquires a corresponding interest in the subject-matter of the contract. It will be remembered that, although the document in the present case was an agreement to sell, it was none the less an equitable assignment. Equitable assignments of future property are always agreements to assign: see *Collyer v. Isaacs* (4). B C

But are the authorities equally or sufficiently clear to the same effect where what is claimed to be equitably assigned is not the whole of a definite consignment of goods, or the whole of a sum of money? It seems to me that they are. I will not rely on the remarks of LORD WESTBURY to this effect as reported in 10 H.L.Cas. at p. 191, because his language is somewhat differently stated in the report of the same case in the LAW JOURNAL, and it may be that the instance he was putting was not a contract to sell 500 chests of a particular kind of tea out of a larger number of chests of the same kind in the vendor's warehouse, but one to sell the whole 500 chests of that kind of tea which were in the warehouse. But the reasoning of LORD CRANWORTH in *Hoare v. Dresser* (7) covers the exact point, and draws the clearest possible distinction between a general engagement to sell property of a kind similar to some property possessed by the vendor and a specific engagement to sell part of the very property which the vendor has (or in view of *Holroyd v. Marshall* (8) and *Tailby v. Official Receiver* (17) may therefore have). LORD CRANWORTH's words have been quoted by ASTBURY, J., but they are so important and so apt that I will repeat them here. He said: D E

"The difference between law and equity I take to be this: that if there has been an engagement to appropriate a particular cargo, or an engagement to satisfy a contract out of a particular thing, such as to appropriate a part of a larger cargo, in either of those cases equity will interfere, in the one case, to decree what in truth is a specific performance, or something very like a specific performance of the contract to appropriate a particular cargo; and, in the other, to give the purchaser a lien upon the larger cargo in order to enable him to satisfy himself of the smaller demand." F G

A little further on he says:

"But I apprehend that neither in equity nor in law can there be any jurisdiction to say that because there is property of the person who ought to have fulfilled his contract, therefore you can make that property available for the specific performance of the engagement." H

The former and not the latter alternative is that presented by the facts in the present case.

True, it is, that in *Hoare v. Dresser* (7) the defendant, the equitable assignee of a portion of a larger parcel of goods, failed as against the plaintiff. But this was because the plaintiff had acquired an intermediate title, which in all the circumstances of that particular case was held to be superior to, and to displace, the equitable title of the defendant. That is one of the dangers inherent in a mere equitable title. On the other hand, it was obviously recognised that, in circumstances not as strongly in the defendant's favour as those in the buyers' favour here, the defendant had an equitable title which was good except as against the stronger title of the plaintiff. A decision to the same effect is that of the majority of the Court of Appeal in the leading case of *Brice v. Bannister* (1). There a direction had been given for value to pay to the plaintiff a sum of £100 out of the I

A moneys due or to become due to the assignor from the defendant, for whom the assignor had contracted to build a vessel for a price payable by instalments. This direction was held to amount to a good equitable assignment to the extent of £100 of any moneys so to become due, and the defendant having disregarded notice of the assignment, and subsequently paid more than £100 to the assignor out of sums subsequently falling due, was decreed to pay that sum to the plaintiff. The sum of £100, though part only of larger sums that had not become due and were unascertained at the date of the assignment, was regarded as a specific sum, for otherwise it was, as laid down by LORD CRANWORTH and by BOWEN, L.J., in the cases already referred to, incapable of being the subject of an equitable assignment. It is not uninteresting to remark that in the dissenting judgment of BRETT, L.J., in *Brice v. Bannister* (1), the very objection raised by the counsel for the trustee in the present case occurs, namely, that a decision in favour of the equitable assignee would be fatal to ordinary business transactions. A similar view of what constitutes specific goods was taken by the Court of Appeal in *Howell v. Coupland* (9), where there was an agreement to supply 200 tons of potatoes out of a produce of a particular farm and in a particular year, and the crop did not amount to more than about 80 tons. The vendor was not held liable in respect of the balance of the tonnage. MELLISH, L.J., said:

"This is not like the case of a contract to supply so many goods of a particular kind, where no specific goods are to be sold. Here there was an agreement to sell and buy 200 tons out of a crop to be grown on specific land, and so that it is an agreement to sell what will be and may be called specific things; therefore, neither party is liable if the performance becomes impossible."

E It was urged for the trustee that this was a mere case of the court declining to enforce a contract which had turned out to be impossible of performance. But the reason why it had turned out to be impossible was because it was a contract for the sale of specific goods and these specific goods partially failed. A general contract would not have been impossible of performance. Precisely analogous are the decisions as to what constitutes specific legacies in wills. A bequest of £1,000 Consols is a general bequest of Consols to that amount, and so is quite independent of whether the testator had Consols to that amount at the date of his will or at the date of his death. The legatee is entitled to have that amount furnished for him, but his legacy will abate with other general legacies should the amount of the estate be insufficient. On the other hand, a legacy of £1,000 Consols out of Consols I now possess (or, I think, out of my Consols I may inherit from X.Y.) is specific. It will not abate with general legacies, but it will be liable to fail should the testator at the time of his death fail to possess the Consols to which his will refers. The law is thus stated in HAWKINS in his classic work ON THE INTERPRETATION OF WILLS (1st Edn., p. 303; 3rd Edn., p. 352), namely:

H "A bequest of 1,000 Consols out of my 3 per cent. Consols (*Mullins v. Smith* (29)), or of £1,000 part of my 3 per cent. Consols (*Kirby v. Potter* (30)), is a legacy of so much stock out of stock and is therefore specific."

I So far, there is what appears to be an overwhelming mass of authority to show that the agreement for sale in this case of 500 tons of Western White wheat out of a parcel of like wheat, which was to be and was identified as shipped within a definite period by definite shippers and in a definite vessel, was an agreement for the sale of specific goods; that it amounted to an equitable assignment, enforceable against the particular parcel of goods in the bankrupt's hands, or in those of any successor in title not having any such higher title as might accrue to a purchaser taking the legal property in the parcel of wheat for value and without notice, and, therefore, that the buyers, as purchasers of these specific 500 tons, having paid the whole of the purchase money therefor except £750, and finding in the hands of the bankrupt or his trustee in bankruptcy a sufficient residue of the particular parcel of 1,000 tons to meet the 500 tons sold to them, are entitled to have these 500 tons (or the proceeds thereof under the sale since made by arrangement between

the parties) made over to them on payment of this balance of £750. But before A leaving the matter, it is necessary to examine the cases cited for the trustee in support of his contention.

Much reliance was placed on the decision in *Wait v. Baker* (20). But in that case the contract was a quite general one, namely, to sell wheat of a particular description, not to sell the cargo or part of the cargo of a particular ship, and the decision merely involved that the subsequent acts of the vendor were held to B amount almost, but not quite, to an appropriation of a particular cargo to satisfy the general engagement. The facts there fell short of the facts in the present case, in the one vital particular of the nature of the contract. There was substantially the same distinction in the decision by the Scottish courts in *Hayman & Sons v. M'Lintock* (6), with regard to the claim of McConnell & Co. There again the contract under which the claim of McConnell & Co. arose was a general contract C to buy wheat of a certain quality, not a specific contract to buy a part of the wheat belonging to the bankrupt in Hayman's store; and though a delivery order was given to McConnell & Co. which enabled them to get from the store some wheat towards satisfying the general obligation, and would have enabled them, had it been made use of in time to the full, completely to satisfy the obligation, there was D nothing in this delivery order to amount to an appropriation of any part of the wheat in store. Accordingly, as to the balance undelivered McConnell & Co. had nothing to rely on but the unfulfilled general obligation of the bankrupts, and for the breach of this general obligation McConnell & Co. could only rank as general creditors in the bankruptcy. The decision then on this claim is obviously of no assistance to the trustee here. But the decision in the same case with regard to E the claims of Stevenson and Muirhead, Watson & Co. seem to me to tend distinctly in favour of the present buyers. The claimant, Stevenson, had been the holder of a bill of lading for 500 sacks of flour belonging to the bankrupt, and as he had not taken delivery of his flour from the ship, these sacks, together with other flour from the ship, had been, in accordance with the general practice of the shipping company, placed in Hayman & Sons' warehouse in the name of the ship. In these F circumstances, the Lord President, approving the decision on this point of the Lord Ordinary (the language of whose judgment is also well worth considering), said this :

"There is the bankruptcy during which Hayman's store is filled with bags apparently belonging to the bankrupt and bags apparently belonging to this third person; and these bags are so imixed that no one can tell which bags G belong to each. If the storekeeper is not in a position to fulfil his contract, that is to say, if he has not bags enough to satisfy his obligation to deliver bags to both the bankrupt and third party, no doubt then a position of some difficulty may arise. But here there is no such difficulty. It is admitted that Hayman has bags enough to satisfy both the claims of the trustee and of H Stevenson, and in the circumstances I prefigured, what would have happened would be that the bags all being the same, a number corresponding to the number held by the third party would be handed to him, and the rest handed to the trustee. I do not think that anyone could suppose that there was any difficulty in that situation. If that is the situation, what difference does it make if, instead of being a third party, Stevenson is a person who holds a security over the goods provided that security has been well constituted?" I

This reasoning seems to me precisely applicable to the present case, so far as any difficulty arises from any mixing of the 1,000 tons of wheat bought from Balfour, Williamson & Co., with the 500 tons bought from Sandford & Co. And it is also, I think, applicable to the situation in regard to the 500 tons sold to the buyers as portion of the larger parcel of 1,000 tons bought by the bankrupt from Balfour, Williamson & Co., the only difference being that in *Hayman's Case* (6) the original title in Stevenson was a legal title under a bill of lading while here the original title of the buyers is an equitable title under specific agreement of purchase. The

A Lord Ordinary, in his judgment, had referred to the decision in *Re Hallett's Estates, Knatchbull v. Hallett* (31) as being in point. That case, in my opinion, is also in point here, when rightly understood, and shows that the buyers were entitled to a charge on the 1,000 tons comprised in the earlier bill of lading, and through that 1,000 tons, on the whole, 1,500 tons of Western White wheat shipped in the *Challenger* so far as the 1,000 tons and the further 500 tons had been mixed, and that this charge was effective to the extent of 500 tons on any part of either the 1,000 tons or the 1,500 tons to which the bankrupt had given no higher title than that which he himself possessed—that is in the circumstances to the residue of 530 tons.

Again, in *Thames Sack and Bag Co., Ltd. v. Knowles & Co., Ltd.* (19), which was cited for the trustee, the original contract was quite general in its terms. C The only question there was as to an alleged subsequent appropriation. The case is of no assistance here. Even less to the point is *Fothergill v. Rowland* (5). There the contract was one the performance of which involved the working of a mine, and the court refused to enforce indirectly a contract which could not be enforced directly as depending on personal skill. It was a mere illustration of the principle involved in *Lumley v. Wagner* (32), and that class of case. D *Snell v. Heighton* (26) was decided at nisi prius on two grounds, apparent possession and absence of appropriation. As regards this second ground, which is the only one material here, it is to be observed that the argument turned on the question of property only, and not on the question of equitable assignment at all. This was so also in the case of *Laurie and Morewood v. John Dudin & Sons, Ltd.* (13). That action was one by ultimate purchasers against warehousemen and wharfingers. E It turned entirely on the question whether the property in the maize in question had passed to the plaintiffs. Equitable assignment was not suggested in either of the last two cases, and indeed could not be raised in an action to which the assignors were not parties, as was the case there. There is no question in this case of the transfer of the actual property at law in the 500 tons sold to the buyers.

In the foregoing remarks I have dealt with the question on the basis of what F seems to me the well-established law in relation to equitable assignments, quite independently of the Sale of Goods Act, 1893. For it is clear that the Act is not exhaustive of the methods by which an equitable title to goods may be acquired, and does not stultify or negative the effect of any transaction which prior to the Act would have amounted to an equitable assignment, or the creation of an equitable lien. Indeed, s. 55, and still more s. 61, appear to amount to an express G statutory recognition of the possibility of such a title apart from the express provisions of the Act. But I do not in any way dissent from the view of the Divisional Court that the buyers are entitled to succeed under the express provisions of the Act itself when properly interpreted. It seems to me that the agreement between the bankrupt and the buyers was with reference to future goods as defined by s. 5 (1) of the Act, and operated as an agreement to sell those very H goods under s. 5 (3); that within s. 62 of the Act their agreement to sell was a "contract of sale," and the goods were "specific goods"; and that if the "specific performance" dealt with by s. 52 includes the enforcement of a specific equitable assignment or lien (as I think it does) the present case is precisely covered by that section, while if it is limited to specific performance in the more technical sense, the buyers need not rely on the terms of the section, but can, as pointed out by I LORD MACNAGHTEN in *Tailby v. Official Receiver* (17), succeed as merely seeking the enforcement of their specific assignment or lien.

Finally, I desire to deal with the contention of the trustee that the decision of the Divisional Court would interfere with the ordinary way in which business is conducted in these matters. I cannot assent to this view. Ordinary business is not conducted dishonestly. It would on any view of the law have been dishonest of the bankrupt after the sale to the buyers of 500 tons of his specific parcel of 1,000 tons to have sold more than another 500 tons of this parcel to other buyers; and in fact he acted honestly in the matter and reserved a quantity exceeding

500 tons to satisfy the buyers' claim. Further, when the bank learned the situation, they met it spontaneously and simply by opening separate accounts in respect of the separate portions, though, of course, subject to their overriding rights in respect of their special property as mortgagees of the whole. If the bankrupt had acted dishonestly and had sold to third parties in the ordinary course of business and so as to pass the general property in portions of the 500 tons which were subject to the equitable claim of the buyers, those third parties would have gained a title superior to the buyers, just as in *Hoare v. Dresser* (7) the defendant's equitable right was displaced by the subsequent superior right of the plaintiff. In my judgment the appeal ought to be dismissed.

Solicitors: *Peacock & Goddard*, for *Bevan, Hancock & Co.*, Bristol; *Hancock & Willis*, for *Barry & Harris*, Bristol.

[Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law.]

Re DEBTORS (No. 669 of 1926)

[COURT OF APPEAL (Lord Hanworth, M.R., Warrington and Scrutton, L.JJ.), July 28, 26, 1926]

[Reported [1927] 1 Ch. 19; 96 L.J.Ch. 33; 136 L.T. 182]

Bankruptcy—Petition—Conditions on which creditor may petition—Debt a "liquidated sum"—Need to be liquidated at date of act of bankruptcy—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 4 (1) (b).

By s. 4 (1) (b) of the Bankruptcy Act, 1914, a creditor is not entitled to present a bankruptcy petition against a debtor unless the debt owing by the debtor to the petitioning creditor is a "liquidated sum payable either immediately or at some certain future time." To satisfy this provision the debt must exist as a liquidated debt at the date of the act of bankruptcy on which it is intended to found the petition. Where, therefore, at the date of the act of bankruptcy debtors owed the petitioning creditors a debt, but the amount at that date was not determined until three days later,

Held: a receiving order made on the petition was wrongly made and must be rescinded.

Notes. Applied: *Re Debtor* (No. 20 of 1953), *Ex parte Debtor v. Scott*, [1954] 3 All E.R. 74.

As to the nature of a petitioning creditor's debt, see 2 HALSBURY'S LAWS (3rd Edn.) 292 et seq.; and for cases see 4 DIGEST 113 et seq. For Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES 321.

Cases referred to:

- (1) *Re Muirhead, Ex parte Muirhead* (1876), 2 Ch.D. 22; 45 L.J.Bey. 65; 34 L.T. 303; 24 W.R. 351, C.A.; 4 Digest 124, 1127.
- (2) *Re Whelan, Ex parte Sadler* (1878), 48 L.J.Bey. 43; 39 L.T. 361; 27 W.R. 156; 4 Digest 117, 1066.
- (3) *Re Hayward, Ex parte Hayward* (1871), 6 Ch. App. 546; 40 L.J.Bey. 49; 24 L.T. 782; 19 W.R. 833, L.JJ.; 4 Digest 116, 1051.
- (4) *Moss v. Smith* (1808), 1 Camp. 489; 4 Digest 116, 1050.
- (5) *Ex parte Thomas* (1747), 1 Atk. 73, 126; 26 E.R. 82; 4 Digest 121, 1105.
- (6) *Re Charles, Ex parte Charles* (1811), 14 East, 197; 1 Rose, 372; 16 Ves. 256; 104 E.R. 576; 4 Digest 117, 1065.

- A (7) *Re Raatz, Ex parte Raatz*, [1897] 2 Q.B. 80; 66 L.J.Q.B. 501; 76 L.T. 503, D.C.; 4 Digest 119, 1086.
- (8) *Ex parte Roberts, Ex parte Wells* (1815), 1 Madd. 72; 56 E.R. 28; 4 Digest 117, 1061.
- (9) *Re Holding, Ex parte Holding* (1821), 1 Gl. & J. 97; 4 Digest 123, 1118.
- (10) *Cowie v. Harris* (1827), Mood. & M. 141; 4 Digest 142, 1326.

B **Appeal** by debtors against a receiving order made by the registrar on June 30, 1926.

The facts are set out in the judgment of the Master of the Rolls.

Edward Clayton, K.C., and *Oscar Kean*, for the debtors, referred to *Ex parte Muirhead* (1), *Re Whelan, Ex parte Sadler* (2), WACE ON BANKRUPTCY, p. 55.

C *E. W. Hansell*, for the petitioning creditors, referred to *Ex parte Hayward* (3), *Moss v. Smith* (4), *Ex parte Thomas* (5), *Ex parte Charles* (6), *Re Raatz, Ex parte Raatz* (7).

Clayton, in reply, referred to *Ex parte Roberts* (8) and *Ex parte Holding* (9).

Cur. adv. vult.

D **LORD HANWORTH, M.R.**—The debtors are members of the Rubber Trade Association of London. In April, 1926, there was a considerable fall in rubber values, and at that time the debtors had a number of outstanding contracts for differences with the petitioning creditors, who are also members of the association. The debtors arranged with the manager of their bank that eight cheques given by them should be honoured. Four of those cheques were issued and paid on April 15, 1926, and on April 16 the four remaining cheques were dishonoured. Among

E the latter was one for £218 17s. 3d. in favour of the Rubber Settlement House, which was connected with the association and formed part of it. On April 17 the Rubber Settlement House received notice of dishonour of their cheque in consequence of which they required the debtors to suspend payment. Accordingly, on April 17, the debtors wrote to the petitioning creditors as follows:

F “We very much regret to inform you that we have been compelled to cease payment. A meeting of brokers concerned is being called at the Rubber Trade Association on Monday, the 19th April, at 3 p.m.”

By the Bankruptcy Act, 1914, s. 1 (1), it is provided:

“A debtor commits an act of bankruptcy in each of the following cases...

G (h) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.”

The notice which I have read would, therefore, clearly be an act of bankruptcy by the debtors. Among the regulations which have to be observed by members of the association is included a rule (No. 12) which is as follows:

H “... It is a fundamental rule of the association that if a receiving order be made against a member or upon any member becoming insolvent, compounding or making any arrangement with his creditors or suspending payment, or if, in the case of a company which is a member, the company becomes commercially insolvent, or if in the opinion of the committee a member, whether a company or not, becomes a defaulter, every outstanding contract for rubber of such member in existence on the day of such receiving order, insolvency, arrangement, composition, liquidation, suspension or default shall be closed

I at the market price of the day as certified by the committee, and the net differences only which shall thereupon be found due between such member and the other members of the association shall be paid or payable.”

Both the petitioning creditors and the debtors were members of the association, and r. 12, therefore, bound them both. It is clear from the transaction that on April 17 the debtors had become defaulters, and in accordance with the rule the committee of the association were then brought into action and the contracts between the debtors and the petitioning creditors were to be closed at the market

price ruling on April 17, the day on which the debtors became defaulters. What were the market prices which were to determine the amount of the liability of the debtors were to be certified by the committee and the net differences only were payable. On April 20, 1926, the committee, acting under r. 12, issued a notice as follows:

"The committee have this day under cl. 12 of the general regulations relating to the constitution of this association declared that [the debtors] have defaulted, and that their existing contracts shall be closed out at the following prices [which were then set out]. Rubber provisionally and finally declared on c.i.f. contracts or tendered on landed terms must go through in the ordinary way, being paid for by the defaulters' buyer at striking prices."

In that notice the prices were set out with the result that on balance a sum of £830 2s. 4d. was found to be due to the petitioning creditors by the debtors. On June 3, 1926, a petition in bankruptcy was filed by the petitioning creditors founded on the act of bankruptcy of April 17. On June 25 the debtors gave notice of their intention to oppose the petition, but a receiving order was made against them by the registrar on June 30, and on July 6 they gave notice of appeal from that order to this court. Two facts also ought to be mentioned. There was a contest between the debtors and their bank as to whether the bank were right in refusing to honour the four cheques referred to, the debtors alleging that they had made a binding agreement with the manager of the bank whereby the manager had arranged to honour those cheques. The bank had suspended the bank manager on the ground that his action in making such an arrangement was not within his authority. On May 7, 1926, the bank had issued a writ against the debtors claiming £22,487 7s. 10d. in respect of an overdraft and for money lent, and on June 10 the debtors had put in a defence and a counterclaim for damages against the bank for their default in not honouring the four cheques. On July 1 the bank had put in a reply. The statement of affairs shows a deficiency in the debtors' assets of not less than £35,737 1s. 3d.

The objection was taken before the registrar and before this court that the petition was not well founded. It was contended that, although there was an act of bankruptcy on April 17, there was no debt at that date of a liquidated sum, that it was not until April 20 that the amount of the debt was ascertained, that under r. 12 the sum due was only in respect of differences, and, therefore, that on April 17 there was no sum payable by the debtors to the petitioning creditors. This raises an important point under statute law and under the common law of bankruptcy. In s. 30 (3) of the Bankruptcy Act, 1914, a wide range of debts which can be proved for is mentioned, but it is not every debt that is provable in bankruptcy. By s. 30 (2):

"A person having notice of any act of bankruptcy available against the debtor shall not prove under the order for any debt or liability contracted by the debtor subsequently to the date of his so having notice."

That subsection repeats the provision contained in the old statute of 46 Geo. 3, c. 135 (1806), to which reference is made in *Moss v. Smith* (4), but the provision does not touch the point that the debt must be due at the time of the presentation of the petition. To see the conditions on which a creditor may present a petition one must look at s. 4 (1) of the Act which provides:

"A creditor shall not be entitled to present a bankruptcy petition against a debtor unless—(a) the debt owing by the debtor to the petitioning creditor, or, if two or more creditors join in a petition, the aggregate amount of debts owing to the several petitioning creditors, amounts to fifty pounds, and (b) the debt is a liquidated sum, payable either immediately or at some certain future time."

It is said by the debtors that para. (b) means that the debt must be a liquidated sum at the time the act of bankruptcy is committed. On the other hand, the

A petitioning creditors contend that, provided the debt is liquidated at the time the petition is presented, it is sufficient, and, therefore, that, as in the present case the sum was liquidated when the petition was presented, the petitioning creditors complied with the requirements of s. 4.

B It appears that in addition to the statute law there is the common law of bankruptcy which was recognised in 1808 when *Moss v. Smith* (4), in which the same point was insisted upon, was decided by a court presided over by LORD ELLENBOROUGH. In that case it was argued by counsel for the petitioning creditors "that by 46 Geo. 3, c. 135, the commission was not avoided or defeated by reason of the act of bankruptcy being committed prior to the petitioning creditors' debt becoming due, the intention of the statute being to render it immaterial in what order the act of bankruptcy and the petitioning creditors' debt arose, so that both were perfect at the date of the commission." The point relied upon by the creditors in the present case could not be more accurately stated, but upon that point the court were unanimous in refusing to accede to the contention. LORD ELLENBOROUGH said (1 Camp. at p. 491):

D "The grievance which the statute meant to remedy was the practice of up-setting commissions of bankrupt by unexpectedly proving an act of bankruptcy prior to that relied upon on the part of the assignees, as had happened so repeatedly in Steel's bankruptcy, and in other instances. Such was certainly the intention of those who supported the Bill when it passed through Parliament, and this was the natural construction of the clause in question. Could it be contended, then, that by a sidewind, a new class of petitioning creditors' debts was established, and the bankrupt law so materially altered?"

E It is plain that there this very point was argued and directly decided against the contention of the creditors in the present case. In *Ex parte Charles* (6) the same point was raised. It was there argued that "this is a debt by relation from the judgment to the verdict, but however that relation might suffice to make a debt provable under the commission, it is not sufficient to make a petitioning creditors' debt which must be a perfect legal debt at the time of the act of bankruptcy." In reply (14 East at p. 209) it was contended that there was nothing in the statute 5 Geo. 2 which required the petitioning creditor to have demandable debt at the time of the act of bankruptcy. LORD ELLENBOROUGH, however, held that the debt in that case was not a sufficient debt in law to support the commission. More recently in *Ex parte Hayward* (3) the same point was considered and SIR WILLIAM JAMES said:

H "Was there then a petitioning creditor's debt at the time of the act of bankruptcy? I am of opinion that there was not. The date of the bill proves nothing. It is necessary to prove the issue of the instrument before the act of bankruptcy. The instrument itself, as LORD TENTERDEN says in *Cowie v. Harris* (10), does not show the period of the endorsement or acceptance. Here that which ultimately ripened into an acceptance was written before the execution of the deed, but it was not an acceptance till the bill was put into the hands of the petitioning creditors; so there was no debt upon it at the date of the deed. Now, it is an old-fashioned rule that the debt of the petitioning creditor must be a debt which existed at the time of the act of bankruptcy, subject to the special provision about debts in futuro."

I MELLISH, L.J., gave the reason for the rule. He said:

"It has always been the settled rule that the debt of the petitioning creditor must be a debt which existed at the time of the act of bankruptcy. The law was so settled, not on the ground of any express words in any of the Bankruptcy Acts, but because it would be manifestly unjust that a person who commits an act of bankruptcy, and who happens to have no creditors, or pays

all his creditors in full, should be liable to be made bankrupt on account of that act by some person to whom he afterwards becomes indebted." A

He declared the rule to be that the debt of the petitioning creditor must be a debt which existed at the time of the act of bankruptcy. In *Ex parte Muirhead* (1), COCKBURN, C.J., said (2 Ch.D. at p. 25):

"Now in order to constitute a good petitioning creditor's debt, you must have that which may be the subject of an action at law or suit in equity." B

In *Re Whelan, Ex parte Sadler* (2), BACON, V.-C., said:

"I thought that there was no doubt about the law, that in no case can a man be made a bankrupt unless he owes £50 at the date of the act of bankruptcy."

The decisions in those cases show that there must be at the date of the act of bankruptcy an available debt payable and due from the debtor. Under s. 4 (1) (b) of the Bankruptcy Act, 1914, a creditor is not entitled to present a bankruptcy petition against a debtor unless the debt is a liquidated sum. Having regard to the cases to which I have referred that liquidated debt must exist at the time of the act of bankruptcy. Those authorities have been considered in a note in WILLIAMS' BANKRUPTCY PRACTICE (13th Edn.), p. 42, which has the authority of VAUGHAN WILLIAMS, L.J. That note states: C D

"By what may be called the common law of bankruptcy, it has always been held that the petitioning creditor's debt must have accrued due before the act of bankruptcy on which it is intended to found the petition (*Moss v. Smith* (4)); but the debt need not have been due to the petitioning creditor at the date of the act of bankruptcy." E

It is impossible to neglect that stream of authorities on this point, and, therefore, as there was no sum fixed as due to the petitioning creditors on April 17, 1926, s. 4 of the Act of 1914 has not been complied with, and accordingly no receiving order ought to have been made. The appeal must be allowed with costs.

WARRINGTON, L.J.—I am of the same opinion. It is unnecessary to re-state the facts which have already been stated by the Master of the Rolls. It is sufficient to say that the alleged act of bankruptcy was committed on April 17, and that the sum alleged to be owing was not ascertained until April 20. In those circumstances two questions have been raised (i) whether there was a sufficient act of bankruptcy on April 17, and (ii) whether the debt relied upon by the petitioning creditors was sufficient to support the petition. It has also been said that there was sufficient cause for the exercise by the registrar of the powers conferred upon him by s. 5 (3) of the Bankruptcy Act, 1914, to dismiss the petition, and that he ought to have done so and ought not to have made a receiving order in the circumstances of the case; but, in my opinion, that contention wholly fails on the facts. F G

As to the first question whether there was a sufficient act of bankruptcy on April 17, the act of bankruptcy alleged was that the debtors gave notice to some of their creditors that they were about to suspend payment of their debts, and it was alleged that the persons to whom that notice was given, the petitioning creditors, were not creditors at that time. But that point fails because in s. 1 (1) (h) of the Act of 1914, "creditors," in my opinion, means creditors for the purposes of the Act. The petitioning creditors' debt is undoubtedly a provable debt in bankruptcy, and therefore it cannot be said that the petitioning creditors were not creditors. In my judgment, the notice of suspension was given to creditors within the meaning of s. 1 (1) (h) of the Act of 1914, and, therefore, it constituted an act of bankruptcy by the debtors. H I

Then comes the question whether there existed a good petitioning creditor's debt sufficient to support a petition. Such a debt must fulfil certain conditions which are expressed in s. 4 (1) (a), (b). [His Lordship read (a) and (b) and continued:] At the date of the petition there was a liquidated sum payable immedi-

A ately or at some certain future time by the debtors to the petitioning creditors, and *primâ facie*, therefore, there existed a good petitioning creditors' debt, but by the common law rule in bankruptcy beyond fulfilling the conditions required by the statute, the debt relied upon must also have fulfilled all the conditions required to make it a good petitioning creditors' debt. In the well-known text-book, WILLIAMS' BANKRUPTCY PRACTICE (13th Edn.), p. 42, there is a note in which

B VAUGHAN WILLIAMS, L.J., stated: [His Lordship read the note which is set out in the judgment of the Master of the Rolls.] In my opinion, that note correctly expresses what is the law, that is to say, that the debt must at the date of the act of bankruptcy be such a debt as could be relied upon by the petitioning creditor in support of his bankruptcy petition. Counsel for the petitioning creditors contended that the condition that the debt should be a liquidated sum at the date of

C the act of bankruptcy did not form part of the common law rule of bankruptcy, but, in my opinion, there is no ground for that contention. It seems to me that there must be a debt of a liquidated sum at the date of the act of bankruptcy and that that is the only logical conclusion. In my opinion, for these reasons the receiving order was improperly made and ought to be discharged and this appeal allowed.

D **SCRUTTON, L.J.**—I agree.

Appeal allowed.

Solicitors: *Cohen & Cohen; Coward, Chance & Co.*

[*Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.*]

E

F

AUSTRALIA (OWNERS) *v.* NAUTILUS (CARGO-OWNERS) THE AUSTRALIA

G [HOUSE OF LORDS (Viscount Dunedin, Lord Sumner, Lord Phillimore, Lord Carson and Lord Blanesburgh), April 19, 20, June 11, 1926]

[*Reported* [1927] A.C. 145; 95 L.J.P. 145; 135 L.T. 576;
42 T.L.R. 614; 17 Asp.M.L.C. 86; 32 Com. Cas]

Admiralty—Trial—Trinity Masters—No judicial functions—Duty of court.

H Where, in an Admiralty action, Trinity Masters sit to advise the court on questions of nautical skill and knowledge they do so as technical advisers and in something of the position of skilled witnesses, and in no way as judges. The court need not take their advice, but in every case must exercise its judicial function of deciding the matter and not surrender any part of that function. If the members of the court entertain an opinion contrary to the advice given by the Trinity Masters they are bound to give effect to their own view. Questions should not be put to the Trinity Masters in such a form that it is tantamount to asking them whether they would find for the plaintiff or for the defendant. A court of appeal is not bound to pay more attention to the opinion of its own assessors than to that of those who advised the court below. If they differ, the court must make its own choice.

I

Notes. Applied: *The Tovarish*, [1930] P. 1. Referred to: *The Otranto*, [1930] P. 110; *Hall v. British Oil and Cake Mills* (1930), 23 B.W.C.C. 529.

As to actions in the Admiralty Court, see 1 HALSBURY'S LAWS (3rd Edn.) 72 et seq., 116, 117; and for cases 1 DIGEST 158 et seq., 234, 235, 41 DIGEST 993, 994.

Cases referred to :

- (1) *Melanie (Owners) v. San Onofre (Owners)* (1919), 35 T.L.R. 507; 63 Sol. Jo. 552; [1927] A.C. 162, n, H.L.; Digest Supp. A
- (2) *Melanie (Owners) v. San Onofre (Owners)*, [1925] A.C. 246; 94 L.J.P. 17; 132 L.T. 567; 69 Sol. Jo. 808; 16 Asp.M.L.C. 479; 41 T.L.R. 206, H.L.; 41 Digest 850, 7132.
- (3) *Artemisia (Owners) v. Douglas (Owners)* (1925), [1927] A.C. 164, n, H.L.; Digest Supp. B
- (4) *The Alfred* (1850), 3 Wm. Rob. 232; 7 Notes of Cases, 352; 14 Jur. 155; 166 E.R. 949; 41 Digest 994, 8789.
- (5) *The Swanland* (1855), 2 Ecc. & Ad. 107; 164 E.R. 333; 41 Digest 778, 6390.
- (6) *The Magna Charta* (1871), 25 L.T. 512; 1 Asp.M.L.C. 153, P.C.; 41 Digest 993, 8781. C
- (7) *The Aid* (1881), 6 P.D. 84; 50 L.J.P. 40; 44 L.T. 843; 29 W.R. 614; 4 Asp.M.L.C. 432, C.A.; 41 Digest 994, 8785.
- (8) *The Beryl* (1884), 9 P.D. 137; 53 L.J.P. 75; 51 L.T. 554; 33 W.R. 191; 5 Asp.M.L.C. 321, C.A.; 41 Digest 994, 8786.
- (9) *The Koning Willem II*, [1908] P. 25; 77 L.J.P. 65; 98 L.T. 13; 10 Asp.M.L.C. 591, C.A.; 41 Digest 743, 5946. D
- (10) *Gannet (Owners) v. Algoa (Owners), The Gannet*, [1900] A.C. 234; 69 L.J.P. 49; 82 L.T. 329; 9 Asp.M.L.C. 43, H.L.; 41 Digest 993, 8782.
- (11) *The Sir Robert Peel* (1880), 43 L.T. 364; 4 Asp.M.L.C. 321, C.A.; 41 Digest 995, 8798.
- (12) *The Assyrian* (1890), 63 L.T. 91; 6 Asp.M.L.C. 525, C.A.; 1 Digest 236, 1622.
- (13) *The Andalusian* (1878), 3 P.D. 182; 47 L.J.P. 65; 39 L.T. 204; 27 W.R. 172; 4 Asp.M.L.C. 22; 1 Digest 150, 574. E
- (14) *The Marathon* (1879), 40 L.T. 163; 4 Asp.M.L.C. 75; 41 Digest 993, 8773.
- (15) *The New Pelton*, [1891] P. 258; 60 L.J.P. 78; 65 L.T. 494; 7 Asp.M.L.C. 81; 41 Digest 766, 6203.
- (16) *The Banshee* (1887), 57 L.T. 841; 6 Asp.M.L.C. 221, C.A.; 41 Digest 761, 6134. F
- (17) *The Llanelly* (1925), 23 Lloyd, L.R. 187, C.A.; (1926), 25 Lloyd, L.R. 37, H.L.

Appeal by the owners of the steamship *Australia* from an order of the Court of Appeal (BANKES, ATKIN, and SARGANT, L.JJ.), assisted by nautical assessors.

The action arose out of a collision which occurred after dark on the evening of Jan. 20, 1923, in the River Scheldt, a little below Antwerp at a place where the river took a sharp turn, between the steamship *Nautilus*, in which the respondents' cargo was laden, and the steamship *Australia*, which was owned by the appellants. LORD MERRIVALE, P., came to the conclusion that there was no doubt as to the fault of the *Australia*, who had left her proper water and was on the starboard side of the channel the more easily to get into a dock, and there was no appeal as to that finding, but he further held, after consulting his assessors, that as a matter of seamanship it was wrong for the *Nautilus* to come round the bend at full speed, and that the *Nautilus* was also to blame. The Court of Appeal put the same question to their nautical assessors as had been put by the President to his assessors, received answers exactly to the opposite effect, and allowed the appeal. The owners of the *Australia* appealed. G

Stephens, K.C., and *L. F. C. Darby* for the appellants. H

Dunlop, K.C., and *H. C. S. Dumas* for the respondents.

The House took time for consideration.

June 11. The following opinions were read. I

VISCOUNT DUNEDIN.—The story of the collision which is the origin of this case can be told in a very few words, though the case itself has given rise to a sharp difference of opinion. The ship of the appellants, the *Australia*, was pro-

A ceeding up the Scheldt, on Jan. 20, 1923, to Antwerp. The ship of the respondents, the *Nautilus*, was coming down. It was 8 p.m., and consequently dark. The Scheldt at the place in question forms a sharp turn which may be conveniently likened to the curve of a fish hook when laid on its side and looked at. The *Nautilus* was coming from the shank with the tide, which was ebbing. The *Australia* was coming from the barb, which I assume to be on the left. The *Australia* **B** was going to enter a sluice called the "Royers sluice," which was situated just where the curve of the hook begins, and consequently on the port side of the channel as looked at from the deck of the *Australia*. She had anchored down stream because the dock was full, but about 7.15 she got notice that the dock was ready to receive her. A tug came down, and about 7.30 she got under way. She was passed by a ship called the *Auckland Castle* which had come out of the Royers sluice. **C** In order to get into the sluice quickly she left her proper water, which was on the starboard side of the channel, and her invasion into the port side was increased by the fact that she sheered and the ebb tide drove her farther in. This happened when she was about half a mile from the Royers sluice. Now the *Nautilus* had been approaching the bend when she saw the *Auckland Castle* coming out of the Royers sluice, and she moderated her speed in consequence, but after the *Auckland Castle* had gone away she resumed her full speed round the corner. Before she got to the corner she saw the lights of the *Australia* across the land. She, therefore, knew that she would have a ship to pass. She sounded one blast and was answered by one blast. That meant at that time that she was going to pass port to port, but when she got round the corner she saw the green light of the *Australia*. That meant that the *Australia* was on the wrong side, and at the same time the *Australia* sounded three blasts, that is to say, that she was going astern. The *Australia* did so because when she saw the *Nautilus* and knew that she herself was over on the wrong side she thought that she had better stop if possible, and then, after a very short interval, she sounded three blasts again. Then, after a time which has been variously estimated at from one to two minutes, came the collision in which the *Nautilus* was sunk.

F The President who tried the case came to the conclusion that there was no doubt as to the fault of the *Australia*. She had got into the wrong water for her own purposes, and she was, therefore, in fault. No appeal was taken by the *Australia* against his judgment so far as it found her in fault; consequently, there could be no question as to that before your Lordships. But then there was the further question: Was the *Nautilus* also in fault and did that fault contribute to the collision? **G** The President consulted his assessors and they answered him that, as a matter of seamanship, it was wrong for the *Nautilus* to come round the bend at full speed—seven knots plus the tide, which was reckoned at three, or, in all, ten knots over the ground. The *Nautilus*, they considered, after she had checked her speed to allow the *Auckland Castle* to proceed, ought not subsequently to have increased her speed but ought rather to have lowered it, keeping in view that she **H** knew that she had a vessel to pass, and, further, they considered that it was quite wrong to go on at full speed when those on board of her became conscious of the fact that the *Australia* was in front of them and on the wrong side of the river—for it was proved that they never saw the red light of the *Australia* till a moment before the collision—and when they heard the repeated three blasts showing that the *Australia* thought that something ought to be done. Had the *Nautilus* acted **I** properly in either of these matters they were of opinion that the collision would not have happened. Accordingly, the President held the *Nautilus* also to blame. The case went to the Court of Appeal. Their Lordships did not differ from the conclusion of the President as to the facts of the case, except in so far as they thought that the time which elapsed between the last three blasts and the collision was more likely to be the short time of one minute than the longer time of two minutes. But they then put the same question to their nautical assessors as had been put by the President to his nautical assessors, and received answers to exactly the opposite effect. Upon this the Court of Appeal reversed the judgment of the

President, saying, no doubt, that they were themselves inclined to agree with their assessors, but at the same time saying frankly that, but for that advice, they would not have ventured to disturb the judgment given. A

In these circumstances we thought it necessary to put to our nautical assessors the same questions, and they gave the same advice as the President had received. One of them, indeed, was not as strong as the other on the mere question of the speed round the point per se, but both were very determined as to the fault, which consisted in not slackening speed when the position became apparent and still more when the three blasts were heard. This sharp divergence of opinion among the skilled assessors who have assisted the various courts has more than once given cause for comment. Speaking for myself, I come to the same conclusion as that to which the majority of the assessors here have come, and I should have done so unassisted by the opinion of any assessor. But as it stands, the case raises in an acute form the propriety of what has been called an appeal from assessors to assessors. I do not know if anything more useful can be said than what was said by LORD BIRKENHEAD, L.C., in *Melanie (Owners) v. San Onofre (Owners)* (1), and I gather that his remarks had the concurrence of the present Lord Chancellor [VISCOUNT CAVE], and were also agreed to in another case by LORD BUCKMASTER and LORD PHILLIMORE. Yet I do think it necessary to protest against a view which, if I am not doing them an injustice, has seemed to prevail in the Court of Appeal in a recent case, to wit, that the court is bound to pay more attention to the opinion of its own assessors than to that of those who advised the court below. There is no hierarchy of assessors. They occupy much the same position as do skilled witnesses, with the difference that they are not brought forward as the partisans of the one side or the other, and just as, for instance, in a patent case, the court must make its own choice between the views which may have been put forward by one witness or by another, so, if assessors differ, the court must make its own choice. In every case the responsibility is with the court. Personally, I think that, while assessors may be used to the full for information, it is a pity, if it can be helped, to put a question to them in such a shape that it is tantamount to asking them whether they would find for the plaintiff or for the defendant. I cannot forget that when assessors were introduced, ships were sailing ships, and the navigation of a sailing ship is an art which the landsman cannot be expected to understand without much explanation. In these modern times it seems to me that it is much oftener a question of common sense in the application of the rules to avoid collision than a question of seamanship in the true sense of the word, so that, speaking for myself, except for the purposes of explanation, I shall always ask an assessor as little as possible. Certainly to find, as we have found, not only in this case, but in several cases which have lately occupied your Lordships' attention, that the different assessors are at variance is much more of a hindrance than an assistance. I move that the appeal be allowed and the judgment of the President restored, the appellants to have the costs in the Court of Appeal and in this House. B C D E F G H

LORD SUMNER.—There is but little doubt or controversy about the circumstances of this collision. The relative positions of the two vessels, when the *Nautilus* first saw the *Australia* and heard her first three-blast signal, their distances apart, bearings and courses, the manœuvres of the *Australia* and the speed of the *Nautilus*, and, finally, the force of the tide and the configuration of the channel were all such as made it easy to state to the assessors the assumptions on which they were to consider the questions put to them. These were questions of nautical skill and of seamanlike prudence and judgment, and on the view, which, under advice given upon them, your Lordships may see fit to adopt, the decision of this appeal depends. That advice was, I confess, not what I had expected, nor, as it appeared to me at the time, such as I was much disposed to accept. It was, that, in the circumstances, it was unskilful and unseamanlike for the *Nautilus* to keep her speed, and that but for this error the collision would not have I

A occurred. A mere lawyer might well be forgiven, if he felt unable to set his own opinion against that of assessors on so professional a matter. The fact that the Court of Appeal had been advised to the contrary by equally competent advisers, might well increase his embarrassment, and when it is remembered that the Trinity Masters had advised the President in the sense in which the House is now advised, he might be tempted in his perplexity to renounce the task of judgment.

B This, however, is exactly what he must not do. Technical advisers are not the judges even of such issues as these. The appointed court must exercise its function of deciding, and find consolation in a consciousness at any rate of blank impartiality. An opposite road of escape might seem to open, namely, that of accepting, as of course, the advice of the assessors consulted, who are provided for that very purpose by the law itself. In reality there is no escape here.

C This is what leads to the "intolerable situation," as it is called, of "appeals from assessors to assessors." After all, the technical advice given below is advice available for the consideration of the appellate tribunal as well as that given by its own assessors. The latter are not substituted for those previously consulted; they are additional to them; and, if one adviser or two advisers are to be preferred, it is because in the judgment of the court the advice given is such as, in itself, is

D the more acceptable.

The phrase "an appeal from assessors to assessors," which has been much used recently—*The Melanie* (1)—collision action; *The Melanie* (2)—salvage action; *The Artemisia* (3), pungent as it is, requires some examination. Strictly, it is a figure of speech, for there is no such thing as an appeal either from or to assessors.

E It is really a criticism of the conduct of one court or of both courts below. It specially describes the effect of an appeal when an appellate tribunal adopts a certain attitude towards its assessors, an attitude which is equally open to criticism in a court of first instance. That attitude is the court's surrender to the assessors of the judicial function of itself deciding the issue, however technical it may be. Authority for the proposition that assessors only give advice and that judges need not take it, but must in any case settle the decision and bear the responsibility is

F both copious and old. It is for them to believe or to disbelieve the witnesses, and to find the facts, which they give to their assessors and their assessors must accept. If they entertain an opinion contrary to the advice given, they are entitled and even bound, though at the risk of seeming presumptuous, to give effect to their own view—*The Alfred* (4), *The Swanland* (5), *The Magna Charta* (6), *The Aid* (7), *The Beryl* (8), per BRETT, L.J., *The Koning Willem II* (9), per KENNEDY, L.J.;

G *The Gannet* (10), per LORD HALSBURY. Such being the position of the judges, what is that of the assessors? In Admiralty practice they are not only technical advisers; they are sources of evidence as to facts. In questions of nautical science and skill, relating to the management and movement of ships, a court, assisted by nautical assessors, obtains its information from them, not from sworn witnesses called by the parties—*The Sir Robert Peel* (11), *The Assyrian* (12)—and can direct them to

H inform themselves by a view or by experiments and to report thereon: Admiralty Court Act, 1861, s. 18. However much Admiralty judges may from time to time seem to have treated the Elder Brethren as members of the tribunal—*The Andalusian* (13), *The Marathon* (14), *The New Pelton* (15)—however informal these consultations may have been—*The Banshee* (16)—the principles above stated have never been in doubt. The precise method of making use of the assessors provided

I for it must rest in the decision of each court, and, except by statute, as in Scotland—Nautical Assessors Scotland Act, 1894, ss. 3 and 6—written questions and answers cannot be prescribed or required of them, though nothing can be of greater assistance to the appellate tribunal in case of an appeal. What is, however, the function of a Court of Appeal is to impose upon itself and to urge upon the court below the duty of making up its own mind, alike on questions of nautical skill and on the value of the advice given upon them. I have seen such phrases as these in judgments which have come before us. "I do not find myself in matters of seamanship competent to differ from the assessors below or the assessors in this

court, but the assessors in this court are provided to advise me on matters of pure seamanship, and I feel it my duty to follow them without expressing an opinion, whether they are right or wrong," or "That being the advice given us by the gentlemen, who are sent by Parliament to advise us, I feel bound to follow it. . . . I think we are bound . . . to follow the advice of our assessors, without expressing any opinion of our own," or "without this skilled assistance, I am not at all sure what conclusion I should come to, if I had to decide these matters for myself"—*The Artemisia* (3); *The Llanelly* (17). With great respect they seem to me to be quite contrary to authority. If, as may happen, a judge cannot decide in his own mind whether or not the advice he receives is sound, his position is simply that the point is not proven, and the loss falls on the party who bears the burden of proof on that issue. It is just as if necessary proof had failed. After all, experience at sea is not everything. Assessors are not chosen for their personal converseance with collisions, and an inexperienced judge or counsel may boast that he has, in a sense, been in hundreds of collisions while the assessors have hardly seen tens.

Accordingly, I have tried again, and after careful reflection have found my judgment to be eventually in agreement with the advice given to us. The *Nautilus* almost got through as it was. Her damage, though it proved fatal to her, resulted from engaging an anchor fluke sufficiently to tear a gash in her side under water. The parts of the two vessels first in contact and the angle then made between them are strong to show that, on the other hand, a very small retardation of the down-coming *Nautilus* would have opened a clear eye for her before she arrived. I was much impressed as to this with the junior counsel's (for the appellants) presentation of the facts. Accordingly, the error in not reducing speed cannot be laid aside on the ground that it did not and could not contribute to the collision. On the other point we are concerned not with any general rule to be laid down now for other circumstances, but solely with the case in hand. No maximum speed is prescribed for the navigation of the river Scheldt. That is left to good judgment in the circumstances of the moment, and I fully appreciate that good judgment directs one to give safety the benefit of the doubt. The advice given to us is not that it was the duty of the *Nautilus* to make the navigation of the Scheldt fool-proof for the *Australia*, but that, knowing the *Australia* to be in difficulties at a short distance round the bend, she should not have assumed that they would have been overcome before she herself got so far down, and that she should have got herself in hand by a reduction of speed, in case those difficulties persisted longer than seemed likely. She would then be able to take effective action of her own to avoid collision, and this at no cost to herself, but that of a very brief delay and the temporary annoyance of slackening speed for a ship which was mis-managing her own business. I have, accordingly, come to recognise that the advice given to us was right, and to think that the *Nautilus* was to blame as well as the *Australia*. Accordingly, in my opinion, the appeal should be allowed and the judgment of the President should be restored.

I am asked to add that my noble and learned friend **LORD PHILLIMORE** concurs in the opinion I have just read.

LORD CARSON and **LORD BLANESBURGH** said that, on the question of the position of the nautical advisers and the ultimate responsibility of the court for the conclusions arrived at, they were in entire agreement with the views so clearly expressed by **LORD SUMNER**, but on the facts they were of opinion that the *Nautilus* was not also to blame.

Appeal allowed.

Solicitors: *Waltons & Co.; Parker, Garrett & Co.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

**Re BOULTON BROS. & CO. Ex parte MONCRIEFF AND
OTHERS v. OFFICIAL RECEIVER**

[COURT OF APPEAL (Lord Hanworth, M.R., Warrington, and Sargant, L.JJ.)
May 7, 10, 11, 1926]

[Reported [1927] 1 Ch. 79; 96 L.J.Ch. 90; 135 L.T. 461; [1927]
B. & C.R. 1]

Bankruptcy—Discharge—Suspension—Debt contracted without reasonable or probable expectation of ability to pay it—Substituted debt—Debt contracted when ability to pay existed—Deterioration in financial position of bankrupt—Inability to pay debt—Debt transferred to company—Guarantee given by bankrupt in respect of debt—Certificate of misfortune—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 26 (2) (ii), (3) (d), (4).

A partnership firm contracted a debt at a time when it was in a financially good position and able to pay it. Later, the value of the firm's assets depreciated, and a company was formed which took over liability for the debt in respect of which the partners gave the company a guarantee. The partners, having become bankrupt, applied for orders for their discharge.

Held: a "debt provable in bankruptcy" contracted at a time when the bankrupt had no "reasonable or probable ground of expectation of being able to pay it" within s. 26 (3) (d) of the Bankruptcy Act, 1914, included a debt substituted for a previous debt which had been contracted when the bankrupt had expectation of being able to pay it; the debt of the bankrupts under the guarantee in the present case was such a substituted debt; and, therefore, the bankrupts came within s. 26 (3) (d), and the court was bound under s. 26 (2) (ii) to suspend their discharge for a period of not less than two years.

Per WARRINGTON, L.J.: In any case the debt under the guarantee was a new, and not merely a substituted, debt.

What is a "misfortune" entitling the court to grant a bankrupt a certificate under s. 26 (4) of the Act that the bankruptcy was caused by misfortune without any misconduct on the bankrupt's part must depend on the facts of each case. The mere making of an investment unwisely does not necessarily indicate misfortune. It does not follow that because there has been no misconduct the bankruptcy must be attributed purely to misfortune, nor merely because the bankrupt has left the conduct of his business in the hands of another person who has proved to be untrustworthy.

Notes. Referred to: *Re Joyce*, [1955] 2 All E.R. 747.

As to orders of discharge, see 2 HALSBURY'S LAWS (3rd Edn.) 515 et seq., and as to certificates of misfortune, see *ibid.*, p. 353. For cases, see 4 DIGEST 539 et seq., 178. For Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Case referred to:

(1) *Re Lord Colin Campbell* (1888), 20 Q.B.D. 816; 59 L.T. 194; 36 W.R. 582; 4 T.L.R. 374; 5 Morr. 94, C.A.; 4 Digest 178, 1656.

Appeal from an order made by Mr. Registrar WARD COLDRIDGE suspending the discharge of the three bankrupts for two years, and an application by the bankrupts under s. 26 (4) of the Bankruptcy Act, 1914, for a certificate that their bankruptcies were caused by misfortune without any misconduct on their part.

The facts are stated in the judgment of LORD HANWORTH, M.R.

Roland Oliver, K.C., and *Sir Cassie Holden* for the bankrupt, Moncrieff.

W. N. Stable for the bankrupt, Colonel Cripps.

E. W. Hansell for the bankrupt, W. W. Boulton.

Tindale Davis for the Official Receiver.

LORD HANWORTH, M.R.—These are three appeals by Mr. Moncrieff, Colonel Cripps, and Mr. W. W. Boulton, all of whom are bankrupts, from an order made

by the late registrar, Mr. WARD COLDRIDGE, upon an application for their discharge made by them under s. 26 of the Bankruptcy Act, 1914. The registrar decided that the discharge must be suspended for the period of two years, and these three appeals, which involve somewhat different facts, are presented by the bankrupts on the ground that in the circumstances of the case the two years' suspension ought not to be imposed, and that, even if there is a suspension, they may fairly claim to have a certificate granted to them under s. 26 (4) of the Act.

The three bankrupts were members of the firm of Boulton Bros. & Co., which was a firm of traders in the city of London largely connected with India. They commenced business with a very small capital. It is unnecessary to go through the earlier stages of the business of the firm. It is sufficient to say that in the report made after the public examination of the debtors it is found that in June, 1920, the position of the firm was a favourable one. At that time the firm had made a net profit of £19,577 for the half-year, and their balance-sheet showed £231,000 of what might be called liquid assets, and approximately £1,200,000 of other securities with a surplus of £290,000. The subsequent history of the firm was disastrous. It appears that in February, 1920, the firm agreed with the Alliance Bank of Simla, through one of the bank's directors then in London, to develop the purchase of bills of exchange on India, which was then considered to be a very safe and profitable form of business, and to extend the existing credit of the bank to £900,000, of which £700,000 was to be lent against securities and £200,000 without security. The Alliance Bank never drew against the securities which the firm placed at the disposal of their bankers. By December, 1920, the position was wholly different from that which it had been in the previous June. Meantime, a fact had occurred which was of deep importance. On Nov. 17 the Alliance Bank opened their own London branch, and from and after that date ceased to treat the firm of Boulton Bros. as their agents in London. At that time it was found that there was a very large amount owing to the bank by the firm, a sum of £743,000. That sum, it is fair to say, was reduced by January, 1921, by something like £230,000, but the debt still remained at £511,104. The position was a serious one for the Alliance Bank of Simla and for the firm. In June, 1921, the firm registered a private company called Boulton Bros. & Co. (London), Ltd. In August, 1922, that company was succeeded by another company called the G.W.F. Trust, Ltd., with a very small capital. The purpose was to release Boulton Bros. & Co. (London), Ltd., from the position which it had held for approximately some fourteen months and to make the G.W.F. Trust, Ltd., the company who were to hold the debt, directly due to the Alliance Bank. When these two companies were started the firm gave two successive guarantees. On June 30, 1921, the guarantee is given to the Alliance Bank of Simla—a guarantee which is signed by Mr. R. G. H. Boulton, who was the leading member of the firm—I may say the active member of the firm in London—and by Mr. Moncrieff and Colonel Cripps. It was not signed by Mr. W. W. Boulton. It was to guarantee a sum which is stated in the outset of the guarantee was £566,372 “and also moneys which shall at any time be due to you from Boultons.” That was in 1921, when the Boulton company was started. In August, 1922, when the G.W.F. Trust, Ltd., was incorporated, another guarantee was given. That is signed by Boulton Bros. & Co. by the hand and in the name of Mr. Robert Boulton, but it is also signed by the three bankrupts. By that guarantee they guaranteed to the Alliance Bank of Simla £596,076 and, further, “any sums which may be due to you from the G.W.F. Trust, Ltd.” Contrasting those two guarantees it is plain that the first guarantee was for a sum then quantified at £566,372. Fourteen months later the guarantee was for a sum then quantified at approximately £30,000 more, £596,076. In spite of those various efforts to keep the business going it failed with the result that the receiving order was made on Oct. 29, 1924. Applications for discharge were made by these three debtors in December, 1925. The reason why there was a long delay was this. The public examination was commenced in February, 1925, and adjourned until May, 1925, and it was thereafter adjourned further because

- A** a prosecution was instituted against the members of the firm, Mr. R. G. Boulton, Colonel Cripps, and Mr. Moncrieff. It is important and right that I should state that when the matter was examined before the judge and petty jury, the grand jury having found a true bill, the judge came to the conclusion that there was no evidence which could be rightly left to the jury as against Colonel Cripps and Mr. Moncrieff, with the result that they were discharged from the prosecution.
- B** It is also right and fair that I should state that Mr. R. G. Boulton was acquitted upon the charge which was made against him. After the conclusion of that trial the public examination was continued, and on Dec. 17, 1925, it was concluded. Thereupon the application was made by the three bankrupts under s. 26 for their discharge.

- C** Before I come to the section I think it is right that I should summarise quite shortly some of the facts which concern each of these three debtors. As I have said Mr. R. G. Boulton was the person who was the vital force and conducted the business in London. Colonel Cripps had been for a considerable time in Russia, and in 1914 when war broke out he rejoined his regiment, the Bucks Yeomanry, and served in various parts of the world, receiving, I think at Gallipoli, a severe wound which detained him in hospital for some eight months. In July, 1919, he was demobilised. As a matter of fact it appears from the report that he had nothing to do with the matters which ultimately brought about the downfall of the firm, he had no communication at all with India, and it is plain from the judgment of the learned registrar that there is nothing alleged against Colonel Cripps. With regard to Mr. Moncrieff his position is this. He also had nothing to do with the detailed matters to which I have referred. He did make a strenuous effort to assist the firm. He pledged his estate in Scotland for a certain sum, and it is in respect of the balance for which that estate was not a good security that there is a claim against him in his separate bankruptcy. But it is plain, from what we have discovered in the report and from what we have been told, that Mr. Moncrieff was ignorant because he was either, at the time when matters of importance were taking place, not in London, or, during a holiday of some eight months when he returned to the British Isles, he was in Scotland and was not taking any part in the proceedings. It is fair again to repeat that there is solid foundation for what I have said in the fact that both Colonel Cripps and Mr. Moncrieff were discharged from the prosecution before it had reached anything like its final stage. With regard to Mr. W. W. Boulton, he joined the firm in 1911. He went to India in March, 1920, that is shortly after the arrangement had been made for the purchase of bills. He returned from India for a few days in November, 1920, and immediately went back again and remained there for nearly two years. He returned from India in July, 1922. No charge was made against him at all. Further, I think it right to say that all these three bankrupts when called upon to make a declaration of their separate assets and liabilities rendered a figure of their assets which has been improved upon in the actual result. I say that
- H** because it appears quite plain from that that there was no effort made on their part to conceal, still less to exaggerate, the situation. It is obvious that they intended to render as exact assistance as they could to the official receiver so that he might have the true figures before him. As I say, in all cases there has been a greater sum realised than the assets were estimated by the debtors. It also appears plain that the losses of the firm were due to two causes. No doubt, they had, from the figures which I have given in June, 1920, very large holdings in industrial securities. That was at a time, which one ought not to forget, when the price of industrial securities ruled high. Those securities have steadily lost value. But it is also plain that the arrangement which was made in February, 1920, under which the firm agreed to develop the purchase of bills of exchange has proved to be a disastrous one, and more than that, at a later stage, when the matter was entirely in the hands of Mr. R. G. Boulton, the course which was taken by him was such as led the Alliance Bank to withdraw the agency from Boulton Bros., and in fact the figures of the losses which appear in the report

record the fact that the losses on bills of exchange were as much as £125,000. A Those transactions were in the hands of Mr. R. G. Boulton. It is true that there was a large depreciation in these shares, but it is impossible to read this report without finding the fact to be that it was the transactions in the bills which were disastrous in themselves and struck at the very root of the business the firm were doing in close association with the Alliance Bank of Simla and which led to the withdrawal of the confidence of the Alliance Bank with consequent disaster B to the firm. It is upon those facts that the appeal is brought before this court.

Section 26 is somewhat intricate, but there is a proviso to s. 26 (2) by which :

“the court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanour under this Act, or any enactment repealed by this Act, or any other misdemeanour connected with his bankruptcy . . .” C

Those words do not apply here because there has been no misdemeanour. The proviso continues :

“unless for special reasons the court otherwise determines, and shall on proof of any of the facts hereinafter mentioned, either—(i) refuse the discharge; or (ii) suspend the discharge for a period of not less than two years. . . .” D

The registrar, upon proof of some of the facts to which I will refer, and which appear in s. 26 (3), felt himself bound to suspend the discharge for a period of not less than two years. The first provision in s. 26 (3) is :

“(a) That the bankrupt's assets are not of a value equal to 10s. in the pound on the amount of his unsecured liabilities, unless he satisfies the court that the fact that the assets are not of a value equal to 10s. in the pound on the amount of his unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible.” E

It is really unnecessary to discuss that sub-cl. (a) because there is another sub-cl. (d) which counsel for Mr. Moncrieff confessed would be fatal to his application if he is unable to put a different construction in law from that which has been put upon it by the registrar. I, therefore, do not discuss sub-cl. (a) because, it not being F necessary to do so, it is probably unwise to try either to define or illustrate the meaning of the words “cannot justly be held responsible.” I turn, therefore, to sub-cl. (d). That is in these terms :

“That the bankrupt has contracted any debt provable in the bankruptcy without having at the time of contracting it any reasonable or probable ground of expectation (proof whereof shall lie on him) of being able to pay it.” G

Counsel for Mr. Moncrieff has argued, and the counsel appearing for the other bankrupts have adopted his argument, that the meaning of those words is “contracted any new debt provable in the bankruptcy without having at the time of contracting it” and so on. It is said that if you turn back to the balance sheet of June, 1920, you find the firm in a secure position, and that what happened H thereafter was the decrease in the value of the industrial securities, and, still more, the failure of the bill transaction, and it is to be noted at the same time the loss on the exchange, which must be not overlooked in considering losses on bills of exchange. It is said that this really was the old misfortune, and that what befell thereafter was merely something which happened in black misfortune's baneful train. There was no new contract, it is argued, in signing the guarantee of June, I 1921; it was merely a guarantee which was necessitated by the facts of the case and had the object, and, perhaps, the merit, of preventing a disaster at that time, it may be, not only to the firm, but possibly to other trading companies or firms with them, and that later, when the guarantee of August, 1922, was signed, it was nothing but a carrying on of an old debt—not contracting a debt, but it was the old debt, the old responsibility, under a later form. I cannot accept that view. It appears that the word “new” does not find its place in this sub-clause. No doubt these sub-clauses in sub-s. (3) overlap. For instance (c) : “That the bank-

A rupt has continued to trade after knowing himself to be insolvent." That is not found or relied upon in the Official Receiver's report. No doubt that (c) to some extent covers what is provided in (d), but it appears to me that the importance of (d) is that once a firm have discovered that they are insolvent they ought not to continue to trade or purport to carry on because they may incidentally involve those who engage with them in trade in still greater losses, that their real duty is

B to face the position and to cut the loss and not to contract any debt, even though their object may be possibly laudable, possible prudent, and possibly wise. But a trader is debarred from contracting a debt provable in bankruptcy without the consequences follow which have followed in the present case. At the time when the two successive guarantees were signed it is clear that there was no reasonable or probable ground of expectation of their being able to pay it unless, as is found

C by the registrar, and, indeed, was stated by one of the members of the firm, there was a revival in the industrial securities. The applicant, Mr. R. G. Boulton, stated when these agreements were given the firm's only expectation of meeting them was out of a business revival, and so far from there being a business revival the story of the last twenty-four months was of a continued shrinkage and loss.

It appears, therefore, that there was a debt contracted by these guarantees. I

D reject the limitation which is proposed to be put to s. 26 (3) (d)—that it means a debt independent of a renewal of an old debt. I will not digress for the purpose of indicating what may be involved more than to say this. In bankruptcy we are familiar with the case in which a debtor ultimately finds himself compelled to go into bankruptcy after having renewed bills to moneylenders or others over a considerable period of time, renewals which involve the capitalisation of debts accruing for interest. It appears to me that the purpose of the para. (d) is to prevent

E that sort of continuance, a continuance on hope, not on business, which may involve others in serious losses in consequence of the trader continuing when he ought to call a halt. It, therefore, appears to me that one of the facts catalogued in s. 26 (3) has been established, and that these three bankrupts have contracted debts provable in their bankruptcy without having at the time of contracting them

F any reasonable or probable ground of expectation of being able to pay them. Therefore, one comes back to see how that fits in with the result on sub-s. (2). The position is that on the proof of that one fact under para. (d) the registrar had only open to him the courses of refusing the discharge or suspending the discharge for a period of not less than two years. It appears to me, therefore, for these reasons that Mr. Registrar COLDRIDGE was quite right in saying that the suspension

G of the discharge must be for a period of not less than two years.

That being so the further point is made by all three appellants that a certificate should be granted under s. 26 (4). The terms of that are:

"With a view to removing any statutory disqualification on account of bankruptcy which is removed when the bankrupt obtains from the court his discharge with a certificate to the effect that his bankruptcy was caused by

H misfortune without any misconduct on his part, the court may, if it thinks fit, grant such a certificate. . . ."

We are asked to grant such a certificate with a view to removing statutory disqualification. By the Bankruptcy Act, 1883, it was provided by s. 32 that where a debtor was adjudged bankrupt he should be disqualified for a great number of active positions, sitting or voting in the House of Lords down to the humbler, though, perhaps, not less important offices of holding the office of guardian of the poor, overseer of the poor, member of a sanitary authority, member of a school board or a highway board, or select vestry, but that that disqualification should be removed if he obtained from the court a certificate that his bankruptcy was caused by misfortune and not his misconduct. By s. 9 of the Bankruptcy Act, 1890, that disqualification was limited to a period of five years from the date of the discharge. One must regard s. 26 (4) as a whole. The disqualification is a

I very serious one. It is an added penalty to any citizen or member of the com-

munity to make it impossible for him for the period of five years to take his part as a citizen, it may be in a parish, it may be in a town, it may be in a county, or it may be in a larger sphere—from taking the active part which most Englishmen desire to take in what are called public affairs. Section 26 (4) clearly indicates that there are circumstances in which that disqualification shall be limited. It is to be limited if a certificate is granted that the bankruptcy was caused by misfortune without any misconduct on the bankrupt's part. There is a contrast made, as often made, between misconduct and misfortune. There is only one case in which that section has been seriously considered by the court. In *Re Lord Colin Campbell* (1) LORD ESHER says:

"It is impossible to give an exhaustive definition to the meaning to be attached to 'misfortune.' I think, however, we must hold that, when the bankruptcy is not solely the result of some accident over which, or over the direct conducting causes of which, the debtor has no control, it cannot be said to arise from 'misfortune'."

It appears to me that what LORD ESHER means is that we ought to consider misfortune, rejecting active conduct on the part of the debtor from being included in the word "misfortune." But I think also that one must consider "misfortune" in relation to the purposes for which it is used, namely, the removal of a statutory disqualification. It must be put in its true perspective. FRY, L.J., says:

"It appears to me that what the legislature had in view in this proviso was, the possibility of there being cases in which a man might become a bankrupt without thereby raising a presumption of his unfitness for holding a public position."

It is, I am quite sure, unwise to attempt to give a definition to the meaning to be attached to the word "misfortune." It can be illustrated only by particular cases. I think the present case would form no precedent for another case. Each of these applications must be judged according to its particular facts, and I doubt very much whether it will ever be possible to found an application, made upon other circumstances at another time, upon the facts which have occurred in the present, or some other, case. But in the present case, taking all the facts into consideration, the attitude and behaviour of the bankrupts during the bankruptcy and the real history of their activities during the time when Mr. R. G. Boulton was unfortunately carrying on the business of the firm unknown to any one of them, it appears to me that we may quite fairly say that, for the purpose of removing the statutory disqualification, we may grant a certificate and say that the bankruptcy of these three bankrupts was caused by misfortune. I should not be prepared to say that a mere investment, perhaps unwisely made, which falls in value indicates simpliciter misfortune. There might be cases in which it might be so, but I do not rely upon that. What appears to me to be relevant to the present application is that all these three bankrupts had no knowledge—indeed, I doubt if they had any control—over the matters which enured to their disaster. They have all taken the part that they did take without any loss of honour on their part, and two of them have been discharged in the circumstances I have already recounted after their conduct had been submitted to the severe examination necessary in the criminal trial. In those circumstances it appears to me that, if one is to consider that there may be cases where misfortune is contrasted with misconduct, this is a case in which one may find that the bankruptcy was caused by misfortune, because one has the clear antithesis that it was without misconduct. In these circumstances, and for these reasons, I think the certificate can be granted, but on the main point it is impossible for us to vary the order which has been made by the registrar that the discharge must be suspended for two years. The certificates will operate at the time when the discharge takes effect.

WARRINGTON, L.J.—I am of the same opinion. The facts proved in the present case are, first, that the bankrupt's estates are not of a value equal to

A 10s. in the pound on the amount of the unsecured liabilities. It is said, and this is the real question in the appeal I think, that the bankrupt has contracted a debt provable in bankruptcy without having at the time of contracting it any reasonable or probable ground or expectation, proof whereof shall lie on him, of being able to pay it. I do not propose to discuss the question whether under s. 26 (3) (a) the large amount of the deficit has been shown to have arisen from circumstances for which the bankrupts cannot justly be held responsible, for if the fact described under s. 26 (3) (d) is established, the registrar had no option, if he suspended them from discharge at all, but was bound to suspend them for a period of at least two years.

Is it, then, proved that these bankrupts have each contracted a debt provable in the bankruptcy without the probable ground of expectation specified in para. (d)? In my opinion, they have. It is unnecessary to go through the facts in detail. I will summarise those material to this question as shortly as I can. In the balance sheet for June 30, 1920, it appeared that the firm were still solvent and that there was a surplus of assets over liabilities of some £300,000. In the month of July, 1920, the senior partner, Mr. R. G. Boulton, entered into very large speculative transactions in trade bills in India. He used for that purpose, and ultimately lost, the proceeds of securities which had been deposited as cover for those transactions. The firm was thereby involved in a liability to the Alliance Bank of Simla in a very large sum, it is enough to say for the present purposes considerably exceeding half a million sterling. That debt remained a debt of the firm, and, therefore, a debt provable against the joint estate of the firm until the two transactions which took place, the first in June, 1921, and the second in August, 1922. By the month of November, 1920, the firm had given up trading and the Alliance Bank of Simla had taken over control of their assets and liabilities. In the month of June, 1921, a limited company called Boulton Bros. & Co. (London), Ltd., was established for the purpose, if possible, of carrying on such of the business of the firm as it was possible to re-start and to carry it on at a profit. As part of the arrangements then made, and made with the assent of the leading creditors of the firm including the Alliance Bank, a transaction took place which had the effect of substituting for the joint liability of the firm to the bank in respect of the large debt to the bank the liability of this limited company, and substituting for the joint liability of the firm, the joint and several liability of the several partners, except Mr. W. W. Boulton who did not sign it, a joint and several liability under the guarantee to the bank which they then signed. So things remained until August, 1922. In August, 1922, again, with the assent of the principal creditors, with a view to placing the original limited company, Boulton Bros. & Co. (London), Ltd., in a position to trade by removing from them the incubus and burden of the bank's debt, arrangements were made, the effect of which was to discharge that debt so far as that limited company was concerned and to transfer it to a new limited company called G.W.F., Ltd. Again the several partners in the firm, this time including the appellant, W. W. Boulton, signed a joint and several guarantee for the debt in question. It is that which is said to be a debt provable in bankruptcy contracted by the bankrupt without having at the time of contracting it any reasonable or probable ground of expectation of being able to pay it.

It is not denied that, if this is a debt within the meaning of para. (d), not one of the three debtors had any reasonable or probable ground of expectation of being able to pay it. The contention is that it is not within the meaning of the subsection a debt provable in bankruptcy contracted by the bankrupts. The way in which the argument is put is this. It is said that prior to the signing of the guarantee, certainly prior to the signing of the guarantee of 1921, there was this debt owing by the bankrupts, and that the only effect, so far as they were concerned, of the signature by them of those guarantees was to alter the form of the debt, and, instead of its being one in respect of which they were the principal debtors, the debt became one in which they were sureties only. It is said that

that is not within the meaning of the section the contracting of a debt provable in the bankruptcy. On the construction of the section I have to point out that the only qualification attaching to the debt, the contracting of which has been proved, is that it shall be a debt provable in bankruptcy. There is no such qualification as that it must be a new and original debt and not a debt in substitution for or in renewal of a previously existing debt. There is no such qualification. I should find it difficult, if I were driven to express a view of the construction of the section, to convince myself that I must introduce into the section as expressed any such limitation as that for which the bankrupts have contended. But I am not driven to that course because I think it is now made quite clear that the debt was not a mere renewal in another form of the old debt. By execution of the guarantee the debts first became a claim upon the separate estate of the several partners and provable in the bankruptcies upon their separate estates. That, having regard to the well-known rules in reference to the separate administration in bankruptcy of the joint estate of bankrupts and of their separate estates, makes a most material difference to the condition of those estates respectively. Whatever view might have been taken if the debt had remained only a joint debt, having become a separate debt, it is for the purposes of the administration in bankruptcy the contracting of a fresh debt provable now by virtue of that contract, for the first time provable against the separate estate of the bankrupts. For these reasons it seems to me that it is impossible to bring the case outside para. (d), and that it has been proved that the fact mentioned in para. (d) has been established, and, therefore, the registrar was right, and in fact had no alternative except to suspend the discharge for two years.

Then there comes another question which has to be determined, and that is whether under s. 26 (4) the court can and ought to grant the bankrupts respectively a certificate to the effect that their bankruptcies were caused by misfortune without any misconduct, so as to remove the disqualification imposed by the Bankruptcy Act, 1883, which is still in force in that respect, modified by the Bankruptcy Act, 1890. The court must be satisfied that the bankruptcy was caused in respect of each of these three bankrupts (and I confine my remarks to them alone) by misfortune without misconduct. It is clear that there was no misconduct in the case of either of these bankrupts, but it does not follow that because there was no misconduct, therefore, the bankruptcy must be attributed purely to misfortune. That point was settled by the case of *Lord Colin Campbell* (1), to which my Lord has already referred. But I do think that in the case of each of these three bankrupts their bankruptcy was caused by misfortune. What really caused the bankruptcy? I think it may safely be said that their bankruptcy was caused partly by the collapse of the industrial securities at the end of 1920 and partly, and I think even more, by the dealings of their senior partner Robert Boulton, and his speculations in the Indian exchange. Was that a misfortune to them? I think it was. Not one of these bankrupts had any knowledge of what was going on. The only way in which it can be said, I think, that in the case of these three bankrupts, the bankruptcy was due not to misfortune, would be if it could be really established that they were responsible for and had brought about the misfortune by leaving the particular business from which the misfortune arose to the conduct of their senior partner. I do not think that that can properly be said. The business had been conducted with profit for many years under the guidance of Mr. Robert Boulton. Not one of the three had the least reason to suspect that Mr. Boulton would be guilty of any rash or hazardous speculation. They had every reason on the contrary for trusting to his prudence and discretion. I think, therefore, that on the whole it would be hard upon them to make them responsible to the extent of refusing a certificate for having left to Mr. Boulton the conduct of the transactions in question. I think, therefore, on the whole, that on the facts proved in this particular case, which must not, I think, be treated as in any way a precedent in other cases where the facts are different, it would not be right to decline to find that the bankruptcy is caused by misfortune and so to refuse a certificate.

A I think the court ought to grant a certificate, but it must of course operate from the time that the discharge takes effect, that is, at the end of the two years' suspension.

B **SARGANT, L.J.**—I am of the same opinion, and I will limit my remarks to two points only—first, the meaning of s. 26 (3) (d) of the Bankruptcy Act, 1914, as applied to this case; and, secondly, the question of the granting of the certificate under s. 26 (4). Counsel for Mr. Moncrieff laid great stress upon the penal character of sub-s. (3). He practically invited us to limit the operation of s. 26 (3) (d) to a case where a bankrupt has contracted a debt which he had no reasonable probability of discharging so as to hurt the creditor with whom he was dealing. He invited us really to say that if the creditor with whom the bankrupt was dealing C knew all the facts of the case and had no reason to suppose that the bankrupt could not discharge the debt, and particularly if the debt so contracted was really the result of previous transactions under which a liability had arisen, that then in that case the language of para. (d) did not apply. I do not think that that can be so. The language is quite explicit; it is not limited by any considerations of the kind suggested. It is to be remembered that the contracting of a debt which cannot be D discharged does not only prejudice the person with whom the contract is made, but prejudices the other creditors of the bankrupt who in consequence of that debt are compelled to accept a smaller dividend. If it were to be said that you are to look at the origin of the debt it seems to me that hundreds of cases would be exonerated which are clearly within the section. If a person has contracted debts with a moneylender and then finds before the debt becomes due that his resources E are exhausted and that he cannot possibly pay, it seems to me that the section would clearly apply if then he proceeded to give fresh bills to the moneylender for a principal sum including the interest on what had already been lent to him, and including interest on that principal sum. I altogether fail to understand the argument that all these transactions under which the firm was relieved and the first limited company was substituted, the firm becoming a surety only, and then F a second limited company was substituted for the first, are to be regarded as sham transactions or transactions which did not alter the relationship of the parties. I think it must be taken that those transactions were real transactions and were carried out in a very definite and business-like way, and that when as a result of them you find the firm becoming liable for gradually increasing sums, and, above all, becoming liable, not only jointly but on a separate liability, which has the G result of making the other creditors of their separate estate, who otherwise would have been paid in full, receive a dividend of $\frac{1}{2}$ d. in the £—it seems to me then that the mischief at which the section is aimed has been done. Therefore, in my judgment, we must hold here that, although the transactions were entered into with the full knowledge of the creditors so as not to harm the debtors in any way, and are transactions not involving the slightest moral turpitude, still, I think, H we must hold that those transactions did amount to contracting debts within s. 26 (3) (d). If so, it was admitted by the counsel for the three applicants here that the debts were debts which they had no prospect at all of paying.

I Turning to sub-s. (4), I want to say this. It is certainly my own view, and I think the other members of the court take the same view, that the certificate we are granting is founded on this—it may be a benevolent view to take—that the downfall of the firm was caused by the speculations that were entered into by Mr. Robert Boulton without the knowledge of the other partners and without any reasonable opportunity for them to have become acquainted with the speculations. I say that for this reason, that if the real downfall of the firm had been occasioned by the carrying of a great load of industrial securities on an insufficient margin, I do not think the fact that the depreciation which overtook those securities was unexpected would be a sufficient circumstance to come to the conclusion that there had been a misfortune within the meaning of that subsection, because I think persons must be deemed to know that depreciations, and depreciations to a con-

siderable extent, may take place in the securities they hold, and if they are holding them on a margin it may well be that the margin will run off and a liability ensue. Nor do I think it would be a sufficient answer, supposing that the partners had simply left the conduct of the business in the hands of Mr. Robert Boulton without any kind of supervision, and then having trusted him to that extent their confidence had turned out to be misplaced, because it seems to me that persons are not entitled to repose excessive trust in other persons, even though they are partners, when they have a fair opportunity of looking into matters for themselves. But in the particular circumstances of this case as affecting each of the three persons it seems to me that they were in positions either of being away from the country or of enjoying a well-earned holiday after a long time spent in India and not being engaged with the branch in which these speculations took place. I think, on the whole, that in this particular case, having regard to all the circumstances, and attributing, as I think we do, the downfall of the firm to the conduct of Mr. Robert Boulton, it may be said properly that these three bankrupts suffered from a misfortune, and it is quite clear that they were not guilty of any misconduct. Limiting myself, therefore, strictly to the circumstances of this case, it seems to me that the court is entitled and ought to grant the certificate that has been applied for.

Solicitors: *Drake, Son & Parton; O. L. Richardson; Tarry, Sherlock & King; Solicitor to the Board of Trade.*

[*Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.*]

KENSINGTON BOROUGH COUNCIL v. ALLEN

[KING'S BENCH DIVISION (Lord Hewart, C.J., Salter and Branson, JJ.), February 25, 1926]

[Reported [1926] 1 K.B. 576; 95 L.J.K.B. 481; 134 L.T. 665;
90 J.P. 105; 42 T.L.R. 449; 24 L.G.R. 254]

Nuisance—Statutory nuisance—"Owner" of premises—"Person receiving rack-rent"—Tenant of whole house who has sublet part—Public Health (London) Act, 1891 (54 & 55 Vict., c. 76), s. 141.

The respondent was the assignee of the lease, at £7 10s. per annum, of a house in London, consisting of basement, ground floor, and first and second floors. A tenant was in possession of the whole premises at a rent of £1 0s. 9³/₄d. a week, which exceeded two-thirds of the full annual value. There being no restriction against sub-letting, the tenant sublet the ground floor and the first and second floors to three separate sub-tenants at rents totalling £1 2s. per week, but he continued to occupy the basement himself. There was no water supply on the first and second floors, and, though the water supply in the basement and on the ground floor would have been sufficient if the house had been occupied as a whole by one tenant, the effect of s. 78 of the London County Council (General Powers) Act, 1907, was that the house, having become a tenement house, had not a sufficient water supply and constituted a nuisance within s. 48 (1) of the Public Health (London) Act, 1891, which provided, by s. 4 (3) (a), that notice requiring abatement of a nuisance arising from any want or defect of a structural character should be served on the owner of the premises. By s. 141: "The expression 'owner' means the

A person for the time being receiving the rack-rent of the premises in connection with which the word is used . . . or who would so receive the same if such premises were let at a rack-rent. The expression 'rack-rent' means rent which is not less than two-thirds of the full annual value of the premises out of which the rent arises. . . ." The respondent was summoned by the local authority for failing to comply with a notice to provide a water supply for the first and second floors.

B **Held:** the "person receiving the rack-rent of the premises" in s. 141 meant the person receiving the rack-rent of the whole of the premises and not only of part; the respondent was receiving the rack-rent of the whole of the premises, whereas the tenant was receiving the rent only of part; and, therefore, the respondent, and not the tenant, was the "owner" of the house within s. 141, and he was rightly made a defendant to the summons.

C **Notes.** The definitions of "owner" and "rack-rent" in s. 141 of the Act of 1891 are in the same terms as those in s. 343 of the Public Health Act, 1936 (19 HALSBURY'S STATUTES (2nd Edn.) 495. See also Housing Act, 1957, s. 39, and Parish Councils Act, 1957, s. 7 (37 HALSBURY'S STATUTES (2nd Edn.) 353, 621. The Act of 1891 was repealed by the Public Health (London) Act, 1936, of which see s. 304.

D As to summary proceedings to abate statutory nuisances, see 24 HALSBURY'S LAWS (2nd Edn.) 97 et seq.; and for cases see 36 DIGEST (Repl.) 332 et seq.

Cases referred to:

(1) *Field & Sons v. Southwark Borough Council* (1907), 96 L.T. 646; 71 J.P. 240; 5 L.G.R. 567.

E (2) *Rice v. White*, [1904] 2 I.R. 8.

Case Stated by the Kensington justices.

The respondent, M. J. Allen, of 117B Galloway Road, London, was summoned before a court of summary jurisdiction for failing to comply with a notice served by the appellants, the Kensington Borough Council, to provide a proper supply of water to the upper storeys of 45 Testerton Street, London, contrary to the provisions of the London County Council (General Powers) Act, 1907. The respondent was the assignee of a lease of 45 Testerton Street, which consisted of basement, ground floor, and first and second floors. The lease was for ninety-eight years, commencing in March, 1866, and the rent reserved was £7 10s. per annum. At the date of the assignment, which was in 1919, the whole premises were in possession of one Allund as tenant of the assignor. Allund remained in possession and occupation of the whole premises as tenant of the respondent on a weekly tenancy at a rent of 15s. per week, subsequently increased to £1 0s. 9½d. per week. There was no restriction against sub-letting, and Allund later sublet the second floor to one sub-tenant, the first floor to another, and the ground floor to a third, on weekly tenancies. The house thereupon became a "tenement house" as defined in the London County Council (General Powers) Act, 1907. The total rents paid by the sub-tenants to Allund amounted to £1 2s. per week. Allund continued to occupy the basement, consisting of two rooms of a rental value of 7s. per week. Either of the rents of £1 0s. 9½d. and £1 2s. exceeded two-thirds of the full annual value of the house. There was no water supply on the first or second floor, and, though the supply of water in the basement and ground floor was such as would be proper and sufficient if the house was occupied as a whole by one tenant, the effect of the London County Council (General Powers) Act, 1907, was to make it an occupied house without a proper and sufficient supply of water, and it constituted a nuisance within s. 48 of the Public Health (London) Act, 1891. The justices were of opinion that the nuisance complained of did exist, but that the respondent was not the "owner" within the meaning of the Act. Accordingly, they dismissed the summons and the local authority appealed.

Montgomery, K.C., and C. L. Henderson for the appellants.

Macmorran, K.C., and S. G. Turner for the respondent.

LORD HEWART, C.J.—This is a Case stated by the justices sitting at Kensington and the question which it involves arises under the Public Health (London) Act, 1891. Complaint was made that the respondent failed to comply with a notice served upon him by the appellants requiring him to provide a proper supply of water to the upper storeys of certain premises, No. 45 Testerton Street, London. The justices, having heard the evidence, dismissed the complaint. They have now stated this Special Case upon the question whether they came to a correct determination in point of law.

The contest was shortly this. The appellants contended that the respondent was the "owner" of the premises, that is to say, 45 Testerton Street, within the meaning of s. 4 of the Public Health (London) Act, 1891. The respondent on his part contended that, although in a sense he was the owner of that house, he was not the owner within the meaning of the section referred to so far as the notice served by the appellants related to the matters which were the subject of the complaint. The respondent at all material times was the assignee of a lease of the house, a house consisting of a basement, a ground floor, a first floor, and a second floor. The lease was for a term of ninety-eight years commencing in March, 1866, and the rent reserved by the lease was £7 10s. per annum. At the date of the assignment the whole of the house was in the possession and occupation of a man named Allund, who was the tenant of the assignor. Allund continued to be in possession and occupation of the whole house after the assignment, as tenant of the respondent, upon a weekly tenancy, the rent being 15s. a week, afterwards raised to £1 0s. 9½d. a week. In the demise to Allund there was no restriction against sub-letting, and, in fact, after the assignment Allund did sublet portions of the premises on weekly tenancies. He sublet, in fact, the second floor to one person, the first floor to another person, and the ground floor to a third person. The total rents payable by those three persons amounted to £1 2s. a week; that is to say, to a sum exceeding by 14½d. the weekly rent which he had to pay to the respondent. More than that, Allund continued and at all material times still continued to occupy the basement of the house. That basement consisted of two rooms, and it was common ground that the rental value of that basement was 7s. a week. It is obvious also (as the Case finds) that either of the weekly rents, that is, the rent of £1 0s. 9½d. payable by Allund to the respondent, or the sum of £1 2s., being the aggregate of the rents of the sub-tenants payable by them to Allund, exceeded two-thirds of the full annual value of the house. On the first and on the second floors of the house there was no provision for a supply of water for domestic or any purposes. On the other hand, the supply of water in the basement and on the ground floor was (as the Case finds) such as would be a proper and sufficient supply if the house were occupied as a whole by one tenant. In those circumstances the question was whether the respondent was the owner for the purpose of this case, or whether the owner was now Allund, his tenant. It is not disputed that in the events which had happened this house had come to occupy the position of a tenement house, that is to say, a house occupied by any person of the working class, wholly or partially let in lodgings or occupied by members of more than one family.

The definition of the expression "owner" is to be found in s. 141 of the Public Health (London) Act, 1891, which provides:

"The expression 'owner' means the person for the time being receiving the rack-rent of the premises in connexion with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such premises were let at a rack-rent."

The section goes on to define the expression "rack-rent" as follows:

"rent which is not less than two-thirds of the full annual value of the premises out of which the rent arises; and the full annual value shall be taken to be the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for the premises, if the tenant undertook to pay all usual

A tenant's rates and taxes, and tithe commutation rentcharge (if any), and if the landlord undertook to bear the cost of the repairs, and insurance, and the other expenses (if any) necessary to maintain the premises in a state to command such rent."

B After the passing of the statute of 1891 a case arose, *Field & Sons v. Southwark Borough Council* (1), in which the appellants were possessed for a term of years of a house and premises in Blackfriars Road. They let them to a certain person with a covenant upon his part not to sublet without their consent. Nevertheless, without their consent he sublet each floor to a separate tenant. In that case also it was found as a fact that the water supply of the house was sufficient if the house had been in the occupation of one tenant only, but the only water supply C which was available for the tenant of the top floor was a supply provided in the yard. In those circumstances it was held by this court that no order could be made against the appellants as owners to abate the nuisance, because the top floor could not be treated as an occupied house. It was said that the term "occupied house" meant the structure as let, and the court added that, even if that initial difficulty had been surmounted, nevertheless the appellants were not D "owners" within the Act inasmuch as they were not in receipt of the rack-rent. After the decision in that case, in March, 1907, the London County Council secured the passing of a local Act called the London County Council (General Powers) Act, 1907, which by s. 78 provided as follows:

E "For the purposes of s. 48 (provisions as to house without proper water supply) of the Public Health (London) Act, 1891, a tenement house shall be deemed to be a house without a proper and sufficient supply of water, unless there shall be provided on the storey or one of the storeys, in which the rooms or lodgings in the separate occupation of each family occupying such house, are situate, a sufficient provision for the supply of water for domestic purposes."

F In other words, that section provided that, if there was such a deficiency in any part of a house of that kind, not merely the part, but the house, was to be deemed to be a house without a proper and sufficient supply of water. The effect of that legislative enactment undoubtedly was to surmount the first part of the decision in *Field & Sons v. Southwark Borough Council* (1); it could no longer be said that what was complained of was limited to and affected only the particular storey which was said to be suffering from a deficiency. Henceforward for that purpose G the part became the same as the whole, and the house as a house was affected by the deficiency to be found in a part of the house. By s. 48 (1) of the Public Health (London) Act, 1891, it is provided:

"An occupied house without a proper and sufficient supply of water shall be a nuisance liable to be dealt with summarily under this Act, and, if it is a dwelling-house, shall be deemed unfit for human habitation."

H By s. 4 (1) of the same statute:

I "On the receipt of any information respecting the existence of a nuisance liable to be dealt with summarily under this Act the sanitary authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, on the occupier or owner of the premises on which the nuisance arises, requiring him to abate the same within the time specified in the notice. . . ."

By sub-s. (3) (a) of that section it is provided: "where the nuisance arises from any want or defect of a structural character . . . the notice shall be served on the owner."

This is, apparently, a want or defect of a structural character.

It is clear, I think, that since the passing of the London County Council (General Powers) Act, 1907, it is no longer possible to contend that the house as a house

is not affected by this defect; and it is clear that the house itself as a whole became a nuisance. The question remained, who was the owner within the meaning of s. 141? Of whom it was true to say that he was the person for the time being receiving the rack-rent of the premises in connection with which the word "owner" is used? Now "premises in connexion with which the word is used" means the premises upon which the nuisance was, and this being the particular nuisance the whole house became a nuisance. The question, therefore, was: "Who was it who was at the material time receiving the rack-rent of the whole house, No. 45 Testerton Street? Counsel for the respondent has directed attention to the subsequent words in that definition "or who would so receive the same if such premises were let at a rack-rent." His argument, if I follow it, seems to amount to this—that where there is a letting to a weekly tenant of the premises as a whole, if he lets or might let parts of the premises to a sub-tenant or sub-tenants, he becomes the person who would receive the rack-rent, if the premises were let at a rack-rent, notwithstanding that at a particular time he had not sublet quite the whole, though he had sublet almost the whole. It is, if I may respectfully say so, an ingenious argument, and it would have the effect of putting every tenant who is free to sublet in the position of the owner. There is, I think, one serious objection to it. It seems to be plain that the alternative "or who would so receive the same if such premises were let at a rack-rent" is an alternative only in the case where in fact the premises are not let at a rack-rent. If the premises are let at a rack-rent it is otiose to look further in order to see if there is somebody else who, in certain circumstances, might let the premises at a rack-rent.

No difficulty, I think, arises in this case from the alternative part of that definition. But a formidable argument has been made upon the basis of an Irish case, *Rice v. White* (2). It is true, as counsel for the respondent has contended, that, although that case was decided in the year 1904, the reasoning in it is not affected by the London County Council (General Powers) Act, 1907, because there ex hypothesi the tenant, Mrs. Fogarty, had sublet a large part of the premises and herself remained in possession of part, and it was not for a moment contended that the house as a whole was not affected by the nuisance. What was required in that case was the construction of proper house drains and water closets and the removal of an ashpit. Counsel, therefore, contends, and it seems to me contends with force, that, whatever may be the value to be given to the decision in that case, it is not for the purpose of the present case diminished by the circumstance that the London County Council in the year 1907 obtained a special Act for their own purposes. In this Irish case a Mrs. Fogarty held certain premises in Dublin under a lease from a lady at the yearly rent of £34. The poor law valuation was £38. Mrs. Fogarty had sublet portions of the premises to weekly tenants, and from those lettings she received no less than £107 a year—in other words, a sum far exceeding the annual value of the premises considered on the basis defined by the statute. Mrs. Fogarty was herself in occupation of the residue of the premises, and it was admitted that the letting value of the part of which she was in occupation was £19 10s. a year. In those circumstances it was held by the King's Bench Division in Ireland that Mrs. Fogarty was the owner of the premises within the meaning of the Public Health (Ireland) Act, 1878, and under that Act was liable to execute structural sanitary repairs. No help can be derived by the appellants from any attempt to distinguish in this respect the provisions of the Public Health (Ireland) Act, 1878, from the Public Health (London) Act, 1891. The two statutes are for all material purposes identical, and, therefore, the question for this court is whether it is prepared to come to the same decision as that which was come to by the King's Bench Division in Ireland in *Rice v. White* (2).

What was it that was involved in that decision? It was, I think, this—that if a person derives from various parts of the premises, making together less than the whole, sums of money as rent, which, being taken together, amount to a sum equal at least to the amount of the rack-rent, then it is true to say of that person

A that he is receiving the rack-rent of the premises. The learned Chief Baron said this ([1904] 2 I.R. at p. 13):

B "I think a contrast is drawn by the definition between, on the one hand, the amount of two-thirds of the valuation, and on the other, the aggregate amount receivable, or which, if all the premises were let at a rack-rent, would have been receivable; subject to this one qualification: that the value of the unlet portions must be ascertained by the valuation. The whole of the premises comprises each part of them, and what is received out of the whole is for the purposes of this definition received out of the premises. In other words, 'premises' in it is to be read distributively. It follows that the occupation by the mesne landlord of part of the premises does not prevent her from being 'owner,' provided the rent she receives out of the residue of the premises is not less than two-thirds of the valuation."

C With the greatest respect to that learned judge and his colleagues who concurred with him, I venture to differ from that conclusion. A distinction, I think, must be drawn between two things: if rent issues out of a part of the premises it is true to say in a sense that it issues out of the premises; it is another thing to say that because it is received out of the premises, although it is received only for some of the parts, it is the rack-rent of the premises. The words in the definition are: "the expression 'owner' means the person for the time being receiving the rack-rent of the premises." Here there was a rack-rent of the premises, which was a rent that was paid for the house, but the only person who paid it was Allund and the only person who received it was the respondent. No other person than the respondent received the rack-rent of the premises, and, to my mind, it matters not that the sums which Allund in his turn received from the subletting of various portions, not the whole of the premises, amounted as a mere matter of arithmetic to a sum exceeding that which would have been a rack-rent of the whole premises. In my opinion, this section requires that in looking for the owner you should find the owner who for the time being receives the rack-rent of the premises as a whole; and I think that on the facts of this case there was only one person who could fulfil that condition. That person was the respondent. Allund did not fulfil it. Allund received no rent of the premises, that is to say, of the house; he received various subsidiary rents of various parts of these premises. The part no longer matters for any purpose in a case of nuisance arising under this Act. In my opinion, therefore, the contention urged before us on behalf of the appellants was right, namely, that the respondent was the owner within the meaning of s. 4 of the Public Health (London) Act, 1891, of the premises in respect of which the notice was served, that is to say, the whole house, number 45 Testerton Street. I think, therefore, that the justices did not come to a correct determination and decision in point of law and that the case ought to be remitted to them with the direction that upon these facts the only conclusion in law is that the respondent was at all material times the owner of the premises referred to.

I **SALTER, J.**—I agree. I find myself with some anxiety differing from a judgment to which **PALLES, C.B.**, was a party, but it appears to me that Mrs. Fogarty, who was the mesne landlord in this Irish case, although she was in receipt of certain rack-rents, was not in receipt of the rack-rent issuing out of the whole house—in that case No. 24 Phoenix Street, and in that case as in the present case it was the whole house that constituted the nuisance.

BRANSON, J.—I agree. In my view, the decision of this case turns, as my Lord has said, upon the true construction to be put upon the word "owner," and this involves a consideration of the definition of that word in s. 141 of the Public Health (London) Act, 1891. It seems to me that in order to satisfy that definition the person who is to be held to be the owner must be a person who receives the rack-rent of the premises, that is to say, the rack-rent of the whole of the premises.

I do not mean that, if a sub-tenant let off the whole of the premises to separate tenants of his own and it appeared that the rents he so received amounted to the rent of the whole of the premises, that would not amount to a receipt by him of the rack-rent of the whole of the premises. My judgment is founded upon the fact that the mesne tenant in this case did not receive the rent of the whole of the premises, having been in occupation of a part of them himself. The result is that I must look to find somebody who is receiving a rack-rent of the whole of the premises, and the only person who satisfies that condition in this case is the respondent. I concur in the judgments that have been given.

Appeal allowed.

Solicitors: *Pontifex, Pitt & Co.*; *Clifford Webster, Emmett & Coote.*

[*Reported by J. F. WALKER, Esq., Barrister-at-Law.*]

BOOTH v. AMALGAMATED MARINE WORKERS' UNION

[CHANCERY DIVISION (Tomlin, J.), March 26, 29, 30, April 13, 14, June 1, 1926]

[*Reported* [1926] Ch. 904; 95 L.J.Ch. 1; 136 L.T. 152;
42 T.L.R. 580]

Trade Union—Amalgamation—Conditions precedent—Invalid amalgamation—No validation by registration—Funds of constituent union held in trust by amalgamated union—Trade Union Act Amendment Act, 1876 (39 & 40 Vict., c. 22), s. 12, s. 13—Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 4—Trade Union (Amalgamation) Act, 1917 (7 & 8 Geo. 5, c. 24), s. 1.

The Trade Union Act Amendment Act, 1876, s. 12, as amended by the Trade Union (Amalgamation) Act, 1917, s. 1, does not confer upon unions statutory power to amalgamate except subject to the conditions precedent contained in s. 12 as amended, namely, that a ballot of each constituent union must be held at which 50 per cent. at least of the members vote, and the votes in favour of amalgamation exceed by at least 20 per cent. the votes against it. An amalgamation has no effect until notice of it is given to the Registrar of Friendly Societies under s. 13 of the Act of 1876, but an amalgamation which is rendered invalid by reason of failure to comply with the provisions of s. 12 as amended is not validated by registration of the notice under s. 13, nor is the registration of the notice conclusive of the validity of such amalgamation. Where a purported amalgamation is invalid the so-called amalgamated union holds any part of the funds of a constituent union which have been handed over to it and which remains in its hands as trustees for the members of the constituent union, and will in a representative action be restrained from parting with or dealing with these funds otherwise than in accordance with the trusts properly applicable to them. The Trades Disputes Act, 1906, s. 4, affords no defence to an action for an account of such funds. Where one of the terms of an amalgamation was that the amalgamated union should take over the liabilities of one of the constituent unions, the amalgamated union was not thereby rendered a purchaser or purchaser without notice of funds of the constituent union subject to trusts known to those responsible for the amalgamation.

Notes. As to the amalgamation of trade unions, see 32 HALSBURY'S LAWS (2nd Edn.) 500, 501; and for cases see 43 DIGEST 102. For Trade Union Act Amend-

A ment Act, 1876, and the Trade Union (Amalgamation) Act, 1917, see 25 HALSBURY'S STATUTES (2nd Edn.), pp. 1257 and 1276 respectively.

Cases referred to :

- (1) *R. v. Friendly Societies Registrar* (1872), L.R. 7 Q.B. 741; 41 L.J.Q.B. 366; 27 L.T. 229; 37 J.P. 262; 43 Digest 97, 1024.
- B (2) *Osborne v. Amalgamated Society of Railway Servants*, [1909] 1 Ch. 163; 78 L.J.Ch. 204; 99 L.T. 945; 25 T.L.R. 107; 53 Sol. Jo. 98, C.A.; affirmed, [1910] A.C. 87; 79 L.J.Ch. 87; 101 L.T. 787; 26 T.L.R. 177; 54 Sol. Jo. 215, H.L.; 43 Digest 104, 1089.
- (3) *Yorkshire Miners' Association v. Howden*, [1905] A.C. 256; 74 L.J.K.B. 511; 92 L.T. 667; 53 W.R. 667; 21 T.L.R. 431; 43 Digest 106, 1122.
- C (4) *Sheet Iron Workers' and Light Platers' Society v. Boilermakers' and Iron and Steel Shipbuilders' Society* (1924), 40 T.L.R. 294; 43 Digest 102, 1067.
- (5) *Dewhurst v. Clarkson* (1854), 3 E. & B. 194; 2 C.L.R. 1143; 23 L.J.Q.B. 247; 23 L.T.O.S. 109; 18 J.P. 535; 18 Jur. 693; 2 W.R. 199; 118 E.R. 1114; 25 Digest 300, 87.
- (6) *Rosenberg v. Northumberland Building Society* (1889), 22 Q.B.D. 373; 60 L.T. 558; 37 W.R. 368; 5 T.L.R. 265, C.A.; 7 Digest 457, 20.
- D (7) *McLuskey v. Cole*, [1922] 1 Ch. 7; 91 L.J.Ch. 242; 126 L.T. 269, C.A.; 43 Digest 96, 1019.
- (8) *Ayscough v. Bullar* (1889), 41 Ch.D. 341; 58 L.J.Ch. 474; 60 L.T. 471; 37 W.R. 529, C.A.
- (9) *Roberts v. Holland*, [1893] 1 Q.B. 665; 62 L.J.Q.B. 621; 41 W.R. 494; 5 R. 370, D.C.; 12 Digest (Repl.) 38, 155.
- E (10) *Ware and de Freville, Ltd. v. Motor Trade Association*, [1921] 3 K.B. 40; 90 L.J.K.B. 949; 125 L.T. 265; 37 T.L.R. 213; 65 Sol. Jo. 239, C.A.; 43 Digest 124, 1264.

Action for declaration and injunction.

F The plaintiff was a member of the National Union of Ships' Stewards, Cooks, Butchers and Bakers (hereinafter referred to as the Stewards' Union) and sued on behalf of himself and all other members of that union. The defendants, the Amalgamated Marine Workers' Union, were a trade union (hereinafter referred to as the "amalgamated union") registered as an amalgamation of the Stewards' Union and another trade union called the British Seafarers' Union. During the autumn of 1921 negotiations took place between committees of the Stewards' G Union and British Seafarers' Union with a view to amalgamation and it was decided to take a ballot upon the question of amalgamation. The Stewards' Union purported to hold a ballot, and on Dec. 29, 1921, the result of the ballot was announced and an agreement for amalgamation signed. Soon afterwards a notice of amalgamation, a request for registration of the amalgamated union, and a H statutory declaration by the general president of the Stewards' Union, Joseph Cotter, to the effect that the provisions of the Trade Union Acts, 1876 and 1917, in regard to an amalgamation had been complied with, were sent to the Chief Registrar of Friendly Societies, and on Feb. 1, 1922, the amalgamated union was registered. The assets of the Stewards' Union amounting to over £76,000 were about this time transferred to the amalgamated union. The plaintiff alleged that I the ballot of the Stewards' Union was irregularly conducted and void and that the statutory number of votes required by the Trade Union Act Amendment Act, 1876, s. 12, as amended by the Trade Union (Amalgamation) Act, 1917, were not recorded thereat. The grounds on which he alleged that the ballot was void were : (a) That the ballot was not kept open for a sufficient time to afford all members entitled to vote an opportunity of doing so; (b) that when it was found, after the ballot was supposed to have closed, that the statutory number of votes had not been recorded, the ballot was informally opened again for a further period of seven days and further ballot papers distributed without inquiring whether the recipients had voted with the result that many members voted more than once;

(c) that, even so, the statutory number of votes was not recorded. The plaintiff A claimed a declaration that the purported amalgamation was null and void; an injunction to restrain the amalgamated union from dealing with the property and assets of the Stewards' Union otherwise than in accordance with the directions of that union; and consequential and other relief. The amalgamated union claimed that all the statutory requirements as to ballot were duly carried out, but that, in any case, the union was a duly registered trade union by virtue of the certificate B of registration of the Registrar of Friendly Societies, and a valid amalgamation of the Stewards' Union and the British Seafarers' Union, and that this certificate was conclusive as to the validity of all steps leading to the amalgamation. The defendant union also relied on the Trade Disputes Act, 1906, s. 4, as a defence to any liability in respect of the funds of the Stewards' Union, and also contended C that the union was a purchaser without notice and could not be disturbed in the possession of these funds so far as not already expended and that the plaintiff was debarred from maintaining the action by reason of having been an officer and member of the amalgamated union.

Gavin Simonds, K.C., and Roxburgh, for the plaintiff, referred to *R. v. Friendly Societies Registrar* (1), *Osborne v. Amalgamated Society of Railway Servants* (2), *Yorkshire Miners' Association v. Howden* (3), *Sheet Iron Workers' and Light Platers' Society v. Boilermakers' and Iron and Steel Shipbuilders' Society* (4). D

Sir Henry Slessor, K.C., and A. Henderson, for the amalgamated union, further referred to *Dewhurst v. Clarkson* (5), *Rosenberg v. Northumberland Building Society* (6), *McLuskey v. Cole* (7), *Ayscough v. Bullar* (8), *Roberts v. Holland* (9), *LEWIN ON TRUSTS* (12th Edn.), p. 1150; *Ware and de Freville, Ltd. v. Motor Trade Association* (10). E

Cur. adv. vult.

June 1. **TOMLIN, J.**, read the following judgment.—This is an action in which one Clarence Booth, on behalf of himself and all other members of the National Union of Ships' Stewards, Cooks, Butchers and Bakers, seeks against the defendant union, called the Amalgamated Marine Workers' Union, a declaration that an amalgamation alleged to have taken place between the first-named union (which I will call the "Stewards' Union") and a third union called the British Seafarers' Union, which led to the formation and registration of the defendant union, was null and void, and other relief directed to recovering any property representing the assets of the Stewards' Union remaining in the hands of the defendant union. F

Section 12 of the Trade Union Act Amendment Act, 1876, as amended by the Trade Union (Amalgamation) Act, 1917, relates to amalgamations, and reads as follows: G

"Any two or more trade unions may, if in the case of each or every such trade union, on a ballot being taken, the votes of at least 50 per cent. of the members entitled to vote thereat are recorded, and of the votes recorded those in favour of the proposal exceed by 20 per cent. or more the votes against the proposal, become amalgamated together as one trade union with or without any dissolution or division of the funds of such trade unions or either or any of them; but no amalgamation shall prejudice any right of a creditor of either or any union party thereto." H

Section 13 of the Act of 1876 further provides as follows: I

"Notice in writing of every change of name or amalgamation signed, in the case of a change of name, by seven members, and countersigned by the secretary of the trade union changing its name, and accompanied by a statutory declaration by such secretary that the provisions of this Act in respect of changes of name have been complied with, and in the case of an amalgamation signed by seven members, and countersigned by the secretary of each or every union party thereto, and accompanied by a statutory declaration by

A each or every such secretary that the provisions of this Act in respect of amalgamations have been complied with, shall be sent to the central office established by the Friendly Societies' Act, 1876, and registered there, and until such change of name or amalgamation is so registered the same shall not take effect."

B The case made by the plaintiff is that the impeached amalgamation was bad, because (a) although the officials of the Stewards' Union affected to take a ballot of the members of that union, the ballot was no true ballot within the statute, or, at any rate, the result of the ballot did not comply with the requirements of the statute; and (b) that the taking of a proper ballot with a result conforming with the requirements of the statute is a condition precedent to the validity of an amalgamation.

C [His Lordship reviewed the evidence adduced by the plaintiff and continued:] The defendant union did not see fit to adduce any evidence at all, and upon the material before me I am satisfied and hold: First, that the ballot was not so conducted as to give a reasonable opportunity to the members as a whole to vote, and was in fact so conducted as not to constitute a real ballot of the members of the union; secondly, that on the ballot the votes of 50 per cent. of the members were not recorded; and, thirdly, that the declaration made by Cotter that the provisions of these Acts had been complied with, and the subsequent return as to the members of the Stewards' Union were respectively false. The precise number of members of the two old unions who became members of the defendant union is not proved, but the number appears to have been small. At an early period of the year 1922 the defendant union, being under the control of Cotter and other officials who had carried through the so-called amalgamation, took possession of all the respective assets of the Stewards' Union and the British Seafarers' Union amounting in value in the case of the Stewards' Union to not less than £75,000, and as appears from the general account of the defendant union for the year ending Dec. 31, 1922, those assets began rapidly to melt away. So far as I can gather from the accounts, the expenditure of the defendant union for the year 1922 was just under £42,000, and was made up roughly as follows: about £1,860 on depreciation; about £9,600 on expenses other than salaries; over £27,000 on salaries, &c., of head office officials, including president, secretaries, and other officials, office staff, including income tax on salaries, and national insurance; and about £3,500 in various forms of benefit to members. In other words, it cost about £38,500 to distribute £3,500 worth of benefit among the members. It is, perhaps, not surprising, in the light of what I have stated, that litigation has resulted. Upon the facts, as I have found them, it is plain that the statutory conditions precedent to the validity of the amalgamation were not fulfilled, and that *prima facie* the amalgamation was invalid.

H But it is said by way of defence that when once a notice of amalgamation has been registered under s. 13 of the Act of 1876, that registration is conclusive, and the court cannot inquire whether the conditions precedent to a valid amalgamation prescribed by s. 12 have been complied with or not, and that I ought to read the concluding words of the section as meaning not only what they do say, namely, that until registration amalgamation is not to take effect, but also what they do not say, namely, that after registration of the notice amalgamation shall take effect even if the conditions prescribed by s. 12 have not been fulfilled. A number of decisions on other statutes have been cited to me, but decisions such as these on other statutes dealing with different subject-matters and expressed in dissimilar language cannot be of assistance. I am concerned only with the language of the statutes relevant to this case, and that language seems to me to be clear, and its effect, in my opinion, is as follows: (i) No statutory power to amalgamate is conferred by s. 12 of the Act of 1876, as amended by the Act of 1917, except subject to the conditions precedent as to ballot mentioned in the section. (ii) Under s. 13 of the Act of 1876 notice in writing of any amalgamation has to

be sent to the registrar and has to be registered, and until registration the amalgamation can have no effect. (iii) There is nothing whereby an invalid amalgamation is validated by registration of the notice of it or which renders the registration of such notice conclusive of the validity of the amalgamation. (iv) Section 13 (5) of the Act of 1871 as to the effect of a certificate of registration of a trade union has admittedly no bearing upon the question of the effect of the registration of the notice of amalgamation. The rules of the Stewards' Union contain no provision authorising amalgamation. Statutory power is the only power which can be relied upon. Upon the facts of this case, as I have found them, the conditions precedent of valid statutory amalgamation were not fulfilled, and, in my opinion, the amalgamation was a nullity, and was not validated by registration of the notice of amalgamation. This conclusion does not, of course, necessarily affect the existence as a union of the defendant union in respect of which a certificate of registration has been issued. The funds of trade unions are trust funds, and having regard to the invalidity of the amalgamation the defendant union had no title to the funds of the Stewards' Union.

Three further defences are, however, set up. In the first place, it is said that the defendant union is a purchaser for value without notice, and cannot be disturbed in the possession of their funds. I am unable to follow the argument. It is true that one of the terms of the proposed amalgamation was that the defendant union should take over the liabilities of the Stewards' Union, but I am unable to appreciate how the defendant union, which was the creation of and governed by the officials of the two original unions responsible for and familiar with the details of the whole transaction, can be said either to be a purchaser or a purchaser without notice, when one of the objects of the creation of the defendant union was to take possession of funds subject to particular trusts known to those responsible for the transaction, and apply them to other purposes. Secondly, it is contended that the defendant union is immune from attack by reason of s. 4 of the Trade Disputes Act, 1906, which is as follows:

"An action against a trade union, whether of workman or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union, in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court."

By sub-s. (2):

"Nothing in this section shall affect the liability of the trustees of a trade union to be sued in the events provided for by the Trades Union Act, 1871, s. 9, except in respect of any tortious act committed by or on behalf of the union in contemplation or in furtherance of a trade dispute."

The plaintiff in this case is not seeking to make the defendant union liable for funds of the Stewards' Union actually expended by it. All he asks at the Bar in effect is that if he is right as to the invalidity of the amalgamation, the trust funds of the Stewards' Union still in the hands of the defendant union may be ascertained, and the trusts applicable to them carried into execution by the court. I do not think that s. 4 of the 1906 Act has any application to an action of this character. It is not an action in respect of any alleged tortious act by the defendant union, but one of a kind well recognised in this court to establish title to a trust fund which has strayed into wrong hands, and the retention of which by those who hold it would be against conscience. I hold that this action is not within the section in question, and can be maintained. In the third place, it is said that the plaintiff is debarred by reason of his own conduct from maintaining this action; and that, if he is personally debarred, he cannot maintain it in a representative capacity on behalf of others. I agree that, if the plaintiff is personally debarred from remedy, he cannot maintain the action by affecting to sue in a representative capacity. The question is whether he is personally debarred. The plaintiff was in 1921 a local official at Southampton of the Stewards' Union. He

A was aware that some amalgamation proposals were going forward, he never received a ballot paper or voted. He did not know of any irregularity in connection with the ballot, and, after the registration of the defendant union, he became a member and official of that union. Subsequently, he quarrelled with the defendant union and ceased to be an official of it, and then, having ascertained for the first time the facts as to the ballot of the Stewards' Union in connection with the amalgamation, he commenced this action. The question is whether, on the principles recognised here, the plaintiff has by his conduct deprived himself of the remedy which he would otherwise have in a case of this kind. In order to deprive him of his remedy it must, I think, be shown that he has so acted with full knowledge of all material facts as to approve what has been done and abandon any rights which he would otherwise have. There is in fact alleged against the plaintiff here nothing except that he became a member of and served the defendant union, but he did that, as I find, without knowledge of the true facts, and I am unable to hold that such conduct precludes him, on discovering the true facts, from seeking to insist upon the enforcement of the trusts properly applicable to funds which are traced into the defendant union's hands.

The action, therefore, succeeds. I shall declare that no valid amalgamation was ever effected between the Stewards' Union and the British Seafarers' Union, and that, notwithstanding the attempted amalgamation, the funds and property of the Stewards' Union remained subject to the trusts applicable thereto as funds and property of such union. I shall grant an injunction to restrain the defendant union, their officers, trustees, servants, and agents from parting or otherwise dealing with any funds or property derived from or representing any part of the funds or property of the Stewards' Union. There will also be an inquiry what are the funds or property now held by the defendant union or by any person or persons or body to the order or for the use of the defendant union derived from or representing any part of the funds or property of the Stewards' Union, and I shall direct a further inquiry who are the persons being members of the Stewards' Union, or persons deriving title from any of such members now entitled to the funds and property of the Stewards' Union, and in what shares and proportions, but this second inquiry is not to be proceeded with without the leave of the judge in person, and the further consideration of this action will be adjourned with liberty to apply. The defendant union must pay the costs of the action up to and including the judgment.

G Solicitors: *Vizard, Oldham, Crowder & Cash; W. H. Thompson.*

[*Reported by L. MORGAN MAY, Esq., Barrister-at-Law.*]

A

Re CRADOCK'S SETTLED ESTATES

[CHANCERY DIVISION (Astbury, J.), April 23, 27, 1926]

[Reported [1926] Ch. 944; 95 L.J.Ch. 364; 135 L.T. 370]

Settled Land—Vesting deed—Compound settlement—Will constituting settlement and subsequent disentailing deed, re-settlement, and marriage settlement—Execution of vesting deed by trustees of will—Tenant for life—Life estate under will restored by re-settlement—Exercise of powers under will and additional powers under re-settlement—Settled Land Act, 1925 (15 Geo. 5, c. 18), s. 22 (2), s. 31 (1); Sched. II, para. 1 (2), (3).

B

By the will of a testator, who died in 1849, property had become, in 1902, settled upon C. for life with remainder to his son H., in tail male. In 1920 H. disentailed, and he and C. re-settled the property with a limitation to the use of C. for life, in restoration of his life estate under the will, with remainder to H. in tail male. By a deed of Jan. 6, 1908, the remainder, subject to the life estate, was limited to the use of H. in fee simple. By a marriage settlement of Jan. 7, 1908, H. conveyed his remainder in fee to the trustees upon certain trusts. There were in existence trustees of the re-settlement of 1902, and also of the marriage settlement, but no trustees of the will. Questions arose as to who were the proper trustees to execute a vesting deed in favour of C. under the Settled Land Act, 1925.

C

Held: the effect of s. 22 (2) of the Act was that C. was confirmed as tenant for life under the will with power to exercise any further powers given to a tenant for life by the re-settlement; the will, the disentailing deed, the re-settlement, the deed of Jan. 6, 1908, and the marriage settlement constituted a compound settlement, of which the trustees of the will, when appointed would, under s. 31 (1) of the Act, be trustees; trustees of the will must be appointed; and they would be the proper persons to execute the vesting deed.

D

E

Notes. Considered: *Re Cowley Settled Estates*, post, p. 665; *Re Curwen, Curwen v. Graham*, [1931] All E.R. Rep. 737. Referred to: *Re Cayley and Evans' Contract*, [1930] All E.R. Rep. 645.

F

As to compound settlements and restoration of life interests on re-settlements, see 29 HALSBURY'S LAWS (2nd Edn.) 593, 756-759, 780, 781; and as to vesting deeds, see *ibid.*, 534 et seq. For cases see 40 DIGEST (Repl.) 845 et seq. For Settled Land Act, 1925, see 23 HALSBURY'S STATUTES (2nd Edn.) 12.

G

Adjourned Summons by Colonel Edmund William Cradock for directions whether the vesting deed which had to be executed in his favour as tenant for life of certain estates should be made by the trustees of the will of Sir Edmund Cradock Hartopp or by the trustees of a re-settlement of 1902.

By his will, dated April 12, 1844, Sir Edmund Cradock Hartopp (who died on April 3, 1849) devised certain estates at Knighton in the county of Leicester to the use of his nephew the Rev. Edward Hartopp Grove for life with remainder to the use of his first and every other son in tail male with remainder to the use of the testator's nephew Edmund James Adderley for life with remainder to the use of his first and every other son in tail male with remainders over, and the testator declared that the said Edward Hartopp Grove and every other person who should become entitled to the said estates should take upon himself the surname of Cradock and bear and use the arms of Cradock; and it was provided that, if any person to whom an estate tail in the said estates was thereby devised should be born in the testator's lifetime, or within due time after his death, then the estates should be limited to the use of such person for life with remainder to the use of his first and other sons successively in tail male, and the testator appointed trustees of his will. After the death of the testator, Edward Hartopp Grove took the surname and arms of Cradock and died on June 27, 1886, without issue.

H

I

- A** Thereupon, Edmund James Adderley assumed the surname and arms of Cradock and entered into possession of the estates. Colonel Edmund William Cradock, his only son (hereinafter called Colonel Cradock), was born on Sept. 18, 1849, less than six months after the death of the testator, and accordingly under the terms of the will, became tenant for life of the estates in remainder expectant on the death of his father, with remainder to his first and other sons successively in tail male.
- B** Hartopp Francis Charles Adderley Cradock (hereinafter called Hartopp Cradock) was the only son of Colonel Cradock and attained the age of twenty-one years on Mar. 17, 1901. By a disentailing deed dated April 29, 1902, and made between Edmund James Cradock, of the first part, Colonel Cradock, of the second part, Hartopp Cradock, of the third part, and Edgar Rainier Ratcliffe, of the fourth part, the estates were disentailed and settled to such uses as Edmund
- C** James Cradock, Colonel Cradock, and Hartopp Cradock should appoint. By a re-settlement dated April 30, 1902 (hereinafter called the re-settlement), Edmund James Cradock, Colonel Cradock and Hartopp Cradock appointed and conveyed the estates to such uses as Edmund James Cradock, Colonel Cradock, and Hartopp Cradock should by deed jointly appoint, and in default to such uses as Hartopp Cradock and the survivor of Edmund James Cradock and Colonel Cradock should
- D** jointly appoint, and in default to the use of Edmund James Cradock for life by way of restoration of his life estate under the will, and after his death to the use of Colonel Cradock for life, by way of restoration of his life estate under the will, together with all powers annexed to or capable of taking effect during the continuance of such life estate, which immediately before execution of the disentailing deed were capable of being exercised, and after the death of Colonel Cradock to
- E** the use of trustees for a term of 1,000 years and subject thereto to the use of Hartopp Cradock in tail male with remainders over, and trustees were appointed for the purposes of the Settled Land Acts, 1882 to 1890. Edmund James Cradock died on May 14, 1903. By a deed dated Aug. 18, 1905, and made between Hartopp Cradock, of the one part, and Harold Abercrombie Holdsworth, of the other part, the said estates were conveyed subject to the life estate of Colonel
- F** Cradock to the use of Hartopp Cradock as a base fee. By a deed dated Jan. 6, 1908, and made between Colonel Cradock and Hartopp Cradock, supplemental to the re-settlement, Colonel Cradock and Hartopp Cradock appointed the estates to the use of Colonel Cradock for his life by way of restoration of his life estate under the will, and after his death, to the use of Hartopp Cradock, his heirs and assigns for ever. By a settlement made on Jan. 7, 1908, upon the marriage of
- G** Hartopp Cradock the estates were conveyed, subject to the life estate of Colonel Cradock, to the use of trustees upon certain trusts. At the date of the summons there were no trustees in existence of the will of Sir Edmund Cradock Hartopp. The present trustees of the re-settlement were Henry Arden Adderley and Alfred Anstey, who was a member of the firm of solicitors for Colonel Cradock. The trustees of the marriage settlement of Jan. 7, 1908, were Alfred Mitchelson and
- H** Sydney Cope Morgan.
- Upon the Settled Land Act, 1925, coming into force, questions arose whether the proper persons to execute the vesting deed in favour of Colonel Cradock were the trustees of the re-settlement, on the footing that, by s. 22 (2), Colonel Cradock became a person having the powers of a tenant for life under the re-settlement, or whether trustees for the purposes of the Settled Land Act, 1925, must be
- I** appointed of the will, who, by the operation of s. 31 (1), would become trustees of the compound settlement constituted by the will and the subsequent deeds. It was necessary that a vesting deed should be at once executed, as parts of the settled estate were ripe for sale. Colonel Cradock issued this summons, to which the trustees of the re-settlement and the trustees of the marriage settlement were defendants, asking whether Colonel Cradock, as having the powers of a tenant for life under the re-settlement, could sell the settled estates, or whether he could only exercise his powers under the compound settlement, of what deeds that compound settlement consisted, and who were the persons who could execute a vesting deed.

Daynes for Colonel Cradock.

H. E. Williams for the trustees of the re-settlement.

W. M. Hunt for the trustees of the marriage settlement.

ASTBURY, J.—This is a summons in respect of a settled estate and in the matter of the Settled Land Act, 1925. It is taken out by Colonel Cradock, who is tenant for life of these estates, for the purpose of ascertaining whether he has, under a re-settlement of 1902, power to sell the settled land, and generally for the purpose of ascertaining who must now execute the vesting deed provided for in the second schedule to the Act and in favour of whom. There is a certain amount of complication about the matter, although, I think, the actual decision of the issues which have been raised is comparatively simple.

The original settlement of these estates was under a will dated April 12, 1844. Under that will the testator appointed and devised land, which I will now describe as the settled land, to the use of a nephew for life with remainder in tail and with remainder to the use of another nephew for life, again with remainder in tail. The will contained a proviso that if any person to whom an estate tail was thereinbefore appointed or devised should be born in the testator's lifetime or in due time after his death, then the appointment or devise were to be revoked, and in lieu thereof the testator devised and appointed the estate and hereditaments comprised in the devise and appointment so revoked to the use of the person so thereby made tenant in tail for his life, and after his death to the use of his sons in tail male. Under the limitations of the settlement so created, the applicant, Colonel Cradock, is now tenant for life, there being, of course, the original remainders in tail. By an indenture of April 29, 1902, the then tenant in tail in remainder, in conjunction with the proper parties, disentailed the estate, and by an indenture of the following day, made between the proper parties, a re-settlement of the estate was made. I need not read the whole of the limitations under the re-settlement, but, in the events which happened, the estate became limited to the use of the applicant, Colonel Cradock, for life in restoration of his estate under the will, and his son Hartopp became tenant in tail in remainder. By an indenture of Jan. 6, 1908, made between the proper parties, the applicant's son, Hartopp, became tenant in fee simple in remainder, instead of tenant in tail, and by an indenture of Jan. 7, 1908, that is the day after, which was a marriage settlement executed on the marriage of Hartopp Cradock, these estates were, subject to the life interest of Colonel Cradock, conveyed to trustees in fee upon the trusts of the settlement. Colonel Cradock, the applicant, is desirous, if he can do so, of obtaining a decision that he, as tenant for life under the 1902 re-settlement, has the powers of a tenant for life, and that the trustees of that re-settlement are the right people to execute the vesting deed referred to in the second schedule to the Act. He bases his contention upon s. 22 (2) of the Settled Land Act, 1925. That sub-section provides:

"Where by a re-settlement of settled land any estate or interest therein is expressed to be limited to any person (whether subject or not to any estate, interest, charge or power expressly created or conferred by the re-settlement) in restoration or confirmation of his estate or interest under a prior settlement, then, for the purposes of this Act and otherwise, that person is entitled to the estate or interest so restored or confirmed as of his former estate or interest."

There can be no possible doubt that under that portion of the sub-section Colonel Cradock is restored to his life interest under the will, or is confirmed in it and remains such life tenant. Then the sub-section provides:

"and in addition to the powers exercisable by him in respect of his former estate or interest [i.e., in addition to all powers exercisable by him as tenant for life under the will] he is capable of exercising all such further powers as he could have exercised by virtue of the re-settlement, if his estate or interest

- A** under the prior settlement had not been so restored or confirmed, but he had been entitled under the re-settlement only."

It is contended that those words give to Colonel Cradock the full powers of a tenant for life under a re-settlement notwithstanding the fact that he is by the same section confirmed in his position as tenant for life, with all the powers consequent thereon under the settlement created by the will.

- B** I do not think that that is the true construction of this section at all. I think what it means, as applied to the present case, is that Colonel Cradock was confirmed as regards his life interest under the will, and that if the re-settlement contained any further powers exercisable by the tenant for life thereunder, then Colonel Cradock is entitled, as tenant for life under the will, to exercise such further additional powers, if any, as might be given to him under the re-settlement.
- C** The result, therefore, is, in my judgment, that at the present time Colonel Cradock is tenant for life under the settlement created by the will.

- Capital moneys ought, *prima facie*, to go to the trustees of the settlement under which the tenant for life so holds. Under the second schedule to the Settled Land Act, 1925, it is provided, in para. 1 (1): "A settlement subsisting at the commencement of this Act is, for the purposes of this Act, a trust instrument." Sub-clause (2) of para. 1 provides:
- D**

"As soon as practicable after the commencement of this Act, the trustees for the purposes of this Act of every settlement of land subsisting at the commencement of this Act (whether or not the settled land is already vested in them), may and on the request of the tenant for life or statutory owner, shall at the cost of the trust estate, execute a principal vesting deed"

- E** therein referred to. It seems to me again clear that the only persons who can execute a vesting deed in this case are the persons who are or may be appointed trustees for the purposes of this Act, of the settlement in the present case. Sub-clause (3) provides:

- F** "If there are no trustees of the settlement then (in default of a person able and willing to appoint such trustees) an application shall be made to the court by the tenant for life or statutory owner, or by any other person interested, for the appointment of such trustees."

- That application is made in the present summons. Section 13 of the Act provides for a disposition not taking effect until the vesting instrument is made. There are a number of other sections, to which I need not refer, which show the necessity, in order that the Act may be carried out, of the execution of this vesting deed.
- G** Under s. 1 (1) of the Act, it is enacted that:

- "Any deed, will, agreement for a settlement or other agreement, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, after the commencement of this Act, stands for the time being—(i) limited in trust for any persons by way of succession, or (ii) limited in trust for any person in possession—(a) for an entailed interest whether or not capable of being barred or defeated; (b) for an estate in fee simple or for a term of years absolute subject to an executory limitation, gift, or disposition over on failure of his issue or in any other event; (c) for a base or determinable fee or any corresponding interest in leasehold land; (d) being an infant, for an estate in fee simple or for a term of years absolute; or (iii) limited in trust for any person for an estate in fee simple or for a term of years absolute contingently on the happening of any event; or (iv) limited to or in trust for a married woman of full age in possession for an estate in fee simple or a term of years absolute or any other interest with a restraint on anticipation; or (v) charged, whether voluntarily or in consideration of marriage or by way of family arrangement, and whether immediately or after an interval, with the payment
- H**
- I**

of any rent-charge for the life of any person, or any less period, or of any capital, annual, or periodical sums for the portions, advancement, maintenance, or otherwise for the benefit of any persons, with or without any term of years for securing or raising the same; creates or is for the purpose of this Act a settlement and is in this Act referred to as a settlement, or as the settlement, as the case requires: Provided that, where land is the subject of a compound settlement, references in this Act to the settlement shall be construed as meaning such compound settlement, unless the context otherwise requires."

It is quite plain that in the present case, by virtue of the will and the subsequent documents which I have referred to, this settled land stands limited in trust for persons by way of succession. I do not think it can be doubted that in the present case the will, the disentailing deed, the re-settlement of 1902, the deed of 1908 under which Hartopp obtained the fee, and his marriage settlement, constitute a compound settlement within the meaning of s. 1 (1) of this statute. Section 3 provides that:

"Land which has been subject to a settlement shall be deemed for the purposes of this Act to remain and be settled land, and the settlement shall be deemed to be a subsisting settlement for the purposes of this Act so long as—
(a) any limitation, charge, or power of charging under the settlement subsists, or is capable of being exercised. . . ."

Here, therefore, there is, under the section I have referred to, a compound settlement, and a vesting deed must, in my judgment, be made by the trustees of that settlement. Section 31 (1) provides:

"Persons who are for the time being trustees for the purposes of this Act of an instrument which is a settlement, or is deemed to be a subsisting settlement for the purposes of this Act, shall be the trustees for the purposes of this Act of any settlement constituted by that instrument and any instruments subsequent in date or operation."

In other words, the trustees of the will, when appointed for the purposes of the Act in this case, become ipso facto on their appointment trustees for the purposes of the Act of the compound settlement that I have referred to. Under one of the forms of vesting instrument, contained in the first schedule, Form No. 1, it is provided that the trustees, in executing the vesting deed, shall thereby declare that "all and singular the hereditaments and premises respectively mentioned in the first and second schedules hereto and all other (if any) the premises capable of being vested by this declaration which are now by any means subject to the limitations of the recited settlement are vested in the said tenant for life . . ." and the vesting deed, if it declares the settlement, in accordance with what I have decided will be a vesting deed complying with the requirements of the statute.

I refer it to chambers to appoint new trustees for the purposes named.

Solicitors: *Moon, Gilks & Moon*, for *Houlditch, Anstey & Thompson*, Exeter; *Hasties*.

[Reported by E. KNOWLES CORRIE, Esq., Barrister-at-Law.]

A

MUTUAL PROPERTY INSURANCE CO. LTD. v. INLAND REVENUE COMMISSIONERS

[KING'S BENCH DIVISION (Rowlatt, J.), November 16, 1926]

B

[Reported 136 L.T. 354]

Stamp Duty—Mortgage—Covenant—Second mortgage—Covenant to pay first mortgage loan to second mortgagees—Duty payable on aggregate amount secured by second mortgage—Stamp Act, 1891 (54 & 55 Vict., c. 39), Sched. I.

C

A second mortgage of freehold property subject to an existing first mortgage by the mortgagor to a third party contained a covenant by the borrower to pay to the second mortgagees by instalments (a) a sum equivalent to the amount of the loan, the subject of the first mortgage, (b) a sum equivalent to the amount of the loan, the subject of the second mortgage, and (c) a sum equivalent to the interest on the amounts remaining unpaid under both mortgages. There was a proviso for redemption on payment of the amount of the second mortgage and interest thereon. The first mortgage had been duly stamped with the appropriate duty on the amount thereby secured.

D

Held: as between the mortgagor and the second mortgagees the instrument was the primary security for the obligation which those parties had created between themselves and was not secondary to the mortgagor's obligation towards the first mortgagee, nor was the covenant by the mortgagor to pay to the second mortgagees the amount of the first mortgage merely ancillary to the first mortgage; the appellants were not paying duty twice on the same sum because the sums concerned in the first and second mortgages constituted different obligations between different parties; and the instrument was liable to stamp duty either as a mortgage or as a covenant within Sched. I to the Stamp Act, 1891, on the aggregate of the sums secured by the two mortgages.

E

F

Notes. As to stamp duty on mortgages, see 23 HALSBURY'S LAWS (2nd Edn.) 297-300; and for cases see 39 DIGEST 291-293.

Cases referred to:

(1) *Lord Canning v. Raper* (1852), 1 E. & B. 164; 22 L.J.Q.B. 87; 20 L.T.O.S. 218; 17 Jur. 390; 118 E.R. 400; 39 Digest 291, 718.

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(2) *Limmer Asphalte Paving Co. v. I.R. Comrs.* (1872), L.R. 7 Exch. 211; 41 L.J.Ex. 106; 26 L.T. 633; 20 W.R. 610; 39 Digest 259, 433.

Case Stated by the Commissioners of Inland Revenue pursuant to s. 13 of the Stamp Act, 1891.

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On Mar. 18, 1926, an instrument dated Feb. 6, 1926, and made between Walter Reginald Newson, of the one part, and the appellants, the Mutual Property Insurance Co., Ltd., of the other part, was presented on behalf of the appellants to the Commissioners of Inland Revenue under the provisions of s. 12 of the Stamp Act, 1891, for the opinion of the commissioners as to the stamp duty with which the instrument was chargeable.

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The instrument in question contained a second mortgage for £145 of certain freehold property, subject to an existing mortgage for £350 to one Charles Jennings Wiltshire, referred to in Part 2 of the second schedule to the instrument in question. The instrument also contained a covenant by the borrower to pay by instalments (a) a sum equivalent to the amount of the loan or advance the subject of the first mortgage; (b) a sum equivalent to the amount of the loan or advance the subject of the second mortgage; and (c) a sum equivalent to the interest at the rate therein provided on the amounts remaining unpaid of the loans or advances the subject of both the mortgages, with a proviso for redemption on payment of the amount of the second mortgage and interest thereon only. The first mortgage was stamped with the appropriate duty of 2s. 6d. per cent. on the amount thereby secured.

The commissioners were of opinion that the instrument presented for adjudication was a security either (i) for the payment or repayment of £495, the aggregate of the sums of £145, the amount of the advance made by the appellants to the mortgagor, Walter Reginald Newson, on the execution of the instrument in question, and £350, the amount of the existing prior mortgage referred to in Part 2 of the second schedule to the instrument in question, or, if not for the payment or repayment of £495, then for the payment or repayment of money exceeding £400 but not exceeding £500; or (ii) for the payment of sums of money at stated periods the total amount of which to be ultimately payable amounted to £495 as aforesaid, or to an amount exceeding £400 but not exceeding £500; and they, accordingly, assessed it to duty at the rate of 2s. 6d. per £100 on the said sum of £495 or on an amount exceeding £400 but not exceeding £500, namely to the duty of 12s. 6d. as a mortgage if the former view was correct, under sub-head (1) of the head of charge, "Mortgage, bond, debenture covenant," in Sched. I to the Stamp Act, 1891; and, if the latter view was correct, under sub-head (1) of the head of charge, "Bond, covenant or instrument of any kind whatsoever" in the same schedule. In view of the terms of s. 13 of the Stamp Act, 1891, and, particularly sub-s. (3) thereof, the commissioners submitted that, if the assessment made was erroneous, the instrument was liable either (i) to two several ad valorem duties under the heads of charge aforesaid, or either of them, on the sums of £145 and £350 respectively, i.e., 3s. 9d. and 10s., amounting together to 13s. 9d.; or (ii) to ad valorem duty as aforesaid on the sum of £145, i.e., 3s. 9d., to further ad valorem duty amounting to 10s. under sub-head (1) of the head of charge "Bond, covenant or instrument of any kind whatsoever" on an annuity of 5 per cent. on £350, namely £17 10s., or a periodical payment of £17 10s. per annum, payable either for an indefinite period or alternatively for a definite and certain period of twenty years attracting the same amount of duty, and to further duty of 10s. as a "Deed of any kind whatsoever not described in this schedule" in respect of its operation as a bond or covenant to pay unascertainable sums of money varying with the rate of income tax from time to time imposed, such latter duties in all amounting to £1 3s. 9d. The appellants contended that the instrument in question was a mortgage to secure repayment of the principal sum of £145, that the borrower could at any time on notice as therein provided redeem the property comprised therein on payment of the principal sum and interest thereon in accordance with the terms of the mortgage, and that any money in excess of the principal sum and interest which might be paid by the borrower to the appellants would be held by them on trust for the borrower. The appellants further contended that the duty payable on the said instrument was at the rate of 2s. 6d. per cent. on the said principal sum, and no more. The questions for the opinion of the court were: (i) Whether the instrument was liable to duty as assessed by the commissioners; (ii) if not, to what duty it was liable.

In the instrument the mortgagor covenanted as follows :

"(i) To repay to the company the principal sum together with interest thereon (or on so much thereof as shall have remained unpaid on the anniversary of the date hereof immediately preceding the day on which any quarterly instalment becomes due) from the date hereof at such rate as after the deduction of the income tax thereon will yield to the company a clear £5 per cent. per annum on not only the amount of the principal sum remaining unpaid as aforesaid but also upon the amount of the said first mortgage at the same time remaining unpaid by quarterly instalments of such a sum as after deduction of income tax as aforesaid will yield to the company the clear sum specified in the fifth column of the said First Schedule the first of such quarterly instalments to be paid three months from the date hereof the second six months from the date hereof and so on every three months until the whole of the principal sum with interest as aforesaid and also all money secured by the said first mortgage have been repaid."

A *C. A. Bennett, K.C., and W. Copping* for the appellants.

The Solicitor-General (Sir Thomas Inskip, K.C.) and Reginald Hills for the commissioners.

B **ROWLATT, J.**—In my judgment, this instrument is properly stampable as a mortgage or a covenant. It is pointed out by the Solicitor-General that it is a mortgage, the rest of the description being satisfied—I will assume that for a moment—as well as a covenant, if it is either, because these annual sums, although they go to the extinction, ultimately, of the first mortgage, are charged in the second mortgage to the second mortgagees. Therefore, if it is within the heading at all, I think it is within either of them or both of them.

C But the question has been raised whether it is within the description at all. The first point which I understand has been made by the appellants is that it is not the primary security, inasmuch as, so far as the instrument refers to the original £350 secured by the first mortgage, it is the first mortgage that is the primary security, and I think it is the same argument, put in another shape, when it is said by counsel for the appellants that the Exchequer are seeking to get the stamp duty on one sum twice over. I can understand the point of view of the D mortgagor when he says, somewhat loosely: “Primarily I have got to pay this £350 to the man who lent me the £350,” but this transaction is between the second mortgagees and the mortgagor, and the second mortgagees have thought fit to ask, and the mortgagor has thought fit to give, a covenant to the second mortgagees to pay this sum. As between those parties it is primary; it is the primary security for that obligation which these parties have created between themselves, and I do E not see how it can be said that it is secondary to the obligation to pay the first mortgage. It is in a sense which I cannot follow that that contention is put forward. In the same way, with regard to the point about paying twice on the same sum, it may be the same sum of money ultimately, but it is a different obligation, a different debt, between different parties, in different amounts—utterly F different. If a tax is on covenants to pay the money and a person chooses to covenant to pay a sum of money, which can be identified as the same sum of money, by various deeds to various people, I cannot see any reason why he should not pay duty on each and every covenant into which he enters.

The second point taken was that this was not a covenant to pay the amount of the total of these annual payments, because they could all be redeemed. I think that is quite misconceived. It is well known that a covenant to pay a debt subject G to contingencies is a covenant to pay that debt subject to the Stamp Acts; *Lord Canning v. Raper* (1) is the leading authority upon that, and there are subsequent cases. This is not precisely to pay on a contingency, but it is a promise to pay which may be defeated by the action of the mortgagor if he redeems. But it is nothing to the point. Here is the covenant to pay. It must be stamped. The circumstance that there are provisions by which the mortgagor can put an end to H that covenant in one way or another by redemption I cannot conceive affects it in the least. It is a covenant to pay the money. He has a way out of it, but there it is. The covenant to pay the money attracts duty under the Stamp Act, according to the principle of *Lord Canning v. Raper* (1), and I should have thought so without that case.

I The third point was taken on the principle of *Limmer Asphalte Paving Co. v. I.R. Comrs.* (2) and the line of cases preceding it, but, in my judgment, they have nothing whatever to do with this matter. In the *Limmer Asphalte Case* (2) a licence had been granted on the terms that the licensee should pay £1,500 in cash and a further £6,000 by instalments, and it was held that the deed embodying this arrangement was not chargeable to stamp duty as a conveyance on sale, no property being conveyed by it, and that, if it had been chargeable, one duty only could have been charged in respect of the £7,500 and not a second duty in respect of the covenants to pay the £6,000 by instalments. In the other cases about covenants to pay the accessories to a mortgage, it was the interest, or the bank

charge, the cost of repairs, and so on, which were all accessories to the mortgage itself, in respect of which a stamp was being exigible, but the covenants in the present case are beyond and outside this second mortgage altogether. The second mortgagees take a mortgage for £145, but then they do something quite outside that. They say: "We want to be secured as regards the first mortgage, so that there will be no trouble from that quarter. We are going to take from you a covenant to give us that money for the first mortgagee, so that we shall be in a position to protect ourselves against the first mortgagee." That is something entirely outside and beyond the second mortgage. I cannot conceive how it can be said for a moment that this covenant is ancillary to the second mortgage in the sense that it fortifies the second mortgage as such. Of course it is an advantage to the second mortgagees. If they had not been the second mortgagees, they would not have taken it. They want to provide for the payment of the first mortgage, but, qua second mortgagees, this deed does not reinforce their position. It only reinforces their position collaterally because they are the second mortgagees and want protection against the first mortgagee. It is not ancillary to the second mortgage as such, in my judgment. I think all the points fail; therefore this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Miller & Smith; Solicitor of Inland Revenue.*

[*Reported by J. S. SCRIMGEOUR, Esq., Barrister-at-Law.*]

R. v. HASLEWOOD. Ex parte MARGERISON

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Salter, JJ.), July 23, 1926]

[Reported [1926] 2 K.B. 468; 95 L.J.K.B. 975; 136 L.T. 276; 90 J.P. 158; 42 T.L.R. 746; 70 Sol. Jo. 906; 24 L.G.R. 505]

Coroner—Inquest—View of body by coroner—Condition precedent to valid inquest—Coroners Act, 1887 (50 & 51 Vict., c. 71), ss. 4 (1), 6 (1).

It is a condition precedent to the holding of an inquest that the coroner shall have viewed the body. If he does not do so, the proceedings which take place are not an inquest, but a nullity, and under s. 6 of the Coroners Act, 1887, the court will order another inquest to be held. The omission to view the body is not a mere irregularity, the only question for the court being whether in the circumstances a fresh inquest should be ordered.

Notes. Section 4 of the Coroners Act, 1887, was partly repealed by the Coroners Act, 1926, Sched. III, but in a respect not material to the present report. For the Acts, see 4 HALSBURY'S STATUTES (2nd Edn.) 823, 846. As to the view of a body by a coroner, see 8 HALSBURY'S LAWS (3rd Edn.) 500-502; and for cases see 13 DIGEST (Repl.) 155-156.

Case referred to:

(1) *R. v. Ferrand* (1819), 3 B. & Ald. 260; 106 E.R. 659; sub nom. *R. v. Farrant*, 1 Chit. 745; 13 Digest (Repl.) 154, 145.

Rule nisi for a certiorari to quash a coroner's inquisition on the ground of irregularity and an application for an order that another inquest should be held before a different coroner.

A The respondent, D. N. Haslewood, Esq., the coroner for Blackburn, having received a medical report as to the finding of the dead body of a boy, ordered an inquest to be held at Ribchester on Mar. 17, 1926. Owing to difficulties of transport he arrived for the inquest a few minutes late, and on his arrival the jury had already viewed the body. Not having in mind the requirement of s. 4 (1) of the Coroners Act, 1887, he thought that, as he was not a medical man, B no good purpose would be served by his viewing the body. The jury found that the boy had shot himself with a revolver, but that there was no evidence to satisfy them as to his state of mind. The father of the deceased was of opinion that the case was more probably one of accident or murder than of suicide, and he obtained this rule under and applied under s. 6 (1) (b) of the Coroners Act, 1887, C under the authority of the Attorney-General, for another inquest to be held. It was contended, in showing cause against the rule, that the case was merely one of irregularity and that the court had a discretion whether it would quash the inquisition and also whether it would order a fresh inquest.

Oliver, K.C., and *Harold Derbyshire* showed cause.

Sir H. Curtis Bennett, K.C., and *P. B. Morle* in support of the rule.

D **LORD HEWART, C.J.**—This is a rule nisi for a certiorari to quash an inquisition held by a coroner, and there is coupled with the application for a certiorari an application under s. 6 (1) of the Coroners Act, 1887, for an order that another inquest should be held. It is not necessary to reiterate all the facts. It is common ground, and it is the subject of a very proper expression of regret on the part of E the coroner, that, for reasons which are explained, and in circumstances which are described by the coroner, there had been no view of the body by him.

Before the passing of the Coroners Act, 1887, it was clearly laid down that a view of the body by the coroner and the jury was a condition precedent to the holding of an inquest. It is of the essence of an inquest that it should be *super visum corporis*: see *R. v. Ferrand* (1). It has been urged by counsel showing F cause that since the passing of the Coroners Act, 1887, that proposition has ceased to be true; that the scheme of that statute was to lay down in ss. 4 and 5 all the duties of the coroner and jury, the performance of which was necessary for the holding of a coroner's inquisition; and then, in s. 6, to provide that on the grounds G specified in the section—including "irregularity in the proceedings"—the court might be satisfied that it was necessary to hold another inquest. The failure to view the body, it was argued, was *pari passu* with the other matters mentioned, and if there had been no view of the body, as in the case of the commission of any other irregularity, there had still been an inquest, and it was for the court in its discretion to decide whether there ought to be a further inquest. In my opinion that contention cannot be upheld. It is still, as in *Ferrand's Case* (1), a condition precedent that there should be a view of the body. A failure in that H is a failure to begin the proceedings at all. That which followed might be described as an inquest, but it was not really an inquest.

It was said in *JERVIS ON CORONERS* (6th Edn., p. 27):

I "It was clearly laid down by all the books that a coroner has no authority to take an inquest of death without a view of the body, and that if he do so, the inquisition is void as being an extra-judicial proceeding. And the same principle appears to be applicable under the present Act."

That seems to be the true view, and in those circumstances it is inaccurate to say that there has been an inquest. The question is not whether one inquest, marred by an irregularity, should be followed by another inquest, but whether what has taken place was an inquest at all. I think that this inquisition must be quashed and the rule made absolute. Further, as there has hitherto been no real inquest, there must be an inquest. There is clearly evidence of a violent or non-natural death, and it has not yet been inquired into, for that which was intended to be an

inquiry never really began to be an inquiry. I see no reason why the inquest A should not be held before the same coroner.

AVORY, J.—I agree.

SALTER, J.—I agree.

Rule absolute.

Solicitors: *John Taylor & Co.*, Blackburn; *James, Mellor & Coleman*, for *Oddie & Roebuck*, Blackburn.

[Reported by J. F. WALKER, ESQ., Barrister-at-Law.]

SHUTTLEWORTH v. COX BROS. & CO. (MAIDENHEAD), LTD., AND OTHERS

[COURT OF APPEAL (Bankes, Scrutton and Atkin, L.J.J.), November 9, 1926]

[Reported [1927] 2 K.B. 9; 96 L.J.K.B. 104; 136 L.T. 337;
43 T.L.R. 83]

*Company—Articles—Alteration—Benefit of company—Matter for company—
Bona fides—Interference by court—Companies (Consolidation) Act, 1908
(8 Edw. 7, c. 69), s. 13.*

In exercising its power by special resolution to alter or add to its articles a company must act, not only in the manner required by law, but also bona fide for the benefit of the company as a whole: see per LORD LINDLEY, M.R., in *Allen v. Gold Reefs of West Africa, Ltd.* (1), [1900] 1 Ch. 656, 671. Whether or not an alteration or addition is for the benefit of the company is a matter for the company and not for the court, and the court will only interfere if it comes to the conclusion that in passing the special resolution the company was not acting bona fide or that the resolution was such that no reasonable persons could have passed it.

Company—Contract—Contract contained in article—Variation by alteration of article.

Where a contract between a company and another party is contained in an article of the company, as distinct from being made by the company in pursuance of a power given by its articles, the terms of the contract are liable to be varied by the article being altered by a special resolution of the company under the relevant provisions of the Companies Acts.

Notes. The Companies (Consolidation) Act, 1908, was repealed by the Companies Act, 1929, itself now repealed by the Companies Act, 1948. Section 13 of the Act of 1908 is reproduced in s. 10 of the Act of 1948: see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Followed: *Sugden v. Urban Fire Insurance Co.* (1930), 75 Sol. Jo. 60. Referred to: *Greenhalgh v. Arderne Cinemas, Ltd.*, [1950] 2 All E.R. 1120.

As to alteration of a company's articles, see 6 HALSBURY'S LAWS (3rd Edn.) 271-273; and for cases see 9 DIGEST (Repl.) 591.

A Cases referred to:

- (1) *Allen v. Gold Reefs of West Africa, Ltd.*, [1900] 1 Ch. 656; 69 L.J.Ch. 266; 82 L.T. 210; 16 T.L.R. 213; 44 Sol. Jo. 261; 48 W.R. 452; 7 Mans. 417, C.A.; 9 Digest (Repl.) 605, 4006.
- (2) *Sidebottom v. Kershaw, Leese & Co., Ltd.*, [1920] 1 Ch. 154; 89 L.J.Ch. 113; 122 L.T. 325; 36 T.L.R. 45; 64 Sol. Jo. 114, C.A.; 9 Digest (Repl.) 595, 3933.
- (3) *Dafen Tinplate Co., Ltd. v. Llanelly Steel Co. (1907), Ltd.*, [1920] 2 Ch. 124; 89 L.J. 346; 123 L.T. 225; 36 T.L.R. 428; 64 Sol. Jo. 446; 9 Digest (Repl.) 594, 3932.
- (4) *Nelson v. James Nelson & Sons, Ltd.*, [1914] 2 K.B. 770; 83 L.J.K.B. 823; 110 L.T. 888; 30 T.L.R. 368, C.A.; 9 Digest (Repl.) 557, 3688.
- (5) *Brown v. British Abrasive Wheel Co., Ltd.*, [1919] 1 Ch. 290; 88 L.J.Ch. 143; 120 L.T. 529; 35 T.L.R. 268; 63 Sol. Jo. 373; 9 Digest (Repl.) 594, 3931.

C

Appeal from an order of AVORY, J., in an action tried by him with a jury at Reading Assizes.

D

The plaintiff claimed damages for wrongful dismissal from his office as manager of the defendant company, a declaration that he was a permanent director of the company, and an injunction restraining the company from altering the company's articles of association. The company was incorporated in May, 1921, to take over as a going concern and carry on the business of a timber and builders' merchants' business which had been carried on at Maidenhead by three persons, of whom the plaintiff was one. The plaintiff was a director of the defendant company from May, 1921, when the company was incorporated, on the terms of art. 18 of the articles of association of the company, which provided that certain persons—including the plaintiff—should be the first directors of the company, that they should be permanent directors, and that each of them should be entitled to hold that office so long as he should live unless he should become disqualified from any of the causes specified in art. 22. Article 22 at that time provided for the vacation of office by a director if he became bankrupt or of unsound mind, or was convicted of an indictable offence, or ceased to hold the necessary share qualification, or absented himself without leave of absence for a period of six months from the meetings of the directors or gave six calendar months' notice that he resigned his office. The plaintiff was also manager of the company at a salary, and in

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1924 he was summarily dismissed by the other directors from his position as manager. He brought an action for wrongful dismissal, the jury found that the reasons given by the other directors did not justify his immediate dismissal without notice, and they returned a verdict for the plaintiff and he was awarded £150 damages. An appeal against the verdict was dismissed, the Court of Appeal holding that there were grounds on which the jury were justified in coming to the conclusion to which they came. None of the causes of disqualification specified in art. 22, as it stood in 1924, had occurred, and there was then no ground under art. 22 which justified the plaintiff's removal from his position of permanent director of the company. The plaintiff's fellow directors, therefore, passed a special resolution under s. 13 of the Companies (Consolidation) Act, 1908 [see now Companies Act, 1948, s. 10] amending art. 22 by adding to the causes of disqualification mentioned therein: "If he [a director] shall be requested in writing by all the other directors to resign his office." Some ten or eleven months after the article was altered the plaintiff was requested in writing by the other directors to resign his office, and in the present action, in addition to the claim for damages, he sought a declaration that the added clause in the article was invalid and that he still remained a director on the ground that the alteration of art. 22 was a breach of the contract to be implied from the articles of association, and "that the said proposed article is not bona fide for the benefit of the company as a whole."

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By s. 13 of the Companies (Consolidation) Act, 1908 [now s. 10 (1) of Companies Act, 1948]: A

"Subject to the provisions of this Act and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles."

AVORY, J., who tried the action, said in summing up to the jury, that he was strongly of opinion that there was no evidence on which the jury could find want of good faith in making the alteration in the article, but he left that question to the jury, and the jury negatived good faith. AVORY, J., ruled that there was no evidence to support the jury's finding and gave judgment for the defendants on that issue. The plaintiff appealed. B

S. Lowry Porter, K.C., and *H. McKenna* for the plaintiff.

C. F. Vachell, K.C., and *Earengely* for the defendants. C

BANKES, L.J.—This is a cross-appeal brought by the plaintiff in an action commenced by him in which he sought to challenge the validity of a resolution of the shareholders of a company, the effect of which was to deprive him of his position as a permanent director of the company.

The company in question was incorporated in May, 1921, to take over a timber and builders' merchants' business which had been carried on at Maidenhead by three persons—the plaintiff, a Mr. Beare, and a Mr. Ernest Burton Norris. These three had carried on business in partnership, and the company was incorporated for the purpose of taking over as a going concern, and carrying on, that business. By art. 17 of the articles of association it was provided that the number of directors should not be less than three nor more than seven. Art. 18 provided that "The following persons shall be the first directors of the company"—and there were named Beare, Ernest Burton Norris, the plaintiff, Thomas Norris (the father of Ernest Burton Norris), and a gentleman of the name of Fritche. The article went on to provide that they should be permanent directors of the company and provided that D

"each of them shall be entitled to hold such office so long as he shall live unless he shall become disqualified from any of the causes specified in art. 22." E

It is not necessary to refer to art. 22 except to say that none of the causes there referred to occurred, and that there was no ground under art. 22 which entitled the shareholders, or anyone, to remove the plaintiff from the position to which he became entitled under art. 18. As well as being a director, he was appointed works manager at a salary, and so he remained, without any question or complaint, for some considerable time. In 1924 and 1925 there were irregularities in reference to the receipt of and accounting for cash by the plaintiff, and, as a result of inquiry into that matter he was summarily dismissed. He brought an action claiming damages for an alleged wrongful dismissal, and the defendants pleaded that the circumstances justified his dismissal. They did not allege that the circumstances amounted to dishonesty on his part, but they alleged that they amounted to incompetence. After a full hearing the jury found a verdict for the plaintiff. That verdict was challenged in this court, and we have decided that there was ground upon which the jury were justified in coming to their conclusion. The jury were also asked to deal with the plaintiff's complaint that he had been wrongfully deprived of his position as a permanent director, and his complaint was that there had been an alteration of the articles of association which was invalid. The alteration was one which added to art. 22 as an additional ground the words "If [a director] be requested in writing by all the other directors to resign his office." That resolution was passed after due notice in November, 1924, but no action was taken against the plaintiff under the amended article until some considerable time afterwards. The plaintiff's complaint in his statement of claim was that the amendment of the article was a breach of the contract to be implied from the articles of association, and "that the said proposed article F

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A is not bona fide for the benefit of the company as a whole." He was, therefore, challenging the validity of the resolution.

The power to alter articles is conferred by s. 13 of the Companies (Consolidation) Act, 1908, which provides :

B "Subject to the provisions of this Act and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles."

C It is not suggested here that there is anything expressly contained in the memorandum which controls the power conferred by that section of altering or adding to the articles, but it is said that it is well established that, although the section in the widest terms gives that authority to a company, the courts will exercise a supervision over the exercise by the company of that power, and will test the question whether the exercise of the power by the company has or has not been a valid one. It is said, and truly said, that the test which has been applied by the court is one which was laid down by LORD LINDLEY, M.R., in *Allen v. Gold Reefs of West Africa, Ltd.* (1). I will refer to the test at once. What he says is this ([1900] 1 Ch. at p. 671) :

D "The power thus conferred on companies to alter the regulations contained in their articles is limited only by the provisions contained in the statute and the conditions contained in the company's memorandum of association. Wide, however, as the language of s. 50 [of Companies Act, 1862] is, the power conferred by it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers
E conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law but also bona fide for the benefit of the company as a whole, and it must not be exceeded."

There is no question here as to the manner required by law. What is said is that this resolution was invalid because, applying LORD LINDLEY, M.R.'s test, it was not bona fide for the benefit of the company as a whole. After the passing of the
F resolution for some time no action was taken, but after the lapse of some months a resolution was passed by which all the directors resolved that the plaintiff should resign his position as director. That is referred to for the purpose of showing that the original action of the shareholders, who were also the directors, in passing the resolution altering the articles was not bona fide, that it was a personal act of vindictiveness on the part of these gentlemen, and that, whatever the meaning
G of the test taken as a whole may be, there was evidence here upon which the jury were entitled to arrive at the conclusion that these gentlemen were actuated by a wrong motive, and therefore could not be said to have acted bona fide. The jury were asked one question, which they divided into two, on this point. They were first asked whether the action of these gentlemen was bona fide. They answered
H "No," and upon that, of course, a question arises at once whether there was evidence entitling them to come to that conclusion, because if there was, there is an end of the matter. AVORY, J., was asked to rule, and did rule, that there was no evidence to support that finding, and he, therefore, entered judgment for the defendants. It is that judgment which is challenged.

I The first matter that we have to consider is whether AVORY, J., was right in coming to the conclusion to which he did come in reference to there being no evidence to support the jury's finding. After the full discussion which has taken place—and every matter that could possibly bear upon the question has been called to our attention by counsel for the plaintiff—we are of opinion that AVORY, J., was right. It seems to me, upon the evidence, that these gentlemen were anxious throughout to take a charitable view of the plaintiff's conduct. There is not a trace of any vindictiveness or wrong motive. The fact that they thought that in the interests of the company he ought to be got rid of is, in my opinion, in circumstances such as these, no evidence of want of good faith, and, speaking for my-

self, I think that the evidence throughout, in this case, directly negatives the idea or suggestion of want of good faith. In these circumstances, one has to consider what is the true interpretation of the test which LINDLEY, M.R., says must be applied in such a case as this. I have read his language. A

The jury were asked to give their opinion, not only on the question of good faith, but on the question whether or not the action of these gentlemen was for the benefit of the company. Having negatived good faith, they went on to say that the action was for the benefit of the company. What exactly they meant by that I do not know. If it amounts to a verdict that what was done was done in the interests of the company, that verdict could only be set aside on the only ground upon which verdicts of a jury can be set aside, namely, that there was no evidence which would justify twelve reasonable men in arriving at such a conclusion. In my opinion, there are certainly no grounds for setting aside that verdict, if it amounts to a verdict, that the action that was complained of was for the benefit of the company. But I do not stop there, because I find a difficulty in being sure of what it was the jury exactly meant by that verdict. Therefore, I have assumed, for this purpose, that there is no direct finding upon that point, and that the court is asked to deal with the matter as though it came before them in the same way in which it has come before Chancery judges when they have had to decide whether, without the intervention of the verdict of a jury, they should interfere with the action of shareholders in altering the articles of association. B C D

Assume, for the moment, that that is the correct position. The first thing one has to decide is this, in reference to the decision of LINDLEY, M.R.: Is he there dealing with two quite separate things, first, bona fides—that is to say, the state of mind of the persons whose act is complained of—and, secondly, apart altogether from their state of mind, the question whether, in the opinion of the court, what the shareholders have done is for the benefit of the company. I think that that view of the test has been negatived in this court in *Sidebottom v. Kershaw, Leese & Co., Ltd.* (2). I think that there all the members of the court, LORD STERNDALÉ, M.R., WARRINGTON, L.J., and EVE, J., negatived that suggestion as to the meaning of the words used by LINDLEY, M.R. One has, therefore, to deal with the test formulated by LINDLEY, M.R., in this way. Starting from the point of view that it is the shareholders to whom the statute has entrusted the power, have these shareholders acted bona fide in the interests of the company as a whole? You may consider the question of bona fides from the point of view of whether they were actuated by an improper motive, or malice and so forth; and you may come to a conclusion which governs the whole case upon the question of their good faith or want of good faith. But assuming good faith in the sense of no wrong motive, what is to be the test that the court, sitting, as it were, as a Court of Appeal from the action of the shareholders, is to apply in reference to that part of the test which deals with the action being, in the opinion of the shareholders, for the benefit of the company? It may be that the action is so outrageous that it throws a light upon the bona fides of the persons who were responsible for it, but, short of being outrageous, it seems to me that it may be so unreasonable that no reasonable men could arrive at such a conclusion, and the court is entitled, I think, to apply the same test to the action of the shareholders as it does to a verdict of a jury, and say that the court will not allow a decision of shareholders to stand which is so unreasonable that no reasonable people could possibly arrive at that conclusion. The case may be still stronger, and one may be able to apply another common law test, and that is, whether or not, upon the facts, the action of the shareholders is capable of being treated as for the benefit of the company. I think these are both tests which the court may properly apply to the action of the shareholders, and I think that *Sidebottom v. Kershaw, Leese & Co. Ltd.* (2) indicates that that is the line which the court ought to take. I respectfully disagree with the view which seems to me to be the view of PETERSON, J., in *Dafen Tinsplate Co., Ltd. v. Llanelly Steel Co. (1907), Ltd.* (3), that it is for the court to treat the matter as though they were the sole judges in the matter, apart E F G H I

A altogether from the action of the shareholders which the court is called upon to deal with.

In the present case it seems to me, applying the test which I have endeavoured to indicate, that it is quite impossible to say that, given good faith, which I think is abundantly proved here, the action of these gentlemen could be said to be either incapable of being for the benefit of the company or so unreasonable that B no reasonable men could consider it was for the benefit of the company, and it is quite insufficient to say that it is action which works extremely hardly upon the minority, the plaintiff, or that it is action which was specially directed against him, because the more outrageous the conduct of a plaintiff the more certain it is that the action of the shareholders, acting entirely bona fide and for the benefit C of the company, will be directed against that person, and directed against that person because of his outrageous conduct and because it is necessary to protect the company against that conduct. In these circumstances, I think that this appeal fails, and that the plaintiff has failed to show either want of good faith or that the action of these gentlemen was not for the benefit of the company.

SCRUTTON, L.J.—In the view I take of the facts and law this appeal completely fails, and I only add anything to the judgment which has just been D delivered because, in my view, the argument addressed to us by counsel for the plaintiff, coupled with some language of PETERSON, J., in *Dafen Tinplate Co., Ltd. v. Llanelly Steel Co. (1907), Ltd.* (3), by which it is supported, if accepted would have the most disastrous results on company business in England and on the relations of the courts to the companies.

E The plaintiff, Mr. Shuttleworth, at the time when this action started was in the position of being, first of all, a permanent director of a company into which a firm had been changed, holding office so long as he should live unless he became disqualified under certain six named disqualifications contained in art. 22 of the articles. He was also manager of the company at a salary, and in 1924 it came to the knowledge of the other directors that in the course of about eleven months F he had not accounted to them on twenty-two occasions for cash which he had received. The other directors took the view that that justified their immediately dismissing him from the position of manager. He objected to that decision. His fellow directors, having consulted their solicitors and counsel as to their powers under the articles, came to the conclusion that, unless they could convict G him of an indictable offence, they had no power to get rid of him from his position as permanent director, and they came to the conclusion that the way to deal with that position was to hold an extraordinary general meeting to alter the articles by including in the grounds of dismissal, in art. 22, the words: "if he shall be requested in writing by all the other directors to resign his office." The intention H to propose that alteration coming to the notice of the plaintiff, he then issued a writ, first, claiming damages for wrongful dismissal without notice from his post as manager, and, secondly, claiming a declaration that he was a permanent director—which in fact he was at the time when the writ was issued—and an injunction to restrain the company from altering the articles of association. In consequence of that writ and of an application for an injunction, the extraordinary meeting at first proposed was not dealt with, but the judge in chambers and the Court of Appeal having declined to grant him an injunction stopping the alteration, I the alteration was made in the articles some few months later, but nothing was done on it for some nine or ten months, at the end of which time the four directors did request the plaintiff to resign. The action for wrongful dismissal coming before a jury, the jury found that the twenty-two items of failure to account for money were not a ground for immediate dismissal without notice. The judge disagreed with that verdict, but as it was not for the judge but for the jury to determine, so long as there were grounds on which the jury could come to that conclusion, it did not matter that the judge would have come to a different conclusion or that any member of the Court of Appeal would have come to a different con-

clusion. We, therefore, on an application by the defendants to set aside that verdict, dismissed the appeal. Then came the second half of the case, the one we are now considering, that dealing with the application for a declaration that the plaintiff was still a permanent director and an injunction restraining the alteration which had been made in the articles. On that the learned judge, having had read to him the authority which used the phrase that the alteration must be "bona fide in the interests of the company"—LINDLEY, M.R., in *Allen v. Gold Reefs of West Africa, Ltd.* (1)—left the question to the jury whether the alteration was proposed and made bona fide in the interests of the company. The jury answered, splitting up their answer: (i) It was not bona fide; (ii) Incidentally it was in the interests of the company. On these findings, AVORY, J., holding that there was no evidence of lack of good faith, entered judgment for the company, and the plaintiff appeals.

First of all was AVORY, J., right in holding that there was no evidence of lack of good faith in the directors who proposed this resolution? I have come to the conclusion that he was and that there was no evidence on which a reasonable jury could find that the directors acted otherwise than in good faith. I am quite unable to take the view that this failure to account for these twenty-two items continuing up to date of writ, and for some very considerable time after writ, the items being ultimately all admitted, was other than a very serious matter in the management of the company. It appears to me that the action of the directors in considering this alteration was taken under careful advice, with no precipitation, and with a genuine desire to provide a remedy for an evil which was forced upon them, namely, that the man whom they admittedly could have dismissed by notice from the position of manager was still sitting with them as a director in spite of his serious laxity in the management of the business entrusted to him. I can see no evidence whatever on which the jury were justified in finding that the determination was taken maliciously or with a desire to spite the plaintiff, or from any other motive than that of doing what the directors thought best in the interests of the company. If there was no evidence of lack of good faith, the other finding of the jury appears to me to defeat the appeal. They find that the alteration was for the benefit of the company. It is true they say it was "incidentally" for the benefit of the company, but I suppose that must mean that the primary motive was lack of good faith or malice, but that maliciously they were doing a thing which was for the benefit of the company. Once one has got that there is no evidence of malice it remains that they were doing the thing for the benefit of the company.

But for the argument which counsel for the plaintiff then suggests—which is the only reason why I am giving a separate judgment—there would apparently be an end of the case. The third point taken was, as I understand, that these articles of association amount to a contract with the plaintiff that he shall be a permanent director for life except in the conditions named in art. 22; being a contract, it could not be varied without the consent of both parties; and the plaintiff never consented to the variation which was made in art. 22. That position is quite sound if you can show a contract outside the articles. If you can show a contract outside the articles, it is no good altering the articles because you cannot alter the contract outside the articles. The best instance of that is *Nelson v. James Nelson & Sons, Ltd.* (4), where there was an article that the directors might appoint a managing director with power to revoke his appointment, and they did appoint, by a separate document in writing, a managing director for a named term. Then during the named term they tried to use the article to revoke his appointment, although the term named in the agreement was still continuing. There the court held, the judge of first instance, that there there was an outside contract and the company could not alter that without the consent of both parties; it was no good the company saying that it had in the articles a power to revoke it when it had made an independent contract appointing the man manager for a named term.

But in the absence of an outside contract, an appointment under an article is

A subject to the power of varying the articles given by s. 13 of the Act of 1908, and, consequently, the contract is not a contract to be a permanent director, but a contract to be a permanent director subject to the power of terminating the appointment given in the articles, or any modification of the articles, which may thereafter be made, under the powers of the Companies (Consolidation) Act, 1908. Therefore, so far, on those three points, it appears to me that the appeal fails.

B But if I understand the argument which was put forward by counsel for the plaintiff, based upon an expression of PETERSON, J.'s, in *Dafen Tinplate Co., Ltd. v. Llanelly Steel Co. (1907), Ltd.* (3), it was this. It does not matter whether the directors thought that this alteration was for the benefit of the company; the question is whether the court thinks it was for the benefit of the company. I suppose he must further say that it does not matter that the jury say it was for

C the benefit of the company; the question is whether the court thinks it was genuinely for the benefit of the company, and the court, on the materials before it, ought to think that it was not genuinely for the benefit of the company, and, therefore, reject both the honest opinion of the directors and the equally honest opinion of the jury, and say that the alteration was invalid. To adopt any view of that sort would be to make the court manager of the affairs of innumerable

D companies instead of the directors to whom the shareholders have entrusted that right of management. I think, with respect to PETERSON, J., and counsel for the plaintiff, that that view is based on a misunderstanding of the expression used by LINDLEY, M.R., in *Allen v. Gold Reefs of West Africa, Ltd.* (1), and by LORD STERNDALE, M.R., in *Sidebottom v. Kershaw, Leese & Co., Ltd.* (2). LINDLEY, M.R., in *Allen's Case* (1), says ([1900] 1 Ch. at p. 671) that the power of alteration

E "must be exercised, not only in the manner required by law, but also bona fide for the benefit of the company as a whole."

The material language there is "exercised . . . bona fide for the benefit of the company." I do not read that as two separate ingredients: (i) You must find it to be bona fide, and (ii) whether bona fide or not, you must find that it is in fact in your, the court's, opinion for the benefit of the company. I read it as being that the directors must act honestly having regard to, and endeavouring to effect, the benefit of the company as a whole. I think some light is thrown upon that by the way in which LORD STERNDALE, M.R., treats it in *Sidebottom's Case* (2). He repeats the language, in effect, of LINDLEY, M.R. ([1920] 1 Ch. at p. 165): "Did they do it bona fide for the benefit of the company"; and then he goes on to say ([1920] 1 Ch. at p. 167), commenting on the decision of ASTBURY, J., in *Brown v. British Abrasive Wheel Co., Ltd.* (5) ([1919] 1 Ch. 290):

"He [the learned judge] found as a fact that the majority shareholders . . . were not doing this for the benefit of the company or in the interests of the company at large, but entirely for their own benefit, and in their own interests. If that finding be right, and as to that I say nothing, it was not bona fide; it was not done for the benefit of the company, but for the benefit of themselves."

As I understand, the learned judge there is contrasting the acts of people who, acting honestly, consider the thing that they ought to consider, namely, the benefit of the company as a whole, and endeavour to decide what will be for the benefit of the company as a whole, with the acts of those who approach the matter, not from that point of view, but from the point of view of considering what will be for the benefit of the majority of the company or themselves as distinguished from the people against whom they are legislating. From that point of view, provided there are grounds on which reasonable people could come to a decision, considering the matters I have indicated only, it does not seem to me to matter at all whether the court would not have come to the same conclusion. It is not the court which manages the affairs of the company; it is the shareholders through

the directors whom they appoint; and so long as the shareholders act honestly and endeavour to consider only the matters they should legitimately consider, namely, the interests of the company as a whole and such action as will promote those interests, it seems to me quite immaterial that the court would come to a different conclusion. The absence of any reasonable ground for a decision that a certain action is conducive to the benefit of the company may be, first of all, a ground for finding lack of good faith, because it may be said that there were no grounds on which honest people could have come to this decision and you may infer bad faith; but, secondly, given honesty, the fact that the company has come to a decision for which there are no reasonable grounds may show that they have not considered the matters that they ought to have considered. On both those grounds you may set a decision aside, but, in my view, if they act honestly, and if the decision is such that honest and reasonable people might come to, the fact that the court would have come to a different decision is no ground whatever for the court interfering. I should be very sorry if the court took upon itself to manage matters which the directors usually understand far better than the court does. So when I find, in the case to which counsel for the plaintiff referred—*Dafen Tinplate Co., Ltd. v. Llanelly Steel Co. (1907), Ltd.* (3)—PETERSON, J., saying ([1920] 2 Ch. at p. 140):

“It has been suggested that the only question in such a case as this is whether the shareholders bona fide or honestly believed that the alteration was for the benefit of the company. But this is not, in my view, the true meaning of the words of LINDLEY, M.R., in *Allen v. Gold Reefs of West Africa, Ltd.* (1), or of the judgment in *Sidebottom's Case* (2). The question is whether in fact the alteration is genuinely for the benefit of the company.”

If he means that, whatever the honest decision of the directors is, it is what the court thinks, and not what the directors think, which is to be the governing matter, I respectively disagree with the interpretation put upon LORD LINDLEY's words. If he merely means that the court will interfere if the decision of the directors, though honest, is such that no reasonable people could have come to it upon proper materials, then I do not object to the explanation, and I should be prepared to act in a case like that; but in the way in which the judgment is reported, I think that the test is erroneous, for the reasons I have given.

As I say, I have only added a separate judgment of my own because I think the point I have last dealt with is of considerable importance in the management of companies by the court. For these reasons, I think, the appeal fails and must be dismissed, with the usual consequences.

ATKIN, L.J.—It appears to me that the first question to be determined is the question raised on the plaintiff's behalf that there was a contract contained in the articles making him a permanent director, which is inconsistent with this additional article, and the additional article would be, therefore, in breach of contract and invalid. That depends upon whether or not there was such a contract with the company as that it would be a breach of the contract to pass this altered article. The principle to be invoked is the principle laid down by LINDLEY, M.R., in *Allen v. Gold Reefs of West Africa, Ltd.* (1), which has been cited on another part of the case. LINDLEY, M.R., says ([1900] 1 Ch. at p. 673):

“But, although the regulations contained in a company's articles of association are revocable by special resolution, a special contract may be made with the company in the terms of or embodying one or more of the articles, and the question will then arise whether an alteration of the articles so embodied is consistent or inconsistent with the real bargain between the parties. A company cannot break its contracts by altering its articles, but, when dealing with contracts referring to revocable articles, and especially with contracts between a member of the company and the company respecting his shares, care must be taken not to assume that the contract involves as one of its terms an article which is not to be altered.”

A In order to determine that question I think it is not immaterial to remember that this company was formed to take over the business of a firm, the partners in which appear to have been three directors—Mr. Beare, Mr. Ernest Burton Norris, and Mr. Shuttleworth. The memorandum recites that the company is for the purpose of acquiring their business on the terms of an agreement which has not been put in evidence before us, but which we are assured contains no terms as to the appointment of the partners as permanent directors. It is to be noticed, therefore, that the contract—and it is a contract—that they should be permanent directors at a salary is contained in the articles only, and it is to be noted also that the contract is a contract which is made not only with the three former members of the firm, but is made with two additional directors, who apparently had no particular interest in the business before—namely, Mr. Thomas Norris—

C who, I understand, is the father of the other Mr. Norris—and Mr. Harry Fritche. The article making them in terms permanent directors also in terms says that they are to hold office unless they shall become disqualified for any of the causes specified in art. 22. It appears to me that the true inference in these circumstances is that there was a contract that the plaintiff should be a permanent director, but a contract contained in articles which themselves could be altered

D with the consent of the company in accordance with the provisions of the Companies (Consolidation) Act, 1908, and it appears to me that, inasmuch as the contract contemplated that the permanent office might be vacated in one of six contingencies, it was not inconsistent with the contract that was made that the article should be altered so as to add a seventh contingency to the six contingencies to which the original contract was admittedly subject. In other words, this is a

E contract made upon the terms of alterable articles, and, therefore, the contracting party cannot complain if in fact an article is altered, because the original contract contemplated that the terms might be altered in the manner provided by the Companies (Consolidation) Act, 1908. Therefore, I cannot find that there was any breach of contract in making this alteration in the articles.

If that is so, then the only other question which arises is whether, apart from

F that, this article is upon general principles objectionable as being not honestly made within the powers of the company. For that purpose one has to consider what limits there are upon the powers of the company to alter their articles. Some limits there are, and the limits are laid down in several cases, but notably in the judgment of LINDLEY, M.R., in the case that I have read from—*Allen v. Gold Reefs of West Africa, Ltd.* (1). There is a reasoned and very lucid judgment by

G LINDLEY, M.R., in which he uses the phrase about exercise of the powers “bona fide for the benefit of the company.” But it appears to me to be a great misfortune that this court, or any court, should consider itself so fettered by a formula that it should not depart from that phrase and study what its real meaning is. It is not a statutory phrase which we have to construe, but we have to regard the principles which were laid down by LINDLEY, M.R., in the course of which he used

H this phrase. For my part I feel satisfied that the construction put upon that phrase and the statement of the true principles is that which is contained in the judgments which have just been delivered. The question, and the only question to my mind, is whether or not, not the directors, but the shareholders, in coming to a conclusion whether they shall alter the articles, do honestly intend to exercise their powers for the benefit of the company, and if they do, then, subject to one

I or two reservations which have already been explained, it appears to me that the altered article must stand. It appears to me impossible that the true view is that it is a matter of law for the judge whether or not the alteration, whether made in good faith or not, is for the benefit of the company. It is said that it is the mark of a good judge to amplify his jurisdiction, but I cannot contemplate the goodness of a judge who assumes to himself the duty of reviewing the decision of every company and every industrial concern in this country on the question whether or not a particular alteration in the articles is or is not eventually for the benefit of the company. It is perfectly obvious that the true judges of the

interests of the company in these cases are the shareholders acting in good faith. A They are not only much better judges, but in a great many cases they are the only competent judges as to what is in the interests of the company and what is not. B I should venture to say that even if the question were to be determined by anybody else than the shareholders. The question must be a question of fact. How C it ever could come to be a question of law it is difficult to imagine, and in this case there appears to me to be a finding of fact by the jury that it was for the benefit of the company. But I do not decide the case at all on that ground. D It appears to me that, in the first instance, the question is solely one for the shareholders acting in good faith. It may very well be that the circumstances are such that the only inference that can be drawn is that the majority of the company are acting so oppressively that they are not acting in good faith, or E another way of putting it—which, I think, is the way approved by LORD STERNDALE, M.R.—is that the decision must be one which is capable of being arrived at by persons acting in good faith and attending to the interests of the company. But that is quite a different set of circumstances to be investigated from the bare question: Aye or no, in the light of the events that have happened, does this tribunal or that tribunal think now that the alteration was or was not for the benefit of the company? With great respect to a very learned judge, I disagree with the judgment to the contrary by PETERSON, J., in *Dafen Tinplate Co., Ltd. v. Llanelly Steel Co. (1907), Ltd.* (3) upon that point. It appears to me that the judgment of LORD STERNDALE, M.R., in *Sidebottom v. Kershaw, Leese & Co., Ltd.* (2), in the passage of the judgment which has been cited, makes it quite clear that his view was that the ultimate decision was to be the decision of the majority of the shareholders.

I should like further to add this. The jury in this case found that the company did not act in good faith. I am quite satisfied that there is no evidence at all upon which they would come to that conclusion. It is obvious that the facts were such as struck the directors at once on their discovery that here was a matter which concerned the interests of the company. They took steps at once to put themselves into a position in which, if it were desirable, they might cause the permanent office of director to be vacated, and they eventually passed this resolution. F The resolution does not take the power simply in reference to one director—they expose all the directors to the exercise of this particular power. They eventually exercised the power, not, indeed, as it appears to me by reason of the events which had given rise to the passing of the resolution, but because of another set of circumstances which happened independently some eighteen months after the first occurrences, and some eleven months after they had got the powers. I think G there was no evidence upon which the jury could come to the conclusion that the shareholders acted in bad faith in coming to this conclusion. I think, therefore, that the appeal brought about by the plaintiff in this respect fails and should be dismissed with costs.

Appeal dismissed. H

Solicitors: *Amery, Parkes & Co.; Rutland, Crauford*, for *C. Ruffe Thomas*, Maidenhead.

[Reported by T. W. MORGAN, ESQ., Barrister-at-Law.]

A
SUNDERLAND CORPORATION v. GRAY

[CHANCERY DIVISION (Clauson, J.), October 26, 27, 1926]

[Reported [1928] Ch. 756; 97 L.J.Ch. 411; 136 L.T. 405;
91 J.P. 52; 25 L.G.R. 139]B
*Street—Street works—Recovery of expenses—Notice to pave not given to all frontagers—Liability of frontager served with notice—Extent of liability—Public Health Act, 1875 (38 & 39 Vict., c. 55), s. 150.*C
A notice served on a frontager to make up the portion of the street opposite to his premises under s. 150 of the Public Health Act, 1875, is not rendered inoperative because all the frontagers on the street are not served, but he will be liable only for his proportion of the sum expended in making up those portions of the street which abut on the premises of such of the frontagers as are served with the notice.Dicta of KEKEWICH, J., in *Handsworth District Council v. Derrington* (1), [1897] 2 Ch. 438, not approved.D
Notes. As to executing street works under the Public Health Act, 1875, see 19 HALSBURY'S LAWS (3rd Edn.) 424 et seq.; and for cases see 26 DIGEST 520 et seq. For Public Health Act, 1875, see 19 HALSBURY'S STATUTES (2nd Edn.) 56.

Case referred to:

E
(1) *Handsworth District Council v. Derrington*, [1897] 2 Ch. 438; 66 L.J.Ch. 691; 77 L.T. 73; 61 J.P. 518; 46 W.R. 168; 13 T.L.R. 505; 41 Sol. Jo. 640; 26 Digest 528, 2268.F
G
Adjourned Summons taken out by the borough of Sunderland, plaintiffs in the action, against Dr. Gray, the defendant, for an order declaring "that the sum of £30 2s. 3d., being the duly ascertained proportion payable by the defendant as the owner of a certain house and premises situate and being No. 23, Thornhill Terrace, Sunderland, of certain expenses incurred by the plaintiffs under s. 150 of the Public Health Act, 1875, in sewerage, flagging, paving, &c., No. 23, Thornhill Terrace aforesaid, together with interest at 5 per cent. per annum from Oct. 19, 1925, the date of the demand for payment of the said sum of £30 2s. 3d., and the costs of this action, is by virtue of s. 257 of the said Act a charge on the said house and premises, and to have such charge enforced by sale, with all necessary and proper accounts, inquiries, and directions, including the appointment of a receiver, and further or other relief." The following statement of the facts is taken from His Lordship's judgment.H
A minute passed by the council of the borough on June 13, 1923, adopted a report of the highways and street lighting committee recommending that Thornhill Terrace, not being levelled, paved, and so forth, to the satisfaction of the council, and it being the intention of the council to serve notices on the owners of the property abutting on such street to execute in the said street such work of the character mentioned in s. 150 of the Act of 1875,

"plans, sections and specifications of the work be prepared in accordance with the said section together with estimates of the probable cost thereof."

I
Plans and specifications of the works were prepared and those plans were referred to in a series of notices which was given to Dr. Gray and other persons who were owners or occupiers of premises abutting on Thornhill Terrace. The notice given to Dr. Gray, the defendant, was addressed to him as owner of 23, Thornhill Terrace, being premises abutting on the said street called Thornhill Terrace. It recited that the street was not paved, &c., to the satisfaction of the local authority, and that his premises abutted on certain parts of the street which required to be paved, made good, and so forth; it gave him notice in pursuance of the Act to pave, &c. Those works were to be

executed in accordance with the plans mentioned, and the time of the execution was to be within the space of two months. Notice was properly served on Dr. Gray. The work was done, and the local authority stated that the expense of making up Thornhill Terrace amounted to £1,898 6s. 10d. The present claim was to have a charge for the apportioned amount of that figure. It appeared that one Thompson had some premises which it was agreed abutted upon Thornhill Terrace, and for some reason no notice was served upon him. It was urged that, having regard to that fact, the local authority had not effectively proceeded under s. 150 of the Public Health Act, 1875, and so were not entitled to recover against Dr. Gray the sum which could have been recovered against him if the notice had been properly served on Thompson.

R. M. Montgomery, K.C., and H. C. Bischoff for the plaintiffs.

E. M. Konstam, K.C., and A. Hildesley for the defendant.

CLAUSON, J., stated the facts and continued: I come to the real and by no means easy point in this case. The argument for the defendant is this. Section 150 of the Public Health Act, 1875, the relevant parts of which I will read in a moment, must be taken at least impliedly to provide that before a frontager can be charged with his proportion of the expense of making up a street the local authority must give notices in accordance with this section to all the persons who are frontagers upon this street, and that, if they omit to give notice to one of the frontagers for whatever reason it may be—mistake or anything else—the condition precedent implied in the section is not fulfilled, and the section does not come into operation, with the result that no advantage can be taken of the section by the local authority. The question is whether that view of the construction of the section is right or is wrong. I will say at once that there is some authority that the section contains a condition precedent in accordance with the argument put forward by the defendant. That authority is to be found in the decision of **KEKEWICH, J.**, in *Handsworth District Council v. Derrington* (1). There the point was considered by **KEKEWICH, J.**, and he held ([1897] 2 Ch. at p. 449) that the true construction of the section was as is contended for by the defendant. That decision, however, is open to the observation that, while his Lordship did express that view of the meaning of the section, that decision of his was not reflected in the order he ultimately made, because he held, for reasons I need not go into for the moment, that the point could not in that case be raised. Accordingly, while his Lordship's opinion was quite clearly expressed, it did not, in my opinion, result in a decision that was capable of appeal. That may have to be considered when I consider whether I am bound in this case to take the same view of the section as **KEKEWICH, J.**, did in that case.

The actual proceeding here is one for the recovery of expenses, under s. 257 of the Public Health Act, 1875, but I need not read that section at length because the right of recovery is there given in respect of sums for which the owner of the premises is made liable under s. 150. So, for the purpose of considering whether a charge can be claimed here it will be sufficient for me to turn to s. 150 and see in terms whether under s. 150 the defendant is in fact liable for the sums in question. That section provides that where any street, or any part of such street, is not paved, &c., to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting on such parts thereof as may require to be paved, &c., require them to pave, &c., the same within a time specified in such notices. It continues:

“Before giving such notice the urban authority shall cause plans and sections of any structural works intended to be executed under this section, and an estimate of the probable cost thereof, to be made under the direction of their surveyor, such plans and sections to be on a scale of not less than one inch for 88 feet for a horizontal plan and on a scale of not less than one inch for ten feet for a vertical section, and, in the case of a sewer, showing the depth

A of such sewer below the surface of the ground; such plans, sections, and estimate shall be deposited in the office of the urban authority, and shall be open at all reasonable hours for the inspection of all persons interested therein during the time specified in such notice; and a reference to such plans and sections in such notice shall be sufficient without requiring any copy of such plans and sections to be annexed to such notice. If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act. . . ."

C On this section first of all this appears. It is reasonably plain, in fact it was decided many years ago, I need not pause to refer to the authorities, that no owner can be made liable for any portion of these expenses unless he has had a notice served upon him. I just pause here to say, by way of parenthesis, that the language I am using in this case is used in a case in which there is no change of ownership of the premises. Difficult questions have arisen and been dealt with in many authorities as to the position when one man has owned the premises at one stage of the proceedings and another has owned them at another stage. I draw attention to the fact that there is no such question here; it may be the language I use, while I hope accurate for the purposes of this case, might not be quite accurate if applied to cases when the ownership changed in the course of the proceedings, so I hope nothing I say will be used to found an argument in a case where ownership has changed. Where there has been no change of ownership it is reasonably plain that no man can be charged under this section with any expense unless he has received a notice, and, accordingly, in the present case, where, as I have said, one frontager, namely Thompson, did not receive a notice, it is quite plain that Thompson cannot be charged under this section. It seems to me, however, that under this section it is quite open to the local authority to charge any frontager with the proper proportion of the expense incurred in making up such parts of the street as abut upon the houses of the aggregate of persons to whom notices have been given under this section. I find nothing in the language of the section which occasions any difficulty. The notice to each man is confined to the part of the street which abuts on his premises provided that the sum which is apportioned between the various persons who are to be charged is the sum, and only the sum, which was incurred in making up the portion of the street which abutted on the premises of the various owners to whom notice was given. There seems to be no injustice in charging those people to whom proper notice was given, notwithstanding that it may be there is a frontager somewhere in the street to whom no notice has been given and who accordingly cannot be charged. As far as the language is concerned I see no difficulty.

H There is, however, this difficulty, and it is the point which impressed KEKEWICH, J., and on which he no doubt grounded the reason for the view he took in the case which I have already cited. The section deals no doubt as a whole with the street or the part of a street which the local authority intend to repair. That is perfectly true, but I do not see that there is any difficulty in reaching the conclusion that if the authority did not take the proper steps to bind every frontager, so far as the part of the street to be repaired abuts on the part of a frontager who is not bound, no provision is made by this section for obtaining in favour of the local authority a charge or liability to bear that particular portion of the expense. It was suggested by counsel for the defendant that the result of that may be that if the local authority has made a mistake and omitted a frontager, but nevertheless repairs the whole street including the part opposite that frontager's house and pays the expense out of the general district rate, they will be doing something that is unlawful, and it may be that by proper proceedings some surcharge could be made. Be that as it

may, I do not see that that affects the position. The same thing may occur if, owing to the omission to serve one frontager, the notices on all the other frontagers are found to be ineffective after the work is completed. It is possible to find that nobody can be charged with the expenses of this work at all, and the local authority is in still a worse position on the construction of the Act. However that may be, I do not feel I am able to place on this section a construction which would have the effect of freeing, if I may take the actual names in this case, Dr. Gray from bearing his proper proportion of the expense simply because Mr. Thompson, with whom Dr. Gray has no concern at all, has not been served with the notice, and, therefore, may be fortunate enough to escape from having to bear his own share of the expenses.

There is, however, this further point. It appears from the evidence that the sum which the plaintiffs are seeking to charge upon Dr. Gray's property was arrived at in this way. They have taken the expenses which are to be apportioned among the frontagers at a figure of £1,898 6s. 10d., and I do not understand that there is any dispute that that £1,898 6s. 10d. is the expense of doing, not only the work opposite the houses of the frontagers on whom notices have been served, but also the work opposite to Mr. Thompson's property. That being the case, it appears to me that the calculation on which the claim is founded is a wrong calculation. It appears to me that under s. 150 the local authority have first to find the expense incurred by them in doing the work mentioned or referred to in the aggregate of the notices, that is to say, they have to find how much the work cost which was done in respect of the portion of road on which those properties abut which belong to persons on whom notice was served. That figure is admittedly not £1,898 6s. 10d. Having regard to certain apportionments which have been made, I do not feel much doubt that the right figure would be about £1,880, but I have not, strictly speaking, the material before me to ascertain the figure, and unless the plaintiffs and the defendant agree the figure, it will be necessary for the figure to be ascertained by inquiry. It is perfectly true that, if the work was done as a whole, as I have no doubt it was over the whole of the street, including the part in front of Thompson's premises, it will be a question of some difficulty to ascertain, except by some method of rule of thumb apportionment, what the expenses were which were incurred on the part of the street opposite the property of the persons on whom notices were served. I hope the expense of ascertaining it under the inquiry will be avoided, and the plaintiffs and the defendant will come to some arrangement.

Solicitors: *Sharpe, Pritchard & Co.*, for *H. Craven*, Town Clerk, Sunderland; *Crossman, Block, Matthews & Crossman*, for *Hedley & Thompson*, Sunderland.

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

THE STREAM FISHER

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bateson, J.), June 14, July 12, 26, 1926]

[Reported [1927] P. 73; 96 L.J.P. 29; 136 L.T. 189;
17 Asp.M.L.C. 159]

Shipping—Collision—Successive collisions—Maritime liens—Priorities.

Maritime liens in respect of damage by collision rank against the *res pari passu* and not in order of date of the respective collisions.

Notes. As to the ranking of maritime liens, see 30 HALSBURY'S LAWS (2nd Edn.) 955 et seq.; and for cases see 41 DIGEST 945 et seq.

Cases referred to:

- (1) *The Saracen* (1846), 2 Wm. Rob. 451; 4 Notes of Cases, 498; 7 L.T.O.S. 469; 10 Jur. 396; 166 E.R. 826; on appeal sub nom. *Bernard v. Hyne, The Saracen* (1847), 6 Moo.P.C.C. 56, P.C.; 41 Digest 954, 8483.
- (2) *The Ripon City*, [1897] P. 226; 66 L.J.P. 110; 77 L.T. 98; 13 T.L.R. 378; 8 Asp.M.L.C. 304; 41 Digest 938, 8298.
- (3) *The Africano*, [1894] P. 141; 63 L.J.P. 125; 70 L.T. 250; 42 W.R. 413; 7 Asp.M.L.C. 427; 6 R. 767; 41 Digest 950, 8447.
- (4) *The John G. Stevens* (1897), 170 U.S. 113.
- (5) *The Frank G. Fowler* (1881), 8 Fed. Rep. 331; (1883), 17 Fed. Rep. 653.
- (6) *The Hope* (1873), 28 L.T. 287; 1 Asp.M.L.C. 563; 41 Digest 945, 8371.
- (7) *The Elin* (1883), 8 P.D. 129; 52 L.J.P. 55; 49 L.T. 87; 31 W.R. 736; 5 Asp.M.L.C. 120, C.A.; 41 Digest 946, 8381.
- (8) *The Clara* (1855), Sw. 1; 26 L.T.O.S. 165; 2 Jur.N.S. 46; 4 W.R. 180; 1 Digest 223; 1492.
- (9) *Harmer v. Bell, The Bold Buccleugh* (1852), 7 Moo.P.C.C. 267; 19 L.T.O.S. 235; 13 E.R. 884, P.C.; 41 Digest 927, 8168.
- (10) *The Aline* (1839), 1 Wm. Rob. 111; 166 E.R. 514; 41 Digest 928, 8178.
- (11) *The Tervæete*, [1922] P. 259; 91 L.J.P. 213; 128 L.T. 176; 38 T.L.R. 825; 67 Sol. Jo. 98; 16 Asp.M.L.C. 48, C.A.; 41 Digest 929, 8189.
- (12) *The West Friesland* (1859), Sw. 454; 5 Jur.N.S. 658; 166 E.R. 1213; reversed (1860), Sw. 456; 166 E.R. 1214; sub nom. *Van Hasselt v. Sack, The Twentje*, 13 Moo.P.C.C. 185; 2 L.T. 613; 8 W.R. 423, P.C.; 41 Digest 941, 8326.
- (13) *Northcote v. Henrich Björn (Owners), The Henrich Björn* (1886), 11 App. Cas. 270; 55 L.J.P. 80; 55 L.T. 66; 2 T.L.R. 498; 6 Asp.M.L.C. 1, H.L.; 41 Digest 942, 8333.
- (14) *The Salacia* (1862), 1 Lush. 545; 32 L.J.P.M. & A. 41; 7 L.T. 440; 9 Jur.N.S. 27; 11 W.R. 189; 1 Mar.L.C. 261; 41 Digest 948, 8409.
- (15) *The Desdemona* (1859), Sw. 158; 28 L.T.O.S. 192; 5 W.R. 167; 166 E.R. 1072; 41 Digest 942, 8337.
- (16) *The William F. Safford* (1860), 1 Lush. 69; 29 L.J.P.M. & A. 109; 2 L.T. 301; 167 E.R. 37; 41 Digest 947, 8398.
- (17) *The Veritas*, [1901] P. 304; 70 L.J.P. 75; 85 L.T. 136; 50 W.R. 30; 17 T.L.R. 721; 45 Sol. Jo. 708; 9 Asp.M.L.C. 237; 41 Digest 929, 8188.
- (18) *The Union* (1860), 1 Lush. 128; 30 L.J.P.M. & A. 17; 3 L.T. 280; 41 Digest 945, 8370.
- (19) *The Gustaf* (1862), Lush. 506; 31 L.J.P.M. & A. 207; 6 L.T. 660; 1 Mar.L.C. 230; 167 E.R. 230; 41 Digest 932, 8220.
- (20) *The Linda Flor* (1857), Sw. 309; 30 L.T.O.S. 234; 4 Jur.N.S. 172; 6 W.R. 197; 166 E.R. 1150; 41 Digest 946, 8380.
- (21) *The Markland* (1871), L.R. 3 A. & E. 340; 24 L.T. 596; 1 Asp.M.L.C. 44; 1 Digest 223, 1496.

- (22) *The Sea Spray*, [1907] P. 133; 76 L.J.P. 48; 96 L.T. 792; 10 Asp.M.L.C. 462; 41 Digest 947, 8395. A
- (23) *The J. W. Tucker* (1884), 20 Fed. Rep. 653.

Summons to determine priorities.

On Nov. 30, 1924, a collision took place between the steamship *Squawk* and the steamship *Stream Fisher*. The collision action by the owners of the *Squawk* was settled. On Mar. 22, 1926, the master obtained judgment for his effects by default against the *Stream Fisher*. On Feb. 6, 1925, a collision took place between the steamship *Criterion* and the *Stream Fisher*. A collision action was commenced on April 27, 1925, and judgment was obtained by the *Criterion* on May 25, 1925. On Feb. 7, 1925, a collision took place between the steamship *Enable* and the *Stream Fisher*, and later on the same day a collision took place between the steamship *Roi Leopold* and the *Stream Fisher*. Collision proceedings in the *Enable* case were commenced on Feb. 10, 1925, and judgment was obtained on April 22, 1925. Proceedings in the *Roi Leopold* case were commenced on Feb. 10, 1925, the defendants admitted liability on April 7, 1925, and the claim was agreed on May 24, 1926. All the actions were in rem and the *Stream Fisher* was sold but failed to realise sufficient to satisfy all the claimants against the fund. This summons to determine priorities was accordingly taken out. B
C
D

Carpmael, for the owners of the *Criterion* and the *Enable*, referred to *The Saracen* (1).

Brightman, for the master of the *Squawk*, referred to *The Ripon City* (2).

Stranger, for the owners of the *Roi Leopold*, referred to *The Africano* (3); THE CYCLOPEDIA OF LAW AND PROCEDURE (1907), vol. 26, p. 809; *The John G. Stevens* (4) and *The Frank G. Fowler* (5). E

Cur. adv. vult.

July 26. **BATESON, J.**—This is a motion to settle priorities, if any, between four claimants for damages by four collisions on four separate occasions. The actions were all in rem and the res has been sold, but the proceeds are not sufficient to satisfy all the four claims. No one contended that any date was material except the date of the collision. Counsel for the claimants in the first three collisions, the *Squawk*, the *Criterion* and the *Enable*, contended that their claims ranked in order of date at the time of collision. Counsel for the owners of the *Roi Leopold* contended either that they should rank in inverse order or at any rate *pari passu*. F

In my judgment they rank *pari passu*. There is no English authority for the contention of counsel for the owners of the *Criterion* and the *Enable* and of counsel for the master of the *Squawk*, except a passage in MACLACHLAN ON MERCHANT SHIPPING (1st Edn.) at p. 598: G

“Liens in the nature of reparation for wrong done, usually arise out of collision, and form the subject of proceedings in damage causes. They have their origin in positive law, and in the policy of quieting strife by distributing compensation for injuries done at the expense of the wrongdoer. They are severally co-extensive in point of right with the value of the ship and the gross amount of the freight being earned; they furnish, therefore, to sundry sufferers by the same collision the claim to rank equally and share *pro rata* in the common fund. Of two successive collisions with the same ship, the sufferers by the earlier standing to the sufferers by the later in no relation of demerit or obligation, retain their priority of claim against the fund, on the principle of the legal maxim: ‘Qui prior in tempore, potior est in jure.’” H
I

Counsel for the owners of the *Criterion* and the *Enable* said that that meant that whoever was first in time had priority. No authority is cited for that proposition in the original edition of MACLACHLAN, and nowhere else is that statement supported. ABBOTT'S MERCHANT SHIPPING contains no support for it in the editions by him, though a passage does appear in the 14th Edn. in which the authors say

A that "maritime liens ex delicto rank in the order of their attachment," and cite in support of that *The Hope* (6); but when *The Hope* (6) is looked at it does not support that view. Later on, in dealing with the case of *The Elin* (7), which was a case as to wages subsequent to a collision, they say:

B "There seems, however, to be no decision that such a claim is to be postponed if the seamen, from the bankruptcy of the owner, or some similar cause, have no other remedy for the recovery of what is due to them."

C So that, in the learned authors' opinion, the question of seamen's wages on a bankruptcy might easily be preferred to a collision lien. No such authority could be found by counsel in the Scottish cases. There is some support in two cases—one in an American District Court and one to some extent in a Circuit Court—and elsewhere there is authority to the contrary. I will deal with the American cases later.

D Counsel for the owners of the *Roi Leopold* pointed out that there was authority to the contrary and referred me to CARVER'S CARRIAGE OF GOODS BY SEA (6th Edn.) s. 320, and especially to p. 436. In dealing with priority of creditors on the ship, he states what the maritime liens are, including damage done by the ship, and the broad rule he says is:

E "that among themselves these claims rank inversely to their order of date. The last come first. One ground for this is, that the claims for services which have conserved the res should come before earlier charges upon the res which have been thereby preserved. Another ground is that one who has a lien on the ship holds that subject to the chances of the ship's voyage, which may give rise to fresh liens. The lien is ordinarily a charge upon a ship in course of an adventure, not upon a ship in safety. Whether willingly or unwillingly the holder of it has become a party to the adventure; and may properly be considered to take the risks of it, as against those who may render services to the adventurer, or who may suffer by the negligent conduct of it."

F The other books I have give no support to the contention of counsel for the owners of the *Criterion* and the *Enable* and counsel for the master of the *Squawk*; nor in ROSCOE'S ADMIRALTY PRACTICE (4th Edn.) can any such support be found. His view is set out on pp. 117 and 118:

G "Liens arising ex delicto take precedence over prior liens arising ex contractu, including salvage, and in respect of damage claimants inter se their claims in actions in rem, based on lien, in respect of the same collision, rank in the order of the judgments; for on obtaining judgment in a damage action the lien may be enforced to the exclusion of another damage claimant subsequently instituting his action even on the same day, but if instituted before judgment the damage is assessed rateably."

H He cites for that *The Clara* (8) and *The Africano* (3). In WILLIAMS AND BRUCE (2nd Edn.), I can find nothing to support this argument. WILLIAMS AND BRUCE is a mine of learning and knowledge in all matters connected with Admiralty: see pp. 85, 289, and 312. Nor can I find any support for it in MARSDEN'S COLLISIONS AT SEA, from the first edition downwards. On p. 91 of the 8th Edn. (which, I think, is merely a repetition of the earlier editions) he says:

I "Where several claimants for damages in several actions in rem in respect of the same collision obtain successive judgments against the ship, their respective liens are enforceable against the ship in the order of the judgments. A plaintiff who institutes his action after another has been instituted, but before judgment, is entitled to damages rateably with the plaintiff in the earlier action."

Counsel for the owners of the *Roi Leopold* further contended that all maritime liens are the same, but the court has never held that the order of date of lien arising gives any priority. If one maritime lien does, one would suppose that all

would. He also relied on the principles and reasoning of *The Africano* (3), and on the fact that all the arguments and decisions of the great number of priority cases were unnecessary if the claimants were right here, that is, the claimants in the earlier collision. A

In my judgment, all maritime liens are the same. They are defined in *The Bold Buccleugh* (9), and the important passages are at pp. 284 and 285 (7 Moo. P.C.). It is to be noted that in those days it was thought that the maritime lien was the foundation of the proceeding in rem: B

“a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists, a proceeding in rem may be had, it will be found to be equally true, that in all cases where a proceeding in rem is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing to be carried into effect by legal process.” C

In later times that has been held not to be so, but in the old days I have very little doubt myself that the two things were the same. Then:

“This claim or privilege travels with the thing, into whosoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process by a proceeding in rem, relates back to the period when it first attached.” D

This is considering throughout the collision between the owners of the res and the person who has suffered damage and it is not a question of priority between two persons who have suffered damage. The judgment goes on to cite *The Aline* (10), which seems to be the foundation of counsel for the owners of the *Criterion* and the *Enable*'s view: E

“So by the collision the interest of the claimant attached, and dating from that event, the ship in which he was interested having been repaired, was put in bottomry by the master acting for all parties, and he would be bound by that transaction.” F

The Aline (10) was a case of preference of a bondholder, and that passage seems to me to make it obvious that the damage lien does not necessarily take priority even of bottomry. Therefore, there is no magic in the first attachment of the lien.

In *The Ripon City* (2) GORELL BARNES, J., says ([1897] P. at p. 242): G

“Such a lien is a privilege claim upon a vessel in respect of service done to it, or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing belonging to another—a jus in re aliena. It is, so to speak, a subtraction from the absolute property of the owner in the thing.”

Then he goes on to deal with the facts of that case as showing that the right must be a right against the owner as well as against the res. In *The Tervaete* (11) SCRUTTON, L.J., says ([1922] P. at p. 270): H

“The so-called maritime lien has nothing to do with possession, but is a priority in claim over the proceeds of sale of the ship in preference to other claimants. . . . But for a lien to arise, in my view, some person having by permission of the owner temporary ownership or possession of the vessel must be liable for the collision. If he is so liable, a privilege or lien at once arises in this sense, that if the vessel comes within English territorial waters it may be arrested, and the claim or privilege on it will date back to the time of the lien. Any purchaser after collision takes the ship subject to this possibility of claim.” I

He is not there considering priority of claims inter se; he is considering priority of claim as against another person. He also says (*ibid.* at p. 271):

A "To hold that a lien would come into existence, if the Government sold the ship to a private purchaser, would be to deprive the Belgian Government of part of their property, for such a lien about to arise must reduce the price paid to the Government and so affect the property of the Government."

There he is speaking again of the subtraction from the property of the owner.

B ATKIN, L.J., says (*ibid.* at p. 274):

"It is not a right to take possession or to hold possession of the ship. It is confined to a right to take proceedings in a court of law to have the ship seized, and, if necessary, sold."

There, again, that is a case of a claim as against the owner of the res, and not a claim as between competing liens. *The Tervaete* (11) is an interesting case as showing that the maritime lien does not necessarily always attach for damage to a ship, because in that case, the vessel being owned by a foreign Government or sovereign, there was no claim at all. I see no indication in any of these cases of any difference between one maritime lien and another.

C Before dealing with the priority cases, I want to say a word as to necessities. Previous to 1840 a necessities man who had supplied necessities within the body of a county had no remedy in the Admiralty Court. The Admiralty Court Act, 1840, gave in certain cases jurisdiction in rem over claims for necessities. Following *The Bold Buccleugh* (9), necessities men under the Act were held to have maritime liens; and so it was for something like forty years: see, e.g., *The West Friesland* (12). Such was the law down to 1886, when *The Henrich Björn* (13) was decided. That decision was that claimants for necessities had no maritime lien. The treatment of priorities in necessities cases during that period of enjoyment of a maritime lien is, however, quite instructive. I could not follow the argument of counsel for the owners of the *Criterion* and the *Enable* that the maritime lien in a necessities case was different from any other maritime lien. Questions of priorities have constantly arisen and been decided; but, so far as I know, no similar case of separate claimants for damage by separate collisions as distinguished from separate claimants for damage by the same collision has ever been raised and decided, although one would think it would have occurred. Two or three collisions are common. Not long ago there was a case of five, followed by a limitation suit. Moreover, the eminent solicitors acting for the plaintiffs in the second, third and fourth collisions here both thought—I say "both" because there were only two solicitors—that a rateable distribution was the right one, and so stated in their letters of July 15 and 17, which were put in.

G The priority cases divide themselves into two groups: (i) competing claims for similar causes of action; and (ii) competing claims for different causes of action; and one finds that in these cases the rule is not always the same. It has always been held that necessities men shared *pari passu*, excepting where one had got priority of decree. Salvage is in inverse order; bottomry is in inverse order. H Wages, I think, are *pari passu*, although I do not know that the question has ever been definitely raised. My attention was not drawn to any case where one seaman had served and earned wages long before another seaman, and, as far as I know, they have always been treated as sharing *pari passu*: see *The Salacia* (14). Where the causes of action have been different, equitable grounds have been relied on to give various priorities according to what was thought to be right. In necessities and damage cases, priority of decree was the only priority ever argued or recognised. It is significant that date of supply or date of damage was never suggested: see *The Clara* (8), *The Desdemona* (15), *The William F. Safford* (16) and *The Saracen* (1). In salvage, the later salvor was always preferred to the earlier. That was on equitable grounds, because the later salvor made it possible that the earlier salvor should get payment. In bottomry it was the same rule as in salvage.

I have not dealt with the master's lien for wages and disbursements. That, of course, stood on rather a different footing, because the master was occasionally

postponed to the seamen. Subsequently his lien for disbursements was statutory. A The damage lien generally was treated as coming first, but not always, the reason being that all the other claims were with regard to voluntary dealings with the ship. Cases other than cases of damage were described as arising out of contract or quasi-contract; salvage (apart from a bargain to salve) is not contract at all. As between bottomry and wages, equitable grounds gave sometimes one and sometimes another priority: see *The Veritas* (17), *The Union* (18), and *The Gustaf* (19). B In *The Gustaf* (19) the shipwright who had a possessory lien was preferred to the necessities man.

"With regard to the claims for necessities, I am of opinion that they cannot compete with the shipwright's lien."

That is DR. LUSHINGTON in *The Gustaf* (19). Lastly, in damage cases where the damage claimants for the same collision are competing—that is to say, ship and cargo—it was decreed that gave priority; otherwise they must rank *pari passu*, C although it may well be that the damage to the cargo occurred later than the damage to the ship.

The result as to priority of lien seems to be this: First, you could get priority if you obtained judgment first; secondly, you could get priority by later lien, as in salvage and bottomry; and thirdly, there were the cases where they rank *pari passu*. D The first of those is not contended for here at all, probably because all judgments are now given subject to the question of priority being determined hereafter. In the second case of priority in inverse order—that is, by the later lien—I see no reason to apply this except possibly as to the *Squawk* case, owing E to the delay; because the master of the *Squawk* could quite well have put forward his case at the same time as his owners put forward their case, and either have got bail or have got paid. But, the other three collisions all happening within a very short time of each other—in one case only a few hours, and in the other case only a few days—I do not think it would be equitable or fair to give any priority for such as that. With regard to the *Squawk* case, if I had to decide F whether there were laches or not, I should want to have all the facts before me. So far as the facts in this case are concerned, if anybody had to be postponed, certainly a man who waited such a long time as the master of the *Squawk* did would have to be postponed, because he had an option whether he should allow the ship to go free of his claim, or wait for some considerable time. The other people had no option. The third remains, and I think that certainly is equitable as regards the last three. I should mention that counsel for the owners of the *Roi Leopold* did not press for the postponement of the *Squawk*'s claim as distinct G from the other ships' claims.

The general result of the examination of the cases on priorities leads me to this: that no such rule as contended for by counsel for the owners of the *Criterion* and the *Enable* and counsel for the master of the *Squawk* has ever been applied, and I do not think it ought to be. I think the origin of the lien and its uncertainty of attachment in some of the cases points to the same conclusion. *The Linda Flor* H (20) points to the same view; because there, although DR. LUSHINGTON gave priority to a claimant for damage by collision over a claim for wages, he specially reserved the case of a bankrupt owner. He says, after deciding that the damage lien took priority over the wages lien in that case: "This is not the case of a bankrupt owner: it will be time to consider such a case when it arises." Again, I *The Markland* (21) is a useful case when dealing with these matters; because in that case a suitor had obtained a decree, but payment out had not been made, and the decision was this:

"The rule that the court will give priority to the suitor who first obtains a decree applies only as between claimants in *pari conditione*. Where, in a suit in rem, a decree has been made *per incuriam* for the payment of money out of the proceeds in court to satisfy the claim of the plaintiff, the court may, before the money has been paid, revoke or vary the decree."

A That case points to the fact that, so long as the court has possession of the proceeds, it will see that they are properly distributed. In *The Sea Spray* (22), BARGRAVE DEANE, J., postponed a claimant in possession of a maritime lien for damage by collision to the claimant for services of the Thames Conservancy who had raised the ship and incurred expenses in so doing, on the ground that

B "as the res had been preserved through the instrumentality of the Conservators, their claim ranked first, and therefore they would be at liberty to sell the vessel and her cargo, reimbursing themselves for their expenses and costs, in the first instance, out of the proceeds of the cargo, and then out of the proceeds of the vessel, paying the surplus, if any, of proceeds into court for the benefit of the parties entitled thereto"

C clearly showing that he did not consider that a damage lien took precedence over all others.

Lastly, in *The Africano* (3), which was a question of rival necessities men, SIR FRANCIS JEUNE, P. ([1894] P. at p. 147), says:

D "If priority in distribution follows the attachment of lien or security, and if a sounder view of the law has transferred that attachment from the date of supply of necessities to the date of action brought in respect of it, we should expect to find it held in the less enlightened period before *The Henrich Björn* (13) that funds in court should be distributed among material men according to the priority of their acts of service. But such was not the view of the judge"

E and then he refers to *The Desdemona* (15) and *The William F. Safford* (16) and continues:

"It is not, perhaps, easy to understand why DR. LUSHINGTON limited, as he appears to have done in that case, the advantages of priority to the earliest decree; but it is clear that he contemplated a decree as alone capable of conferring priority."

F That seems to be the effect of all the cases where any priority is given at all. The same view was taken in an Irish case decided in 1869. So that, on the whole, I have come to the conclusion that *par passu* is the right method of dealing with these different claims.

G The American cases referred to by counsel for the owners of the *Criterion* and of the *Enable* were two, *The J. W. Tucker* (23) and *The Frank G. Fowler* (5). The *J. W. Tucker* (23) was a District Court case before JUDGE BROWN, and was a case of competing liens for towage, where the rule in America seems to be that towage or necessities in the same season on the Great Lakes rank *pro rata*. In that case, the same rule was applied to canal boats on Connecticut River for liens arising in the same season. The judgment refers to *The Frank G. Fowler* (5) as establishing for that circuit the principle that a lien is a vested proprietary interest in the res itself from the time when it accrues; and then proceeds to deal with the various rules of inverse order and *pro rata* applied in ranking of similar and different causes of action, finally deciding in favour of *pro rata* in the case before the court. In the *CYCLOPEDIA OF LAW*, edited by MR. WILLIAM MACK, in vol. 26, p. 809, title "Maritime Liens," the author, MR. HUGHES, after referring to *The Frank G. Fowler* (5) and *The John G. Stevens* (4), says:

I "In view of the nature of maritime lien as a *jus in re*, so firmly established by the most recent decisions, the view that the last tort lien is to be preferred seems best sustained by principle."

That is apparently MR. CARVER's view. In 1897, in the Supreme Court from Circuit Court of Appeals, *The John G. Stevens* (4), GRAY, J., delivering the opinion of the court, says (170 U.S. at p. 120) that this case does not

"present a question of precedence between two claims for distinct and successive collisions, as to which there has been a difference of opinion in the

Southern District of New York; JUDGE CHOATE . . . giving the preference to the later claim upon the ground that the interest created in the vessel by the first collision was subject, like other proprietary interests in her, to the ordinary marine perils, including the second collision."

BLATCHFORD, J., reversed the decree because the vessel had not been benefited, but had been injured by the second collision. That is the effect of *The Frank G. Fowler* (5). This statement of American law is not enough to alter my view after full argument and such consideration of the cases as I have been able to give them.

There is one further matter, and that is this. If it be true that all maritime liens for damage attach at the moment of the damage occurring, then, when the ship gets into the hands of the court, she is in the hands of the court with all the several liens attaching to her. One would think that the proper thing to do under those circumstances would be to see that everybody was equally treated. Under these circumstances the motion will be dismissed.

Solicitors: *Thos. Cooper & Co.*; *W. H. Crump & Son*; *Downing, Middleton & Lewis*.

[Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.]

SWAYNE v. HOWELLS AND ANOTHER

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Salter, JJ.), October 18, 19, 29, 1926]

[Reported [1927] 1 K.B. 385; 96 L.J.K.B. 148; 136 L.T. 326; 91 J.P. 16; 43 T.L.R. 14; 24 L.G.R. 578; 1 B.R.A. 183]

Rates—Sporting rights—Licence to fish—Severance from occupation of land—No deed of grant—Liability of licensee to be rated—Rating Act, 1874 (37 & 38 Vict., c. 54), s. 3, s. 6.

By s. 3 of the Rating Act, 1874, "The Poor Rate Acts shall extend . . . to rights . . . of fishing, when severed from the occupation of the land. . . ." By s. 6: "(1) Where any right . . . of fishing . . . is severed from the occupation of the land and is not let, and the owner of such right receives rent for the land, the said right shall not be separately valued or rated. . . . (2) Where any right of sporting, when severed from the occupation of the land is let, either the owner or the lessee thereof, according as the persons making the rate determine, may be rated as the occupier thereof. (3) Subject to the foregoing provisions of this section the owner of any right of sporting, when severed from the occupation of the land, may be rated as the occupier thereof. (4) For the purposes of this section, the person who, if the right of sporting is not let, is entitled to exercise the right, or who, if the right is let, is entitled to receive the rent for the same shall be deemed to be the owner of the right." The appellant had for some years by an annual payment obtained an exclusive right to fish in certain rivers, but he had no deed of grant of the fishing rights. He was rated in respect of the fishing, but he refused to pay on the grounds that he was not the person liable to pay.

Held: a person who had only a licence to fish was not an owner of the right of sporting within the meaning of s. 6 of the Act of 1874, and, therefore, the appellant was not liable to be rated.

Notes. Section 3 of the Rating Act, 1874, has been amended by the Statute Law Revision (No. 2) Act, 1893, and by the Local Government Act, 1948, s. 137

A and Sched. xii, Part V. Section 6 has been amended by the Local Government Act, 1948, s. 70 (2) and Sched I.

Applied: *Towler v. Thetford Rural Council* (1929), 99 L.J.K.B. 258. Referred to: *Cleobury Mortimer R.D.C. v. Childe*, [1933] All E.R.Rep. 728.

As to the rating of woodlands and sporting rights, see 27 HALSBURY'S LAWS (2nd Edn.) 430-432; and for cases see 38 DIGEST 570-572. For the Rating Act, 1874,

B s. 3 and s. 6, see 20 HALSBURY'S STATUTES (2nd Edn.) 72, 73.

Cases referred to:

(1) *Rogers v. St. Germans Union* (1876), 35 L.T. 332; 40 J.P. 807; 38 Digest 500, 549.

(2) *Brigstocke v. Rayner* (1875), 40 J.P. 245; 25 Digest 356, 76.

Case Stated by Herefordshire justices.

C A complaint was preferred by the respondents, Aaron Howells and Thomas Williams, the overseers of the parish or township of Longtown, Herefordshire, under the Rating Act, 1874, against the appellant, George Champeny Swayne, for failure to pay rates amounting to £41 16s. 10d. in respect of the years 1924 and 1925. The rates in question were levied in respect of certain alleged fishing rights enjoyed by the appellant in the rivers Monnow and Eskley. Subject to the objections that there was no right to rate the appellant and that his name was wrongly placed on the rate book, it was admitted that the rates in question had been duly made, published and demanded, and were unpaid, and that if any sum in respect of rates was due the sum of £41 16s. 10d. was correct. The appellant had for a considerable number of years obtained an exclusive right to fish over reaches of the rivers by payment of an annual sum to each of eight different owners or occupiers in respect of separate holdings which together made up the whole. Before Nov. 19, 1924, neither the respondents nor their predecessors had rated the appellant in respect of the fishing. In one year the appellant paid over £106 in all for the exclusive right of fishing, and he exercised that right in each case during the times covered by the rates in question. In July, 1925, the appellant gave up the fishing of two of such owners or occupiers, and their fishing was thereafter let to someone else. The appellant was assessed in one assessment in respect of the fishing obtained by him. He appealed to the assessment committee on the grounds that he was not the person liable to pay and that the fishing was extravagantly rated. The assessment committee confirmed the assessment. There was no deed of grant to the appellant of the fishing rights.

G It was contended on behalf of the appellant that he had merely a licence to fish, and, as the licensee, was not rateable in respect of fishing rights. The right of fishing, being an incorporeal hereditament lying in grant, must be transferred by deed, and in the absence of such a deed, no such right was at any material time vested in him. There had been no severance of the fishing rights, and, therefore, there was no rateable hereditament on which a rate could be made. It was contended on behalf of the respondents that no legal severance was required under the Rating Act, 1874. Sporting rights were rateable when severed from the occupation of the land, and the term "severed from the occupation of the land" did not contemplate a legal severance.

H The justices found as a fact that the appellant enjoyed the beneficial occupation of the fishing in respect of which the rates were made, and that he was liable to be rated. They ordered a distress warrant to issue against the appellant and the appellant now appealed.

I *R. P. Croom-Johnson* for the appellant.

Blanco White for the respondents.

Cur. adv. vult.

Oct. 29. **LORD HEWART, C.J.**, read the following judgment of the court, in which he stated the facts, and continued: By s. 3 of the Rating Act, 1874, rights of sporting, which include rights of fishing, when severed from the occupation of the land, were brought within the category of rateable hereditaments, and, if the

Act had contained no further provision with respect to them, the liability to be rated would have fallen on the person in beneficial occupation or enjoyment of the right. But, in our view, s. 6 of the Act must be read as prescribing the persons on whom this liability is to fall, and, unless the appellant is shown to be a person liable under that section, he is, we think, entitled to succeed on this appeal. Subsection (1) of that section applies to a case where the owner of the land has let the land, reserving to himself the rights of sporting—*Rogers v. St. Germans Union* (1). In that case, the right of sporting is not to be separately rated. Subsection (2) appears to apply only to a case where the sporting right is let on lease, and, therefore, has no application to the present case. A
B

The question remains whether the appellant can be said to be "the owner of the right of sporting" within the meaning of sub-s. (3) construed in the light of sub-s. (4). It is difficult to suppose that the word "let" in sub-s. (4) was intended to be construed in another or wider sense than in sub-s. (2), but in either view, looking at the latter part of sub-s. (4), we do not think that a person who has only a licence to fish is contemplated as owner of the rights of sporting within the meaning of s. 6. The legislature must, we think, be taken to have known when this Act was passed that these sporting rights are frequently let for the season only, and, therefore, made special provisions that, in the absence of a lease, the landlord should be deemed to be the occupier. C
D

It was further contended on behalf of the appellant that, there being in this case no grant by deed of the fishing rights, there was in law no severance from the occupation of the land. *Rogers v. St. Germans Union* (1) and *Brigstocke v. Rayner* (2) appear to support this view, but, in any case, for the reasons given, we are of opinion that the appellant was not rateable and that the appeal should be allowed. E

Appeal allowed.

Solicitors: *Darley, Cumberland & Co.*, for *A. Jefferay Mawer*, Wells, Somerset;
E. F. & H. Landon, for *John Moore*, Hereford.

[Reported by J. F. WALKER, Esq., Barrister-at-Law.] F

A

POINTING v. WILSON

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Salter, JJ.), October 28, 1926]

B

[Reported [1927] 1 K.B. 382; 96 L.J.K.B. 309; 136 L.T. 307; 91 J.P. 5; 43 T.L.R. 44; 70 Sol. Jo. 1091; 28 Cox, C.C. 291]

Criminal Law—Assault—Assault on prison officer—Punishment—Prison Act, 1898 (61 & 62 Vict., c. 41), s. 10.

C

By the Prison Act, 1898, s. 10: "Every prison officer while acting as such shall, by virtue of his appointment, have all the powers, authorities, protection, and privileges of a constable." Assaults on constables are punishable with a severer sentence than assaults on others. The appellant assaulted a prison officer.

Held: prison officers were, by s. 10 of the Act of 1898, put on the same footing with constables so far as the measure of punishment for assault on them was concerned.

D

Notes. The Prison Act, 1898, was repealed by the Prison Act, 1952, s. 54 (2) and Sched. IV. Section 10 of the 1898 Act has been replaced by s. 8 of the 1952 Act.

As to assault on a prison officer, see 10 HALSBURY'S LAWS (3rd Edn.) 634-635; and for cases see 15 DIGEST (Repl.) 852-855. For the Prison Act, 1952, s. 8, see 36 HALSBURY'S STATUTES (2nd Edn.) 680.

E

Case Stated by Hampshire Quarter Sessions.

The appellant was a convict serving a sentence of penal servitude in Parkhurst Prison, Isle of Wight. The respondent was a warder in the said prison and was a prison officer within the meaning of the Prison Act, 1898. On June 26, 1926, the appellant was charged before petty sessions that on May 15, 1926, he unlawfully assaulted the respondent when acting in the execution of his duty as a prison officer. The justices, having heard the evidence, convicted the appellant and sentenced him to six months' imprisonment with hard labour, such sentence to take effect from the completion of the sentence of penal servitude. The appellant appealed to quarter sessions against the conviction and sentence, on the ground that the conviction was bad on the face of it because, for the offence charged against the appellant, the justices had no power to impose a sentence of six months' imprisonment.

G

It was contended on behalf of the appellant that the charge could only be dealt with as one of a common assault, the maximum penalty for which, if dealt with on summary proceedings before a petty sessional court, was two months' imprisonment with or without hard labour: see s. 42 of the Offences against the Person Act, 1861. There were various statutes which rendered the offence of assaulting a police constable in the execution of his duty an offence triable before justices at petty sessions, e.g., in reference to county police, the County Police Act, 1839, s. 8, which incorporated s. 11 of the Special Constables Act, 1831; in reference to borough police the Municipal Corporations Act, 1882, s. 195. By s. 12 of the Prevention of Crimes Act, 1871, it was provided that where any person is convicted of an assault on any constable when in the execution of his duty, such person shall, in the discretion of the court, be liable to be imprisoned for any term not exceeding six months, with or without hard labour. Section 10 of the Prison Act, 1898, provided that every prison officer while acting as such shall by virtue of his appointment have all the powers, authorities, protection and privileges of a constable.

H

I

Quarter sessions overruled the appellant's contention, being of opinion that the purpose and effect of the statutory provisions which made it an offence to assault a constable in the execution of his duty were the protection of such constable and

that such protection was extended and made applicable to a prison officer by s. 10 of the Prison Act, 1898, and dismissed the appeal. The appellant now appealed. **A**

W. E. Lloyd for the appellant.

H. G. Garland for the Crown.

LORD HEWART, C.J.—This is a perfectly clear case. The question is whether it was within the power of the petty sessional court to pass on the appellant a sentence of six months' imprisonment with hard labour. The court of quarter sessions, to which he appealed, were of opinion that it was, and I think that quarter sessions were right. It was not disputed that if the appellant, or, indeed, anybody, had assaulted a constable when in the execution of his duty, he would be liable to six months' imprisonment with hard labour. The argument is that the provision relating to that sentence does not apply to a prison officer acting in the due discharge of his duty. But s. 10 of the Prison Act, 1898, confers on prison officers, acting as such, all the powers, authorities and protection of police constables. The argument for the appellant seems to me to depend on two errors. First, it assumes that the word "protection" does not apply to prison officers, though the rest of the section does so apply; and, secondly, it puts a very limited meaning on "protection." It involves the desperate proposition that the public is not at all protected by the fact that there is a punishment for assault. I think that the section clearly puts prison officers on the same footing with constables so far as the measure of punishment for assaults on them is concerned. The appellant's proposition is unarguable and the appeal fails. **B**
C
D

AYORY, J.—I agree. **E**

SALTER, J.—I agree.

Appeal dismissed.

Solicitors: *Speechly, Mumford & Craig*, for Lamport, Bassitt & Hiscock, Newport, Isle of Wight; *Director of Public Prosecutions*.

[Reported by J. F. WALKER, Esq., Barrister-at-Law.] **F**

A

ATTORNEY-GENERAL FOR ALBERTA v. COOK

[PRIVY COUNCIL (Viscount Cave, L.C., Viscount Haldane, Viscount Dunedin, Lord Shaw, Lord Phillimore, Lord Blanesburgh and Lord Merrivale), July 25, 1924, December 7, 8, 10, 1925, February 18, 1926]

B

[Reported [1926] A.C. 444; 95 L.J.P.C. 102; 134 L.T. 717; 42 T.L.R. 317]

Domicil—Divorce—Spouses judicially separated—Capacity of wife to acquire domicil of choice in Canadian province different from that of husband—Right to decree under law of new domicil.

C

A wife who is judicially separated from her husband is not capable of acquiring a domicil of choice different from that of the husband so as in the courts of such acquired domicil to obtain a decree of divorce on grounds sufficient under the law there in force.

D

Rights of spouses in matrimonial proceedings in Canada cannot be dealt with on the footing that they have a common domicil in Canada, but must be determined on the footing of the rights of the parties and the remedies available to them under the municipal laws of one or other of the provinces.

The law applicable in the province of Alberta in respect of divorce and judicial separation, **held**, to be that which was laid down for England in the Matrimonial Causes Act, 1857.

E

Notes. Additional grounds for divorce have been enacted in legislation subsequent to the Matrimonial Causes Act, 1857: see now the Matrimonial Causes Act, 1950, s. 1—s. 7, and as to judicial separation see s. 14: see 29 HALSBURY'S STATUTES (2nd Edn.) 388.

Considered: *Salveson (or von Lorang) v. Austrian Property Administrator*, [1927] All E.R.Rep. 78; *Herd v. Herd*, [1936] 2 All E.R. 1516. Referred to: *H. v. H.*, [1928] P. 206; *Travers v. Holley and Holley*, [1953] 2 All E.R. 794; *Dunne v. Saban (formerly Dunne)*, [1954] 3 All E.R. 586.

F

As to domicil in relation to jurisdiction to sustain matrimonial causes, see 7 HALSBURY'S LAWS (3rd Edn.) 24, 102 et seq.; and for cases see 11 DIGEST (Repl.) 466 et seq. As to legislative powers in Canada, see 5 HALSBURY'S LAWS (3rd Edn.) 494-496.

G

Cases referred to:

(1) *Board v. Board, A.-G. for Alberta Intervenant*, [1919] A.C. 956; 88 L.J.P.C. 165; 121 L.T. 620; 35 T.L.R. 635, P.C.; 27 Digest (Repl.) 267, *942.

(2) *Bell v. Kennedy* (1868), L.R. 1 Sc. & Div. 307, H.L.; 11 Digest (Repl.) 329, 39.

(3) *Udny v. Udny* (1869), L.R. 1 Sc. & Div. 441, H.L.; 11 Digest (Repl.) 326, 22.

H

(4) *Le Mesurier v. Le Mesurier*, [1895] A.C. 517; 64 L.J.P.C. 97; 72 L.T. 873; 11 T.L.R. 481; 11 R. 527, P.C.; 11 Digest (Repl.) 468, 1011.

(5) *Lord Advocate v. Jaffrey*, [1921] 1 A.C. 146, 89 L.J.P.C. 209; 124 L.T. 129; 36 T.L.R. 820; 64 Sol. Jo. 713, H.L.; 11 Digest (Repl.) 356, 253.

(6) *Wilson v. Wilson* (1872), L.R. 2 P. & D. 435; 41 L.J.P. & M. 74; 27 L.T. 351; 20 W.R. 891; 11 Digest (Repl.) 468, 1010.

I

(7) *Williams v. Dormer* (1852), 2 Rob. Eccl. 505; 16 Jur. 366; 163 E.R. 1395; 11 Digest (Repl.) 357, 257.

(8) *Warrender v. Warrender* (1835), 2 Cl. & Fin. 488; 9 Bli.N.S. 89; 6 E.R. 1239, H.L.; 11 Digest (Repl.) 356, 250.

(9) *Dolphin v. Robins* (1859), 7 H.L. Cas. 390; 29 L.J.P. & M. 11; 34 L.T.O.S. 48; 23 J.P. 725; 5 Jur.N.S. 1271; 7 W.R. 674; 3 Macq. 563; 11 E.R. 156, H.L.; 11 Digest (Repl.) 356, 252.

(10) *Pitt v. Pitt* (1864), 10 L.T. 626; 10 Jur.N.S. 735; 12 W.R. 1089; 4 Macq. 627, H.L.; 11 Digest (Repl.) 348, 167.

- (11) *Armytage v. Armytage*, [1898] P. 178; 67 L.J.P. 90; 78 L.T. 689; 14 T.L.R. 480; 11 Digest (Repl.) 475, 1052. A
- (12) *Le Sueur v. Le Sueur* (1876), 1 P.D. 139; 45 L.J.P. 73; 24 W.R. 616; sub nom. *Le Sneur v. Le Sneur*, 34 L.T. 511; on appeal sub nom. *Le Sueur v. Le Sueur* (1877), 2 P.D. 79, C.A.; 11 Digest (Repl.) 357, 255.
- (13) *Ogden v. Ogden*, [1908] P. 46; 77 L.J.P. 34; 97 L.T. 827; 24 T.L.R. 94, C.A.; 11 Digest (Repl.) 357, 260. B
- (14) *Stathatos v. Stathatos*, [1913] P. 46; 82 L.J.P. 34; 107 L.T. 592; 29 T.L.R. 54; 57 Sol. Jo. 114; 11 Digest (Repl.) 472, 1039.
- (15) *De Montaignu v. De Montaignu*, [1913] P. 154; 82 L.J.P. 125; 109 L.T. 79; 29 T.L.R. 654; 57 Sol. Jo. 703; 11 Digest (Repl.) 473, 1040.
- (16) *Hastings v. Hastings*, [1922] N.Z.L.R. 273; 11 Digest (Repl.) 473, *561.
- (17) *Barber v. Barber* (1858), 62 U.S. 227; 21 Howard, 582. C
- (18) *Cheever v. Wilson* (1869), 9 Wall, (U.S.) 108.
- (19) *Haddock v. Haddock* (1905), 201 U.S. Sup. Ct. Rep. 390.
- (20) *Stephens v. Totty* (1602), Cro. Eliz. 908.
- (21) *In the Goods of Davies* (1840), 2 Curt. 628; 163 E.R. 530; 23 Digest (Repl.) 153, 1645.
- (22) *Yelverton v. Yelverton* (1859), 1 Sw. & Tr. 574; Seq. & Sm. 49; 29 L.J.P. & M. 34; 1 L.T. 194; 6 Jur.N.S. 24; 8 W.R. 134; 164 E.R. 866; 11 Digest (Repl.) 471, 1025. D

Appeal from a judgment of the Appellate Division of the Supreme Court of Alberta, reversing a decision of WALSH, J.

The appeal raised two questions: (i) Whether a wife who has obtained a decree of judicial separation from her husband can afterwards acquire a domicile other than that of the husband, and (ii) whether the provincial courts of Canada had jurisdiction in divorce in all cases in which the matrimonial domicile was within the Dominion. On June 19, 1922, the wife instituted her present suit for divorce on the ground of her husband's cruelty and adultery. The action came on for trial in the Supreme Court of Alberta before WALSH, J., the husband not appearing. The learned judge held that the domicile of origin of the husband was Ontario, and that he had not acquired any other domicile. He, accordingly, dismissed the suit for want of jurisdiction, being of opinion that the wife was not competent to acquire a domicile separate from that of her husband. Upon the wife's appeal to the Appellate Division of the Supreme Court of Alberta the Attorney-General for Alberta intervened. The decision of WALSH, J., was reversed by a majority (SCOTT, C.J., STUART, BECK and HYNDMAN, JJ.; CLARKE, J., dissenting), and a decree was made for dissolution of the marriage. The Attorney-General of Alberta appealed to His Majesty in Council. E
F
G

F. Ford, K.C. (of the Canadian Bar), and *W. O. Willis, K.C.*, for the appellant.

R. B. Bennett, K.C. (of the Canadian Bar), and *Geoffrey Lawrence, K.C.*, for the respondent. H

Feb. 18. **LORD MERRIVALE**.—This is the appeal of the Attorney-General of Alberta from the judgment of the Supreme Court (Appellate Division) granting a decree of divorce in an undefended suit which in the trial Division had been dismissed for want of jurisdiction. The questions involved are of general importance, namely, whether a wife judicially separated from her husband may acquire a domicile of choice apart from the husband, and whether in the courts of such her domicile she may obtain a decree of divorce upon grounds sufficient under the law there in force, although the husband is not there domiciled. I

The respondent, the wife, was married to her husband in the province of Ontario, in the Dominion of Canada, on July 16, 1913. Four years later they went to the United States. In 1918 she removed to Calgary in the province of Alberta, and she resided there continuously until the hearing of the cause in question. To cite the statement of the learned trial judge, WALSH, J.:

- A "The husband drifted from one State of the American Union to another, then came to Calgary for a short time, and eventually left Alberta, going, as far as is known, to a logging camp in British Columbia."

Since then nothing was known of him. In November, 1921, the wife sued in the Supreme Court of Alberta for judicial separation from her husband, and was decreed the relief she sought, upon evidence which satisfied the court that both the spouses were resident within its jurisdiction. The husband had been served there. In 1922 the wife instituted her present suit for divorce. She alleged that her husband's latest place of residence which was known to her was within the province, and obtained an order for substituted service upon him of these proceedings. As between the parties to the appeal it was assumed that there was such residence of the husband, and that there had been such service of the proceedings as would have given jurisdiction to the courts of Alberta in an ordinary action in personam. This assumption being made, it was not thought necessary to consider—apart from the main questions in the case—whether there are conceivable grounds upon which, when jurisdiction depends upon domicile, it can be given by the rules of procedure of the forum resorted to (not being the forum of the domicile), or can be made to depend upon the presence or absence of a party sued who is in fact domiciled elsewhere.

With regard to the domicile of the parties the trial judge, WALSH, J.,

"thought the evidence sufficient to justify a conclusion that Ontario was the domicile of origin of the husband and not to show that he had acquired any other domicile."

- E The learned judge further found in express terms that "the husband is not and never was domiciled in Alberta." As to the wife, this is said in the judgment:

"The argument is that . . . as she has elected this as her domicile (as I think that she has so far as she can), this court has jurisdiction to decree a dissolution of the marriage."

- F WALSH, J., held at the hearing that if there was jurisdiction in the court to decree a divorce of this marriage, it should be decreed upon grounds of cruelty, desertion and adultery, but in view of the facts as to domicile the learned judge felt himself bound to act upon what he regarded as a well-established rule of law that so long as the married state continues the wife's domicile is that of the husband. He, therefore, dismissed the suit. Upon the wife's appeal to the Appellate Division, the Attorney-General of Alberta intervened because of the general importance of the questions involved, and the Attorney-General as intervener is appellant in this appeal against the judgment of the Appellate Division, whereby the decision of WALSH, J., was, upon the majority of opinions, reversed.

- In the Supreme Court, and upon the hearing of this appeal, a subsidiary question was raised as to whether the domicile of persons settled in one of the provinces of the Dominion of Canada is domicile not in the particular province, but in the Dominion, in such sense that rights dependent upon domicile within the Dominion may be determined in any court in the Dominion having jurisdiction locally over the subject-matter, and that each such court may summon before it a person domiciled within the Dominion and deal with such person in matters of status according to the laws in force within the territorial area of its jurisdiction. The proposition that persons domiciled in all the provinces of the Dominion of Canada have a Canadian domicile was founded upon the terms of the British North America Act, 1867, and the practice of the Canadian legislature in respect of divorce. The statute in question enacts by s. 91 (26) that the exclusive legislative authority of the Parliament of Canada shall extend to marriage and divorce, while by s. 92 (22) the legislature in each province may exclusively make laws with regard to the solemnisation of marriage in that province. As to the exercise of the legislative power of the Dominion in respect of marriage and divorce, the only relevant facts which were laid before their Lordships were that in 1924 marriage was dissolved

by Acts of the Dominion Parliament in 134 cases, and that such statutes commonly, if not invariably, set forth that the parties are domiciled in Canada. No doubt was raised but that the Dominion Parliament has legislative power to dissolve the marriage here in question. The facts placed before their Lordships do not show with precision the extent of the conflict of laws in the provinces of the Dominion with regard to marriage and dissolution of marriage, succession and testamentary disposition, though a passage in the judgment of BECK, J., in the Appellate Division adverts to the two matters last mentioned. It was common ground, and is beyond question, that the provinces have divers laws in respect of jurisdiction as to marriage and divorce, and that in some provinces no means exist for divorce a vinculo by judicial process. No reference was made to any statute of the Dominion Parliament which deals with the question of jurisdiction in the courts of the provinces, inter se, to decree dissolution of marriage as between parties not alleging themselves to be domiciled in the same province. But in *Board v. Board, A.-G. for Alberta Intervenant* (1) it was established by the decision of the Judicial Committee that when the province of Alberta was, in 1905, formed out of the North West Territory by Dominion Act, the laws of England as to divorce established by the Matrimonial Causes Act, 1857, became applicable to Alberta, and that the Supreme Court of the province obtained jurisdiction to enforce them. *Board v. Board, A.-G. for Alberta Intervenant* (1) will be again referred to later on.

The purpose of ascertaining domicile is, as was said by LORD WESTBURY in *Bell v. Kennedy* (2) (L.R. 1 Sc. & Div. at p. 320):

"to determine which of two municipal laws may be invoked for the purpose of regulating the rights of parties."

LORD WESTBURY also said in *Udny v. Udny* (3) (L.R. 1 Sc. & Div. at p. 457) that domicile is the condition

"by virtue of which is ascribed to an individual the character of a citizen of some particular country . . . on the basis [of which] the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy or intestacy must depend."

In *Bell v. Kennedy* (2) LORD WESTBURY said this also:

"Domicil . . . is an idea of law. It is the relation which the law creates between an individual and a particular locality or country."

Uniformity of law, civil institutions existing within ascertained territorial limits, and juristic authority in being there for the administration of the law under which rights attributable to domicile are claimed, are indicia of domicile, all of which are found in the provinces. Unity of law in respect of the matters which depend on domicile does not at present extend to the Dominion. The rights of the respective spouses in this litigation, therefore, cannot be dealt with on the footing that they have a common domicile in Canada, but must be determined upon the footing of the rights of the parties and the remedies available to them under the municipal laws of one or other of the provinces. The competency of the wife's suit for divorce depends, then, first, upon her power during her marriage to acquire domicile in Alberta, her husband not being domiciled there, and, secondly, upon the jurisdiction of the Supreme Court of Alberta at her instance to change the matrimonial status of her husband.

The first of these questions engaged most of the attention of counsel in the argument of the appeal. The second is also of high importance. It touches the due administration of justice and the mutual relations of self-governing communities. Propositions of law in respect of domicile were advanced on the respondent's behalf to this effect—that the identity of the domicile of a wife with that of her husband is a legal fiction or presumption of law; that domicile depends upon the capacity in law of individuals to choose a permanent home; and that when this capacity exists in a wife by reason of judicial separation, and has in fact been

A exercised, the rights arising from domicile result in her favour. The mode of giving effect to such rights must, it was argued, be matter of procedure for the tribunals of the State within which domicile has been gained. A separate contention was raised upon the construction of the statute, the Matrimonial Causes Act, 1857, under which the separation here in question was decreed.

B The contention that husband and wife may be domiciled apart and may resort to different jurisdictions and different codes of law to seek thereunder dissolution of the marriage between them appears to challenge directly the rule laid down in *Le Mesurier v. Le Mesurier* (4) in 1895 and affirmed in the House of Lords in *Lord Advocate v. Jaffrey* (5) that matrimonial status is governed by the law of the domicile of the parties. In the former case the rule was stated by LORD WATSON to be that

C "the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage."

In the latter it was epitomised by LORD HALDANE in these words:

"Nothing short of a full juridical domicile within its jurisdiction can justify a British court in pronouncing a decree of divorce."

D Both pronouncements are declaredly founded on a principle which was stated in the judgment of LORD PENZANCE in *Wilson v. Wilson* (6) (L.R. 2 P. & D. at p. 442):

"The difference of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws."

E The decision in *Le Mesurier v. Le Mesurier* (4) does not deal with the case of spouses judicially separated, and that case is expressly reserved for future decision in the opinions of the noble and learned Lords who decided *Lord Advocate v. Jaffrey* (5). The judgment delivered by LORD WATSON in *Le Mesurier's Case* (4), however, brings inevitably into view the fact that divorce obtainable under different systems of municipal law by spouses living in separate jurisdictions is irreconcil-

F able with the existence of any axiom in private international law that there is in the case of every marriage one sole jurisdiction in which dissolution of the marriage tie can be decreed. It was common ground in this case that the rule propounded on behalf of the respondent has not been heretofore laid down by any express judicial decision which binds this board. The decision under appeal was arrived at upon examination of conflicting opinions, some of them declared by distinguished judicial persons, and others expressed by eminent jurists. These opinions have received the consideration to which they are entitled.

G *Williams v. Dormer* (7) which was heard in the Court of Arches in 1852, appears at first sight to be a case in point. It was cited to show that in the opinion of an eminent judge of the Ecclesiastical Courts, SIR JOHN DODSON, divorce a mensa et thoro annulled, for the purposes of those courts, the presumption that a wife's domicile is that of her husband. Examination of the report does not establish this proposition. The suit was a husband's suit for nullity brought in the diocese of Canterbury. There had been at an earlier date a decree of divorce a mensa et thoro at the wife's instance. A question arose as to the competence of the suit by reason that in order to found jurisdiction the actor in the suit must show the respondent to be resident within the jurisdiction of the court whose authority was invoked. The libel as framed did not show this fact, and the husband proposed to amend it by averring that he "was and is resident at Tunbridge within the jurisdiction . . ." and that by reason thereof "the said . . ."—the wife—"is subject to the jurisdiction of the court." With regard to this topic only, SIR JOHN DODSON is reported to have used the words following:

"Would it follow that the wife, in this case, was also resident in the same jurisdiction? Certainly not. It was properly observed by her counsel that there has been a sentence of separation from bed, board, and mutual cohabitation, consequently, that the presumption of law, which usually obtains, namely,

that the wife is legally domiciled where the husband has his domicile, cannot in this case prevail. On the contrary, the probability is she is resident somewhere else; and on referring to the former suit of nullity it appears that such suit was instituted in the diocesan court of London; therefore, if her residence is to be presumed to be in any jurisdiction in particular, it would be rather in the diocese of London, than in the diocese of Canterbury. I must say I consider these objections well founded, and that the defects in the libel are not removed."

The observations of the learned judge were directed solely to a question of residence within a local jurisdiction. He used the word domicile in a popular sense in relation to this topic in course of determining whether a married woman was to be presumed in point of fact to be resident in the diocese in which her husband alleged himself to have his abode. The case throws no light on the questions which have here to be determined.

LORD BROUGHAM, in 1835, in *Warrender v. Warrender* (8) "left open for discussion" the question whether divorce a mensa et thoro would enable a wife to acquire a domicile of her own. The matter became, in 1859, a subject of discussion between some of the learned Lords who decided *Dolphin v. Robins* (9), though, as was carefully pointed out, it did not arise for decision. Adverting to the hypothetical case of a wife separated by divorce a mensa et thoro, LORD CRANWORTH said (7 H.L. at p. 416):

"The argument which goes to assert that she cannot set up a home of her own, and so establish a domicile different from that of her husband, is not to my mind altogether satisfactory."

LORD KINGSDOWN thought it necessary to dissent even from this tentative suggestion of uncertainty. LORD CAMPBELL withheld the expression of any opinion, as the question did not arise in the case. In *Pitt v. Pitt* (10) LORD WESTBURY expressed a doubt such as LORD CRANWORTH had indicated in *Dolphin v. Robins* (9) and LORD KINGSDOWN again recorded his dissent. "I," he said, "do not share the doubts which my noble and learned friend has expressed." The question as to which, in 1835, LORD BROUGHAM thought it advisable in *Warrender v. Warrender* (8) to reserve his opinion related to the effect of the divorce a mensa et thoro under the ecclesiastical law, and the discussion in *Dolphin v. Robins* (9), though it occurred two years after the passage of the Matrimonial Causes Act, 1857, appears to have been directed to the same question and not to the effect of a decree of judicial separation under the statute. LORD WESTBURY's observations five years later in *Pitt v. Pitt* (10) were suggested by one of the cases of hardship which, in 1898, were more definitely considered by SIR GORELL BARNES, P., in *Armytage v. Armytage* (11).

Armytage v. Armytage (11) is one of a group of English cases in which SIR GORELL BARNES, P., SIR SAMUEL EVANS, P., and BARGRAVE DEANE, J., as judges of the Divorce Division of the High Court of Justice, dealt with circumstances of hardship and asserted or exercised jurisdiction in divorce on grounds other than that of domicile of the parties. *Le Sueur v. Le Sueur* (12), which was also mentioned in argument, was one in which SIR ROBERT PHILLIMORE, in the same Division, was disposed to assume that desertion on the part of a husband would enable the wife to choose a new domicile. This assumption has since been held in *Lord Advocate v. Jaffrey* (5) to be contrary to principle. The cases relied upon were *Armytage v. Armytage* (11), *Ogden v. Ogden* (13), *Stathatos v. Stathatos* (14) and *De Montaigu v. De Montaigu* (15). In the cases of *Armytage* (11) and *Ogden* (13) the judgments were those of SIR GORELL BARNES. *Armytage v. Armytage* (11) is of authority for a proposition, now well established, that the jurisdiction to decree judicial separation depends upon residence and not upon domicile. In the course of his judgment SIR GORELL BARNES explicitly accepted the rule as to domicile laid down in *Le Mesurier v. Le Mesurier* (4), but appeared to specify an exception to it. The learned judge said:

A "This court does not now pronounce a decree of dissolution where the parties are not domiciled in this country, except in favour of a wife deserted by her husband, or whose husband has so conducted himself toward her that she is justified in living apart from him, and who, up to the time when she was deserted or began so to be was domiciled with her husband in this country, in which case, without necessarily resorting to the American doctrine that in such circumstances a wife may acquire a domicile of her own in the country of the matrimonial home, it is considered that, in order to meet the injustice which might be done by compelling a wife to follow her husband from country to country, he cannot be allowed to assert for the purposes of the suit that he has ceased to be domiciled in this country."

C In the later case of *Ogden v. Ogden* (13) the marriage in France of an English-woman to a domiciled Frenchman had been declared null in France, and a question of the validity of the French decree of nullity was litigated in the High Court here and in the Court of Appeal. Before the decree of nullity was obtained in France the wife had sued in England for divorce, and, on the ground of lack of jurisdiction by reason of the foreign domicile of the spouses, the suit had been dismissed by SIR FRANCIS JEUNE, P. SIR GORELL BARNES, as a member of the Court of Appeal, D concurred in affirming the validity of the French decree of nullity, but in the course of his considered judgment stated an opinion ([1908] P. at p. 82) that a wife situated as was the wife in question might, consistently with principle, be allowed to obtain relief in the court of her original domicile. This opinion, it is to be observed, was in conflict with the view of LORD ST. HELIER, who heard the wife's suit and dismissed it for want of jurisdiction. Whether it can be in part sustained, E consistently with authority, may be open to discussion. In *Stathatos v. Stathatos* (14) an English woman had gone through a ceremony of marriage with a man of Greek domicile. In 1910 a Greek court declared the marriage a nullity. In 1912 the wife sued in England for divorce. BARGRAVE DEANE, J., on the faith of *Ogden v. Ogden* (13), decreed divorce, but said:

F "It is undoubtedly giving the go-by to what has always been the rule of law and practice here, namely, that the wife's domicile is the husband's domicile, whatever that may be. I should feel very much happier in the course I am going to take if I knew that my decision were going before the Court of Appeal."

G *De Montaigne v. De Montaigne* (15) was a case of hardship, where SIR SAMUEL EVANS, P., relying on the decision in *Ogden v. Ogden* (13), departed from the rule that jurisdiction in divorce depends upon domicile with this observation:

"I think it better, where necessary, in a case like this, to make an exception from the ordinary rule that domicile governs these cases, and to grant [the petitioner] a decree, as a practical way of giving her the redress to which she is entitled."

H The doubts expressed by LORD CRANWORTH and LORD WESTBURY—and indicated by LORD BROUGHAM—in opinions delivered by them in the House of Lords, and the views pronounced and action taken by the learned judges of the Divorce Division, involve a question not directly raised upon this appeal, namely, whether without express legislative sanction, courts having jurisdiction in divorce may by I estoppel or like device ensure that one of the spouses shall not resort to a jurisdiction other than that in which both were domiciled, and invoke its powers, on the ground of domicile newly acquired within its authority, to change the status of the spouse left resident in the original place of domicile. It is not necessary on this occasion to deal specifically with that question.

In *Hastings v. Hastings* (16), which was heard in the Supreme Court of New Zealand in 1922, a wife resident in New South Wales had obtained a decree of judicial separation, and after the lapse of three years sued her husband in New Zealand, where he resided, to obtain dissolution of her marriage by virtue of a

statute of the New Zealand legislature. ADAMS, J., who tried the case, thought the balance of opinion among jurists to be in favour of the view that a wife who has obtained a decree of judicial separation may acquire a domicile independently of her husband, but he dismissed the suit because—quoting the language of the report—"the husband for want of domicile owed no obedience to this court." The case is, so far as decision goes, adverse to the respondent's contention that a wife judicially separated may proceed for divorce in the courts of a State where her husband is not domiciled. The cases most like in general character to the present, cited on behalf of the respondent, were a series of judgments in the Supreme Court of the United States—*Barber v. Barber* (17), *Cheever v. Wilson* (18) and *Haddock v. Haddock* (19). Delivered respectively in 1859, 1870 and 1905, they embody in judicial decisions determinations of the highest authority with regard to the jurisdictional relations inter se of the States in the United States which, if they were decisions upon the law of the Canadian Dominion, the province of Alberta, or the Canadian provinces inter se, might be held to conclude the present inquiry in the respondent's favour. These cases, however, are primarily decisions upon questions dependent upon the constitution of the United States, the jurisdiction and procedure of the States individually, and the nature and effect of residence and domicile respectively to found jurisdiction in divorce under the laws by which the States collectively and individually are governed.

A case more nearly in point than most of those before mentioned is that of *Lord Advocate v. Jaffrey* (5). Although the question of domicile which arose for decision arose with regard to a wife not separated by judicial decree, discussion took place with respect to the decision in *Le Mesurier v. Le Mesurier* (4), which was directed to the general question of jurisdiction in divorce, and to the grounds upon which in our law domicile and jurisdiction divorce depend. LORD HALDANE said this in *Lord Advocate v. Jaffrey* (5):

"Since *Le Mesurier v. Le Mesurier* (4) . . . nothing short of a full juridical domicile within its jurisdiction can justify a British court in pronouncing a decree of divorce. . . . There can be only one real domicile. . . . There is no authority for the proposition that under the law of these islands husband and wife can have, while they continue married, distinct domicils. . . . If it were otherwise . . . proceedings for dissolving the status of marriage might be carried through in two jurisdictions, possibly with different results."

LORD CAVE said:

"I doubt whether the rule as to a wife's domicile following that of her husband is founded only upon her obligation to live with him. It appears to me to be more correct to say that it is a consequence of the union between husband and wife brought about by the marriage tie. . . . The rule is no doubt abrogated by a divorce a vinculo, and possibly (although this has not yet been finally decided) by a divorce a mensa et thoro or a judicial separation. . . ."

As to a possible exception in a

"case where a husband who, having been guilty of desertion or some other matrimonial offence in this country, endeavours to deprive his wife of her remedy by changing his domicile, there is no doubt authority (which it is not now necessary to examine) for the proposition that in such a case the husband will not be allowed to set up his own wrong as an argument for prejudicing his wife's rights."

LORD SHAW said this:

"I must not myself be held as assenting to the view that it has ever yet been decided by law that even a judicial separation properly and formally obtained would operate as a change in the so-called, and, in my opinion, very doubtfully named *domicilium matrimonii*. I see the greatest difficulty in any invasion of the principle which appears to me to be fundamental—namely, that that unity which the marriage signifies is regulated by one domicile and

A one domicil only, i.e., that of the husband. I am quite sure that LORD WATSON in *Le Mesurier v. Le Mesurier* (4) treated the matrimonial domicil as the real domicil and nothing but the real domicil, but considered that as the real domicil of one person—namely, the husband. Much confusion may be caused by the introduction of the idea of there being two domicils of the marriage or two domicils of succession while the marriage tie continues. . . . In the great

B fundamental issues of status and succession the domicil of the wife is the domicil of the husband until divorce a vinculo matrimonii has been obtained."

The questions to be here decided, with such guidance in principle as may be obtainable from the opinions to which attention has thus been directed, are these: Upon what law does the jurisdiction in divorce depend in the province of Alberta?

C Under that law may a married woman—the marriage subsisting—choose her own domicil irrespective of her husband's domicil? To the jurisdiction of such independent domicil of hers may she cite her husband in a suit for divorce? As to the first of these questions no dispute is possible. Upon an appeal to His Majesty in Council from Alberta in 1919, *Board v. Board, A.-G. for Alberta Intervenant* (1) it was ascertained that the law applicable in Alberta in respect of divorce and

D judicial separation is that which is laid down for England by a statute of the Imperial Parliament, the Matrimonial Causes Act, 1857. The case, therefore, depends upon the true view of the general rule of law with regard to the domicil of husband and wife, and the effect in respect of domicil, as between husband and wife, of divorce a mensa et thoro and of judicial separation under the Act of 1857. For the respondent it was contended that if the decree of divorce a mensa et thoro did not, before 1857, enable a wife who obtained it to choose an independent

E domicil, the terms of the Matrimonial Causes Act, 1857, are such that a decree pronounced thereunder must be held to have that effect. What, then, is the nature and effect in our law of the rule as to domicil of husband and wife? How does it originate? How, if at all, is it affected by the statute of 1857? The opinion expressed by LORD CAVE in *Lord Advocate v. Jaffrey* (5) is in point here. He said:

F "I doubt whether the rule as to a wife's domicil following that of her husband is founded only upon her obligation to live with him. It appears to me to be more correct to say that it is a consequence of the union between husband and wife brought about by the marriage tie (see CODE XII, i, 13; STAIR I, iv, 9; PHILLIMORE ON DOMICIL, s. 40)." "As the wife takes the rank, so does she the domicil, of her husband."

G is the statement of SIR ROBERT PHILLIMORE in his treatise on the LAW OF DOMICIL, published in 1847, to which reference is made. In support of a proposition that this is the maxim of the Roman as well as of continental civilians, the learned author cites the following texts of Roman law:

H "Item rescripserunt mulierem quam diu nupta est incolam ejusdem civitatis videri, cujus maritus ejus est, et ibi unde originem trahit non cogi muneribus fungi. (DIGEST 50, l. 37.) Mulieres honore maritorum erigimus, genere nobilitamus, et forum ex eorum persona statuimus et domicilia mutamus." (CODE XII, l. 13, X 40, 9.)

Underlying the English rule as to a wife's domicil is a principle of the common law, uniformly declared during six centuries before 1857, and not dependent upon

I any maxim of the civilians, whatever may have been its origin. Four citations may be made which set forth this rule: "Vir et uxor sunt quasi unica persona" (BRACON, DE LEGIBUS, lib. v., c. 25, s. 10); "Le baron et sa feme ne sont forsque un person en ley" (LITTLETON, TENURES s. X, 168, 291); "The husband and wife are one person in the law" (COKE, INSTITUTES I, 112 a); "By marriage husband and wife are one person in law" (BLACKSTONE, COMMENTARIES I, 442). The rule thus declared was not a fiction or presumption which, within the competence of the tribunals concerned, might control procedure, but must be disregarded upon questions of substantive right. It was of unquestioned operation under the com-

mon law to an extent which is only partially indicated by the instances comprised under the title Baron and Feme in the "Table" annexed to COKE'S FIRST INSTITUTE. By this rule the wife's property was disposed of and her jurisdictional status ascertained, and it determined her situation as to domicile.

Consideration must be given to the effect of the decree of divorce a mensa et thoro in the Ecclesiastical Courts, for two reasons. Counsel for the respondent relied upon judicial dicta in relation to this decree; and the Matrimonial Causes Act, 1857, provides (ss. 7 and 16) that a decree for a judicial separation thereunder "shall have the force, consequence and effect of a divorce a mensa et thoro under the existing law" and "such other legal effects as are in this Act mentioned"—that is to say, the effects attributable to ss. 25 and 26 of the Act. The substance of the sections so mentioned is indicated in the side notes thereto: (XXV). "In case of judicial separation the wife to be considered a feme sole with respect to property she may acquire, &c." (XXVI); "also for purposes of contract and suing." The terms and the effect of the sentence of divorce a mensa et thoro under the ecclesiastical law are well known. OUGHTON'S ORDO JUDICIORUM, published in 1728, sets forth (tit. CCXV) the operative words:

"Dictos N. et M. . . . a thoro mensa ac mutua cohabitatione atque obsequiorum conjugalium impensione donec et quosque duxerint invicem reconciliandos et non aliter neque alio modo separamus et divortiamus."

The learned author states in a note that "often the word divortiamus is omitted." It is in effect redundant. In more modern times the decree of divorce a mensa et thoro was expressed in English, in a form which will be found in the textbooks: see PAYNTER'S PRACTICE OF THE ECCLESIASTICAL COURTS RELATIVE TO MARRIAGE AND DIVORCE (2nd Edn.) at p. 182, and SHELFORD ON MARRIAGE, p. 364 n. The material words are these:

"We do pronounce decree and declare that the said A.B. ought by law to be divorced and separated from bed board and mutual cohabitation with the said C.B. her husband until they shall be reconciled to each other; and we do by these presents divorce and separate them accordingly."

What is most strikingly apparent in the language of the decrees in question is the limited scope within which they purport to operate. The status of marriage remained. The decree lapsed if the parties were reconciled. The compulsory provision of maintenance by the husband to the wife during the period of separation under the name of alimony was, as the textbooks show, a mere means of enforcement by process of ecclesiastical law—in the first instance by excommunication—of marital obligations which were cognisable by the Ecclesiastical Courts: see OUGHTON, tit. 206; AYLIFFE'S PARERGON, p. 58. Except in the last-mentioned particular it is difficult to find in the decree of divorce a mensa et thoro anything more in point of operative effect than a licence to the wife which protects her from suit in the ecclesiastical courts for restitution of conjugal rights. The capacity of the wife to sue in the ecclesiastical courts invested her with no status or persona in courts of temporal jurisdiction. After divorce a mensa et thoro obtained by the wife the husband retained, notwithstanding the decree, whatever property of the wife, real or personal, was already vested in him by marriage, and his rights in respect of property which might accrue to the wife during the separation. If he was tenant by the curtesy of her hereditaments, he remained tenant by the curtesy. The accruing income of her personalty, not secured to her separate use, accrued to him. If after divorce a mensa et thoro a legacy bequeathed to the wife became payable, it fell to the husband. He might release it: *Stephens v. Totty* (20). Upon his death—the decree of divorce subsisting—she was, as his widow, entitled (subject to the discretion of the ordinary) to call for a grant of administration under the statute 21 Hen. 8, c. 5, and as widow she had her right of dower: *In the Goods of Davies* (21). "A wife shall be endowed, though she was divorced a mensa et thoro" (COMYN'S DIGEST A. 10 (1); COKE UPON LITTLETON, 33, p). It is instructive to contrast the transient and limited effects of the decree of divorce

A a mensa et thoro with the effect of two conditions, known to the common law, which did destroy the unity in law of husband and wife—profession of religion and abjuration of the realm. These are said by COKE, in his notes to LITTLETON, s. 200, to dissolve the tie of marriage. COKE adds that in 8 Edw. 2 “an abjuration is called a divorce”—and he says as to each, “it is called a civil death.”

B The further argument on the respondent's behalf that a decree of judicial separation under the statute of 1857 so enlarges the effect of a divorce a mensa et thoro as to enable a wife so separated to acquire separate domicile depends upon implications sought to be founded upon ss. 25 and 26 of the Act of 1857.

C Section 25: In every case of a judicial separation the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a feme sole with respect to property of every description which she may acquire, or which may come to her or devolve upon her; and such property may be disposed of by her in all respects as a feme sole, and on her decease the same shall in case she shall die intestate, go as the same would have gone if her husband had been then dead; provided that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate. Section 26: In every case of a judicial separation the wife shall, whilst so separated, be considered as a feme sole for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant. Provided, that where, upon any such judicial separation alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessities supplied for her use. Provided, also, that nothing shall prevent the wife from joining, at any time during such separation, in the exercise of any joint power given to herself and her husband.

F Words could not well have been better chosen than those in ss. 25 and 26 to confine within precise limits the inroads intended to be made upon the pre-existing legal relationship of husband and wife. The period during which the wife separated by decree is under s. 25 to be considered as a feme sole with respect to property which she may acquire or which may devolve upon her is limited to the term “from the date of the sentence and whilst the separation shall continue.” Under s. 26 the wife “while so separated” is to be “considered as a feme sole for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding.” The statute does not purport to discharge the wife from her character of wife. It suspends certain obligations of matrimony. Upon a reconciliation the wife, rescinding the suspension, returns home as wife; upon a departure from the obligation of sexual continence she may as a wife be divorced a vinculo. By the practice in divorce in England, if after separation she has cause for divorce against her husband, she may require him as husband to provide for the costs of the suit in which she seeks that relief. So also, under the settled practice of the Probate Division of the High Court, upon the death of a woman judicially separated from her husband, the letters of administration granted to the next-of-kin have been always limited to that part of her estate which by virtue of the decree of separation vested in her as a feme sole, reserving the right of the husband to claim a grant in respect of the residue: *TRISTRAM AND COOTE'S PROBATE PRACTICE* (15th Edn.) pp. 105, 106; *Yelverton v. Yelverton* (22).

I Singular anomalies must arise in respect of the causes for divorce—strictly limited and carefully defined in the Act of 1857—if upon the true construction of the clauses relating to judicial separation a wife who is judicially separated is thereby qualified to choose an independent domicile. A husband may be, and

sometimes has been, a suitor for judicial separation for cruelty or for adultery. Assuming ss. 25 and 26 to have the suggested effect with regard to domicile, it would seem to follow that a guilty wife judicially separated may by virtue of domicile acquired in a foreign jurisdiction become entitled to cite her husband to answer there a suit for divorce upon grounds sufficient by the local law but unknown in the law of his domicile. The marriage of British subjects would thus become liable to dissolution by authority to which they owe no obedience. The contention that a wife judicially separated from her husband is given choice of a new domicile is contrary to the general principle on which the unity of domicile of the married pair depends; divorce a mensa et thoro gave no such right; and the statute of 1857 was not framed with that intention and does not effect that purpose. Under British law one of the effects of marriage is to give to the spouses a common domicile—the domicile of the husband. Within the jurisdiction thereby arising, and by the marriage laws to which the spouses are there subject, the claims of either of them to a decree of dissolution of marriage ought to be determined. In so far as British tribunals are concerned it is a requisite of the jurisdiction to dissolve marriage that the defendant in the suit shall be domiciled within the jurisdiction. In such cases actor sequitur forum rei. This is the true effect upon the present proceedings of the rule laid down in *Le Mesurier v. Le Mesurier* (4). The appeal of the Attorney-General succeeds. There will be no order as regards costs. Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitors: *Blake & Redden; Lawrence Jones & Co.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

SUZUKI & CO., LTD. v. T. BEYNON & CO., LTD.

[HOUSE OF LORDS (Viscount Cave, L.C., Lord Dunedin, Lord Shaw, Lord Sumner and Lord Buckmaster), December 3, 4, 1925, January 29, 1926]

[Reported 95 L.J.K.B. 397; 134 L.T. 449; 42 T.L.R. 269;
17 Asp.M.L.C. 1; 31 Com. Cas. 183]

Shipping—Charterparty—Negligence exception clause—Clause providing that captain shall prosecute his voyages with utmost dispatch—Breach—Claim for damages—No finding of negligence—Liability of shipowners.

By a charterparty shipowners agreed to let and charterers agreed to hire a named steamship for a period of six calendar months. The charterparty provided as follows: "3. The charterers shall provide and pay for all the coals, fuel, water for boilers. . . . 9. The captain shall prosecute his voyages with the utmost dispatch and shall render all customary assistance with the ship's crew. . . . 14. Throughout this charter losses or damages whether in respect of goods carried or to be carried or in other respects arising or occasioned by the following causes shall be absolutely excepted, viz.: . . . negligence, default, or error in judgment of the pilot, master, or crew, or other servants of the owners in the management or navigation of the steamer." The charterers alleged that the captain had not prosecuted a voyage with the utmost dispatch. The owners contended that the breach (if any) of cl. 9 was occasioned by the negligence of the master in the management or navigation of the steamer, and that they were, therefore, exempted from liability by cl. 14. There was no shortage of coal, and it appeared to be common ground that the lack of speed

A of the vessel was due to insufficient coal consumption on the voyage. The dispute having been referred to arbitration, the umpire expressed the opinion that the speed of the steamer was generally less than it would have been if the master had exercised due diligence and that the failure of the master to prosecute the voyage with the utmost dispatch resulted from a general slackness in the performance of his duty or an inability properly to perform his duty in accordance with the charterparty, and he found in favour of the charterers.

B The Court of Appeal referred the award back to the umpire who, in answer to questions put by the court, said that he intended the court to draw the inference that the master was not competent in the sense of being unable properly to perform his duty in accordance with the provisions of the charterparty and/or that he was guilty of "general slackness," but not slackness amounting to negligence in management or navigation.

C **Held** (LORD SHAW and LORD BUCKMASTER dissenting): on the facts found by the umpire and quite apart from any question of construction of the provisions of the charterparty, it was impossible to hold that the owners had established that species of negligence which was required in order to make good their defence, and, therefore, they were liable for the damages awarded.

D Per LORD SUMNER: "Management" of a ship has no precise legal meaning, and its application depends on the facts, as appreciated by persons dealing with steamers.

Notes. Referred to: *Istros (Owners) v. F. W. Dahlstroem & Co.*, [1931] 1 K.B. 247.

E As to a negligence clause in a charterparty, see 30 HALSBURY'S LAWS (2nd Edn.) 331-335; and for cases see 41 DIGEST 425 et seq.

Case referred to:

(1) *Toyosaki Kissen Kaisha v. Société Les Affréteurs Reunis, The Kibi Maru* (1922), 27 Com. Cas. 157; 10 Lloyd, L.R. 147, D.C.; 41 Digest 433, 2717.

Appeal.

F Appeal by shipowners from a decision of the Court of Appeal (BANKES, SCRUTTON and SARGANT, L.JJ.), dated Nov. 28, 1924, affirming a judgment of BAILHACHE, J., dated Mar. 28, 1924, whereby he upheld an award in the form of a Special Case made by an umpire in favour of the respondents.

G The question in dispute on the appeal was whether, on the true construction of a charterparty made between the appellants as owners and the respondents as charterers and on the facts found by the umpire, the respondents were entitled to recover from the appellants damages for a breach of the obligation imposed by the charterparty on the captain to prosecute his voyages with the utmost dispatch or whether the appellants were protected from the consequences of this breach by an exception in the charterparty of negligence, default, or error in judgment of the master in the management or navigation of the steamer. The facts are set out in

H the opinion of VISCOUNT CAVE, L.C.

S. L. Porter, K.C., and *David Davies* for the shipowners.
Langton, K.C., and *Carpmael* for the charterers.

The House took time for consideration.

Jan. 29, 1926. The following opinions were read.

I **VISCOUNT CAVE, L.C.**—The difficulty in this case appears to me to arise partly from an ambiguity in a charterparty and partly from an obscurity in an award. By a charterparty dated Nov. 22, 1919, the appellants, the owners, agreed to let and the respondents, the charterers, agreed to hire the steamship *Keifuku Maru* for a period of six calendar months. The material portions of the charterparty are as follows:

"3. The charterers shall provide and pay for all the coals, fuel, water for boilers. . . . 9. The captain shall prosecute his voyages with the utmost dis-

patch and shall render all customary assistance with the ship's crew. . . .
14. Throughout this charter losses or damages whether in respect of goods carried or to be carried or in other respects arising or occasioned by the following causes shall be absolutely excepted, viz.: . . . negligence, default, or error in judgment of the pilot, master, or crew, or other servants of the owners in the management or navigation of the steamer."

The ship performed four voyages under the charterparty, and it is the second of these voyages, a voyage from Bahia Blanca to Dunkirk, which is alone in question on this appeal. The charterers alleged that the captain had not prosecuted the voyage with the dispatch required by cl. 9 of the charterparty. The owners, while disputing that allegation, contended that the breach (if any) of cl. 9 was occasioned by the negligence or default of the master in the management or navigation of the steamer, and that they were, therefore, exempted by cl. 14 from liability. There was no shortage of coal, and it appears to be common ground that the lack of speed of the vessel was due to insufficient coal consumption on the voyage. The umpire, to whom the dispute was ultimately referred, made an award, in which he stated his conclusions as follows:

"26. After taking into consideration the relative qualities of the bunker coals used throughout the whole of the four voyages together with a comparison of the weather conditions in respect of each voyage and other facts, I hold, (a) that the master did not prosecute the voyages in question with the utmost dispatch and render all customary assistance with the ship's crew, so that the speed of the steamer was generally less than it would have been if the master had exercised due diligence, whereby time was lost; (b) that the failure of the master to prosecute the voyages in question with the utmost dispatch resulted from a general slackness in the performance of his duty or an inability properly to perform his duty in accordance with the provisions of the charterparty in this connection; (c) that in consequence the charterers suffered damage in respect of the second voyage to the extent of £2,414 8s. 4d."

and he awarded that sum to the charterers, subject to the opinion of the court on a question of law which he stated in the following terms:

". . . whether the owners are exempt from liability in respect of the master not having prosecuted his voyages with the utmost dispatch as provided for in cl. 9 of the charterparty on the ground that this resulted from the negligence, default, or error in judgment of the master or crew in accordance with cl. 14 of the charterparty or by other specific provisions of the general terms of the charterparty."

On the argument of the case before the late BAILHACHE, J., he expressed the opinion that the failure to keep up a sufficient head of steam in order to keep the speed which the vessel was reasonably capable of keeping was negligence in the management or navigation of the steamer within the meaning of cl. 14 of the charterparty; but he held that cl. 14 was not intended to "wipe out" cl. 9, and on the authority of a case decided by a divisional court, upheld the award in favour of the charterers. The owners having appealed to the Court of Appeal, that court was not unnaturally perplexed by the language of the award and referred the award back to the umpire for answers to the following questions:

"(i) . . . whether by his finding in paras. 26 (a) and (b) he intends this court to draw the inference that he has found that the master, in reference to the due prosecution of the voyage, was not competent; (ii) or was guilty of slackness only; and if the latter, (iii) whether the slackness amounted to negligence in the navigation or management of the steamer."

These questions the umpire answered as follows:

"I intended the court to draw the inference that the master was not competent in the sense of his inability properly to perform his duty in

- A accordance with the provisions of the charterparty and/or that he was guilty of slackness—namely, ‘general slackness,’ but not slackness amounting to negligence in management or navigation.”

On this answer, the Court of Appeal affirmed the judgment of BAILHACHE, J., and the owners have appealed to this House.

- B The first question which arises is as to the construction of the charterparty. Assuming that the loss of speed which caused a breach of cl. 9 resulted from the master’s failure to use sufficient bunker coal, and that this failure amounted to negligence or default in the management or navigation of the steamer within the meaning of cl. 14, what is the legal result? Is cl. 9 to have effect, or is cl. 14 to prevail over cl. 9 and to excuse the owner from liability? On this point I am impressed by the reasoning of BAILHACHE, J. If the contract means that the captain is to prosecute his voyages with the utmost dispatch, but that if, by reason of his negligence, default or error in judgment in the management or navigation of the ship, he does not so prosecute his voyages, the owner is exempt from liability, then the effect of cl. 14 is practically to nullify cl. 9 of the charterparty. It is true, as SCRUTTON, L.J., pointed out, that the speedy prosecution of a voyage may be affected by matters other than management or navigation, such as undue delay in a port of call; but I cannot doubt that cl. 9 was intended to include an undertaking by the owners that the captain should maintain a reasonable speed while the vessel was at sea, and I find it difficult to understand how a failure on the captain’s part to comply with that obligation could be due to any cause other than his negligence, default or error of judgment in management or navigation. On the whole, I should be disposed to hold that the general words of cl. 14 were not intended to exempt the owners from the consequences of a breach by the captain of the definite and specific obligation imposed by cl. 9.
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- But assuming that construction to be wrong, and that a breach of cl. 9 is not actionable if caused by negligence within the meaning of cl. 14, the owners are still in great difficulty. In order to succeed in their defence, they must at least establish negligence within the meaning of cl. 14 to the satisfaction of the judge of fact, and this they have failed to do. No doubt, the original award of the umpire was obscure, and it might have been possible to spell out of it a finding of negligence in management or navigation; but the further answer of the umpire negatives any such finding. The first part of that answer, in which the umpire uses the compound conjunctive “and/or”—an expression which may have its uses in commercial contracts but is wholly out of place in a judicial finding—is by no means helpful; but the latter part of the answer, in which the umpire finds that the master was not guilty of slackness amounting to negligence in management or navigation, is definite and, I think, conclusive. Your Lordships have not been asked to send the award back for a further answer, and the answer must be taken as it stands; and, having regard to its terms, I think it impossible to hold that the owners have established that species of negligence which is required in order to make good their defence. If so, it follows that, on this ground, and quite apart from any question of construction, the owners have been rightly held liable for the damages awarded. For these reasons, I am of opinion that this appeal fails and should be dismissed with costs, and I move your Lordships accordingly.
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- I **LORD DUNEDIN.**—The thoroughly unsatisfactory feature of this case is that we are compelled to consider not what were the true rights of the parties in the circumstances which occurred under the charterparty which formed the contract between them, but what the arbitrator has determined, his determination being couched in language which has all the appearance of stultification of expression resulting from confusion of thought. I do not repeat the articles of the charterparty on which the question to be decided arose, as that has already been done by his Lordship on the Woolsack. I ask myself what is it that the arbitrator meant when he framed this special case. He found:

"(a) that the master did not prosecute the voyages in question with the utmost dispatch and render all customary assistance with the ship's crew, so that the speed of the steamer was generally less than it would have been if the master had exercised due diligence, whereby time was lost."

To this he added :

"(b) that the failure of the master to prosecute the voyages in question with the utmost dispatch resulted from a general slackness in the performance of his duty or an inability properly to perform his duty in accordance with the provisions of the charterparty in this connection."

And accordingly, as a result,

"(c) that in consequence the charterers suffered damage in respect of the second voyage to the extent of £2,414 8s. 4d."

But he went on to state :

"The question of law for the opinion of the court is whether the owners are exempt from liability in respect of the master not having prosecuted his voyages with the utmost dispatch as provided for in cl. 9 of the charterparty on the ground that this resulted from the negligence, default or error in judgment of the master or crew in accordance with cl. 14 of the charterparty or by other specific provisions of the general terms of the charterparty."

Now what I think he meant by that was to say : "Does my finding (b) amount in law to negligence, default or error in judgment, and if so, does cl. 14 excuse the breach found under cl. 9?" The judge of first instance upheld the award as made on the ground that, if one reads cl. 14 as being brought into operation by finding (b), one would annihilate cl. 9, and that, as that could not be allowed, therefore, the negligence which was the class of negligence which went straight in the teeth of the undertaking under cl. 9 could not form an excuse under cl. 14.

The Court of Appeal took a different view. They thought that negligence was a question of fact, and they accordingly remitted the Case to the arbitrator, with this instruction :

"(i) Referred back to arbitrator for him to inform this court whether by his finding in paras. (a) and (b) he intends this court to draw the inference that he has found that the master, in reference to the due prosecution of the voyage, was not competent; (ii) or was guilty of slackness only; and if the latter, (iii) whether the slackness amounted to negligence in the navigation or management of the steamer."

I take the clear meaning of the question, omitting the part as to incompetence, to be this : Is the only fault that you find in the master that of slackness, and, if that is the only fault, did it amount to negligence in navigation or management? The Court of Appeal might, I think, have construed for themselves his findings as they originally stood, but their view in sending the Case back was, I think, this (and I cannot say I think it was wrong) : If one takes finding (a) as equivalent per se to a finding of negligence, then the difficulty felt by BAILHACHE, J., does arise, for one cannot say the master failed without at the same time saying he was negligent, seeing that every assertion under cl. 9 was, at the same time, an excuse under cl. 14. To this the arbitrator replied as follows :

"I intended the court to draw the inference that the master was not competent in the sense of his inability properly to perform his duty in accordance with the provisions of the charterparty and/or that he was guilty of slackness, namely, 'general slackness,' but not slackness amounting to negligence in management or navigation."

Writ large, that seems to me to be this : You have asked me whether the master's only fault—the fault which led to my finding that he had not prosecuted the voyage with due diligence—was slackness. I say it was his only fault, and then, further, I say that this fault did not amount to negligence in navigation or management.

A That seems to me a positive finding in fact—however wrong it may be—to the effect that the class of error which the master made was not an error which amounted to negligence in navigation or management.

The real difficulty I have felt is whether it is possible to say that this answer, though negating negligence, does not negative default through that word not being mentioned. It would be possible to say so, but I feel that it would be really
B to misconstrue what the arbitrator said. I think when he found that he had to decide as a matter of fact and not as a matter of law whether the expression “master’s conduct” fell within the words of the exception, he decided that it did not, and, if that is so, however wrong he may be, his award must stand. I greatly regret to have to come to this conclusion, all the more as there has been such a difference of opinion on the case. In no view can it ever be treated as a precedent,
C for it is nothing but the interpretation as best one can of the ambiguous words used by a confusedly thinking man. I ought to add that I have taken no notice of *The Kibi Maru* (1), because there is no report which presents a sufficiently intelligible view of the facts or judgment as to make it possible to deal with it. In any view it would not bind this House, but whether the decision was right or wrong I have not the slightest conception. I assume it was right, but its appli-
D cation is impossible.

LORD SHAW.—I am of opinion that the judgments of the courts below are erroneous, that the appeal should be allowed, and that the question put by the arbitrator should be answered in the affirmative—that is to say, that the owners are exempt from liability. I think the judgment pronounced in the Court of Appeal by SCRUTTON, L.J., to be in all points correct.

E I think it is necessary to see with some carefulness how it is that the question comes before the law courts at all. It does so in respect of the provisions of the Arbitration Act, 1899, and the submission of an arbitrator of a question for the opinion of a court is that that question is a question of law. It is no part of the function of a court to review the judgment of the arbitrator on a question of fact.
F This is perfectly familiar ground. I only mention it so that one may have it in view in looking at what is before your Lordships as a question. The arbitrator states it thus:

“The question of law for the opinion of the court is whether the owners are exempt from liability in respect of the master not having prosecuted his voyages with the utmost dispatch as provided for in cl. 9 of the charterparty; on the
G ground that this resulted from the negligence, default or error in judgment of the master or crew in accordance with cl. 14 of the charterparty or by other specific provisions of the general terms of the charterparty.”

I am of opinion that the only meaning which can be attached to the question so submitted as a question of law is that negligence, default or error in judgment by the master is assumed to have taken place; that is the ground, in fact, on which
H the arbitrator proceeds to put his question in law. The point which the arbitrator did submit, and alone submitted, to the court was: Assuming the fact to be so, did cl. 14 of the charterparty as to the master’s negligence, &c., exempt the owners from liability under cl. 9? I most entirely agree with SCRUTTON, L.J., that that must be so. If the arbitrator meant to submit that he found there was no master’s negligence in the case, and yet he proposed a question of law—namely, whether
I the owners were exempted from their obligations under cl. 9, by reason under cl. 14 of a negligence which did not exist in fact, then the whole proceeding was an absurdity. But it was not an absurdity to ask the opinion of the court as he did—namely, “Assuming negligence under cl. 14, which I find as a fact, does cl. 14 exempt the owners from their liability under cl. 9?”

In my opinion, that was a question of law quite suitable for presentation to the court, and I think mischance and confusion have arisen because it was not answered as put. Had it been so answered, negligence being assumed as a fact—without which, indeed, there was no question of law to present at all—then the case would

have been at an end. Instead of doing this, however, the Court of Appeal (unquestionably embarrassed by *The Kibi Maru Case* (1), to which I shall presently refer) remitted the Case to the arbitrator with practically the suggestion that, although the only question of law which he had sent forward assumed negligence, yet he might not be of opinion that there was negligence. Would he explain what he really did mean? This was a psychological essay not unfitted to result in the confusion which unfortunately the case now presents. It was, in effect, saying to the arbitrator: "Are you sure that the negligence, default or error of judgment which you have assumed in the management and navigation of the vessel really was negligence, default or error of judgment?" But it was not even saying this; for the remit to him by the Court of Appeal did not put the full material words before him—namely, "negligence, default or error of judgment," but tied him up to the word "negligence." The arbitrator thereupon added to the confusion by introducing the possibility that it was the master's incompetence which was in his mind, as well as, or even as, an alternative to slackness, particular or general. It is difficult to imagine a less satisfactory clearing up even of a question of fact.

Before proceeding further I may say that I am humbly of opinion that cl. 9 and cl. 14 of the charterparty can stand together. I think that BAILHACHE, J., rightly held that the arbitrator's findings amounted to an affirmation of negligence on the part of the master in the navigation or management of the ship. I think, however, that he erred in holding cl. 14 to be a comprehensive negation of cl. 9 and concluding, therefore, that cl. 14 should practically stand out of the charterparty. There might be a variety of other faults on the part of the master and crew—faults connected either with the navigation or the management of the vessel, and there might, indeed, be gross and wilful mismanagement, or other instances, such as those cited by SCRUTTON, L.J. The repugnancy between two clauses in a contract which would lead to the deletion or ignoring of one of them must be a complete repugnancy, and wherever that is not manifest the clause ought to stand, and the contract be read as a whole. I think that the latter is the situation of the present case.

Further, I think that the assumption of negligence, which was the sole basis for the presentation of a question of law, was rightly made, for I am of opinion that the true reading of the whole award leads inevitably to the result that the arbitrator has found that there was negligence in fact. Too little attention has been given to para. (a) of his award which still stands. Paragraph (a) is as follows:

"I hold, (a) that the master did not prosecute the voyages in question with the utmost dispatch, and render all customary assistance to the ship's crew, so that the speed of the steamer was generally less than it would have been if the master had exercised due diligence, whereby time was lost."

There is here a sufficiently clear affirmance that the loss of speed arose from the lack of due diligence in the handling of the steamer. When the Case was remitted back to the arbitrator two further errors, in my opinion, crept into the proceedings. A reference was made to para. (b) of the award. Paragraph (b) is to the effect:

"that the failure of the master to prosecute the voyages in question with the utmost dispatch resulted from a general slackness in the performance of his duty or an inability properly to perform his duty in accordance with the provisions of the charterparty in this connection."

In presenting the question of law to the court, the arbitrator had taken it to be a fact on which the court could proceed—namely, that there was negligence arising under cl. 14. The court then asked whether the slackness referred to in (b) was slackness only or whether it amounted to negligence in the navigation of the steamer—that is to say, the court confronted the arbitrator with a situation which negated the only condition on which a question of law could have arisen for the court to settle. The arbitrator, accepting the position, stated that he intended the court to infer that there was not slackness amounting to negligence in navigation or management. I think no court should by the restriction of the question have

A either made such an answer legitimate or, when the answer was given, should have taken it off his hands. The findings of the arbitrator, in my humble judgment, must be taken as a whole. They are definite to the effect that the loss of speed was due to a lack of due diligence and to general slackness on the master's part. Nobody has any idea of what this general slackness was, and I agree with SCRUTTON, L.J., and my noble and learned friend, LORD BUCKMASTER, in thinking

B that the whole result of the findings is that negligence in the management or navigation of the vessel was in fact and truth found by the arbitrator, and there was no reason for avoiding calling it negligence by name. I go the length of holding that for a man to affirm that lack of due diligence and general slackness resulting in the lowering of the speed of this vessel did not mean that negligence occurred in the master's navigation or management of the ship, is truly absurd.

C So viewing the findings, I decline the attempt to rationalise the absurd and call it law.

The mischance in this case is largely attributable to the decision in *The Kibi Maru* (1). That appears from the judgment both of BAILHACHE, J., and of the learned judges of the Court of Appeal; and I further suspect the confusion and error of that case reached the proceedings in the arbitration themselves. With

D great respect to the learned judges who decided *The Kibi Maru Case* (1), I think it to have been erroneously decided in law; and it is manifest that that decision is introducing embarrassment into the law of arbitration, and even into the conduct and deliverances of arbitrators. I respectfully dissent from the judgment proposed from the Woolsack. I share the opinions of SCRUTTON, L.J., in the court below and of LORD BUCKMASTER in this House.

E **LORD SUMNER.**—Without quoting his words at length, the umpire awards to the charterers £2,414 8s. 4d. as damages for breach of cl. 9 of the charterparty, reciting that, according to the charterers' contention, this breach resulted from the master's neglecting to increase the speed of the steamer by an increased coal consumption. This award he makes subject to the opinion of the court on a

F question of law—namely, whether the master's failure to prosecute his voyages with the utmost dispatch resulted from his negligence, default or error in judgment in accordance with cl. 14—that is, in the management or navigation of the steamer, so as absolutely to except losses occasioned thereby. The umpire adds: "If the opinion of the court upholds my findings, as above, then my award shall stand." The findings referred to, so far as concerns the present purposes, are these:

G "(a) that the master did not prosecute the voyages in question with the utmost dispatch . . . so that the speed of the steamer was generally less than it would have been if the master had exercised due diligence, whereby time was lost; (b) that the failure of the master to prosecute the voyages in question with the utmost dispatch resulted from a general slackness in the performance of his duty or an inability properly to perform his duty, in accordance with

H the provisions of charterparty in this connection."

So far it might seem that the award finds, as facts, a failure of the master under cl. 9 and also a failure to exercise due diligence. If failure is the same as default—and I must say that I see small difference between the words here—it might then be said, that the award finds as the cause of insufficient dispatch, default and negligence of the captain and that the explanation of his want of due diligence

I by the slackness of his understanding is interesting, but irrelevant.

I am satisfied that negligence of the master, and this alone, was the case made and fought throughout. The statement of claim pleaded the cause of the failure to prosecute the voyages duly as neglect to increase speed by means of coal consumption. The findings of the umpire deal with this neglect and with no other cause for the lack of dispatch. There is nothing in the award to suggest a case of wilful default or of failure consisting of diligent effort unattended by success, and in the courts below it is clear that negligence alone was understood to be the matter relied on. Accordingly, I have to ask myself whether the award should be read

as a finding of negligence owing to the umpire's reference to what the captain could have done by the exercise of due diligence. His finding, given by way of supplement in answer to questions by the Court of Appeal, leads me to the conclusion that the answer is "No." This finding is as follows:

"I intended the court to draw the inference that the master was not competent, in the sense of his inability properly to perform his duty in accordance with the provisions of the charterparty and/or that he was guilty of slackness—namely, 'general slackness,' but not slackness amounting to negligence in management or navigation."

Here for the first time management or navigation of the steamer are dealt with. In the face of this express disavowal, I do not think that the award can be treated as finding negligence, and, further, as it disavows the particular kind of negligence, namely, in management or navigation, which the shipowners must establish or fail, it seems to me that the umpire, as judge of fact, has stated the owners out of court.

Whether his finding is unsatisfactory or not, it is hardly for me to say. Your Lordships were not asked to send the award back to be re-stated in any respect, nor would there be much use in doing so, as it is already about two years old, and the umpire has attempted once already to elucidate it, not, perhaps, as successfully as might have been wished. I see no ground for bringing the captain's action or inaction under the head of navigation. I speak with humility after what has just been said, but I still think that there is a real field in which the captain's shortcomings would not fall within the exception cl. 14, and yet would constitute a breach of his obligation to use dispatch under cl. 9. The maintenance of full speed may often be part of the duty, which those responsible for navigation have to perform, directly or by others, as, for example, in order to save a tide at a bar or to correct excessive leeway or deflection by currents, or to make the ship quick to answer her helm, or to make a course good against head winds, or what not. Here, however, it is not pretended that the ship was handled in an unseamanlike manner, or that either ship or cargo was imperilled by the navigation that took place. The term "management" may better fit the present case, but it is not a term of art; it has no precise legal meaning, and its application depends on the facts, as appreciated by persons experienced in dealing with steamers. There is a management which is of the shore, and a management which is of the sea. I do not think the award states the facts sufficiently to enable us to say that the evidence is all one way to show mismanagement of the steamer, in the sense of cl. 14, and without more facts before us we could not in any case deal with the question as a practical matter. Clause 9 is emphatically a merchants' clause. Its object is to give effect to the mercantile policy of preferring a saving of time to a saving of coal. It constitutes an instruction to the captain, like a clause about telegraphing so many hours' notice of his time of sailing and such matters; but if he forgets it, the sound business view quite possibly may be that he has neglected his duty and the interests of the steamer's managers, though he has not been negligent in the management of the ship. It may not have been a thing of which one must necessarily say that a good skipper could not have done it. I think this is what the umpire meant by speaking of general slackness in antithesis to negligence in management, and in so doing he was, no doubt, endeavouring to give effect to the distinction made by the Divisional Court in *The Kibi Maru* (1). I am, accordingly, of opinion that this was a question for the umpire, as to which he is not shown to have fallen into any error of law, and as to which also we have not sufficient knowledge of the facts to decide (if it were for us to decide) whether he may not have been right after all. Accordingly, I think the appeal fails.

The practice of incorporating arbitration clauses into charterparties and many similar standard forms of contract is now inveterate and is not likely to be changed. I suppose that men of business find that arbitration works well in the main and satisfies their requirements. This case, however, is not by any means the first to

A make me doubt whether the law as to stating Special Cases in arbitrations for the opinion of the court is altogether satisfactory. In mercantile transactions, at any rate, questions are constantly raised which are questions both of law and fact, and they constantly fail to find a satisfactory answer because of the exceedingly artificial line which practice draws in appellate proceedings between law and fact. The selection and framing of the questions for the opinion of the court is a task as
B responsible as it is delicate. The success of a judge in telling a jury what questions there are for them and what law they are to take from himself is often doubtful, but in stating a Case for the opinion of the court, it is the juryman who has to tell the judge what questions of law there are for him and what facts he is to assume without question. I doubt if the results are altogether happy. I wish, however, to deprecate any strictures on the umpire or on the course taken by him
C in this case. It is only fair to him, as a layman, that every allowance should be made for the difficulty of appreciating exactly what findings of facts would be required, and exactly where questions of fact end and questions of law begin. I am far from thinking that the umpire, for his part, was either lacking in care or deficient in the intelligence which so difficult a case required.

D **LORD BUCKMASTER** (read by LORD SHAW).—The difficulty that I find in reaching a decision in this case is due more to the obscurity of the award than to uncertainty in the terms of the charterparty. Of this latter document cl. 9 and cl. 14 are the only ones relevant to the present appeal. Clause 9 renders the owner liable if the captain does not prosecute his voyages with the utmost dispatch. The award finds in terms that this has not been done, and the owner is, therefore,
E liable unless he is exempted from liability by the provisions of cl. 14. It would, at first sight, appear as though this latter clause would relieve the owner from all the obligations cast on him by cl. 9 and so render it nugatory, but it appears to me that the two clauses may be reconciled by considering that cl. 9, when the exceptions have been taken away, might still leave the owners liable for delay attributable to their action. The fact that the captain is under the orders and directions of the
F charterers might still enable the owners to give such directions as would prevent the voyage being prosecuted with the utmost dispatch, thus leaving them responsible for the consequence of their own actions while exempting them from all delay due to the negligence and defaults of the captain himself in the management or navigation of the steamer. It remains to be considered whether such default or negligence has been established. It appears to me that the findings of the award amount to this: that the master did not exercise due diligence and that this caused
G loss of time; that he did not perform his duty as he was bound to do, and that his inability so to perform it was due to general slackness. The final conclusion that this slackness did not amount to negligence in management or navigation can, in my opinion, only be interpreted as meaning that the negligence which I think has been definitely found was not, in the opinion of the arbitrator, negligence in
H management or navigation. In this I think he is attempting to construe the charterparty in the light of his findings, and I think he has construed it wrongly. It may well be that the negligence was not negligence in navigation, for that may relate to acts of seamanship, but I cannot escape from the conclusion that he was, on the findings, guilty of default or negligence in the management of the vessel. Due diligence can only mean the reasonable and proper diligence to be expected
I of a competent officer, and that the charterers are entitled to obtain. If it was not rendered, and I think it is clear from finding (a) that it was not, the delay was due either to the master's negligence or default, and in either case there was a neglect of duty, and that is sufficient. If once it be accepted that the meaning of the arbitrator was, having found the facts, to leave the conclusion of law to the court, much, if not all, of the ambiguity of the award disappears, and the finding that the negligent acts fall under one or other branch of the provisions of cl. 14 relieves the owners of liability. This disposes of the main arguments in the case, but there was another point ingeniously raised and attractively argued by junior

counsel for the charterers which merits attention. It is that the whole of cl. 14 relates to losses or damages in respect of goods only, but I do not think this is the true interpretation of the clause, which should be read as referring to losses or damages whether in respect of goods or in other respects.

For these reasons, I think that the appeal should be allowed.

Appeal dismissed.

Solicitors: *W. & W. Stocken; Downing, Middleton & Lewis, for Downing & Handcock, Cardiff.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

LETANG v. OTTAWA ELECTRIC RAIL. CO.

[PRIVY COUNCIL (Viscount Cave, L.C., Viscount Haldane, Lord Atkinson, Lord Shaw and Lord Parmoor), April 26, 27, May 20, 1926]

[Reported [1926] A.C. 725; 95 L.J.P.C. 153; 135 L.T. 421;
42 T.L.R. 596]

Negligence—Defence—Volenti non fit injuria—Need to prove risk of injury freely and voluntarily encountered—Insufficiency of proof of knowledge.

It must be observed that the maxim "volenti non fit injuria" is not "scienti non fit injuria." To establish a defence based on the maxim in an action for negligence causing injury to the plaintiff a defendant does not discharge his legal obligation by merely affecting the plaintiff with knowledge of the danger. He must prove circumstances which leave no inference open save that the risk resulting in the injury was freely and voluntarily encountered by the plaintiff with full knowledge of its nature and extent.

Notes. Under the Occupiers' Liability Act, 1957 (see 37 HALSBURY'S STATUTES (2nd Edn.) 832), the distinction between invitees and other visitors to premises is done away with and a duty is put on the occupier to take reasonable care to see that any visitor to the premises is reasonably safe. The defence of contributory negligence was abolished by the Law Reform (Contributory Negligence) Act, 1945.

Referred to: *Regal Oil Co. v. Campbell*, [1936] S.C.R. 309; *Reith v. Safeway Stores*, [1936] 1 W.W.R. 481; *Lamu v. Joki*, [1938] O.W.N. 262; *Crewe v. N.A. Life Assurance Co.*, [1942] 4 D.L.R. 75; *Harison v. Toronto Motor Co., Ltd.*, [1945] 1 D.L.R. 286; *Jackson v. Chow*, [1946] 2 W.W.R. 161; *Roe v. MacLeod*, [1946] 3 W.W.R. 522; *Marra's Bread Co. v. E. Canadian Greyhound Line*, [1947] O.W.N. 847; *Warmund v. Smith*, [1947] O.R. 181; *St. George v. Condron*, [1949] 2 D.L.R. 697.

As to the defence of volenti non fit injuria, see 28 HALSBURY'S LAWS (3rd Edn.) 82 et seq.; and for cases see 36 DIGEST (Repl.) 150 et seq.

Cases referred to:

- (1) *Indermaur v. Dames* (1866), L.R. 1 C.P. 274; Har. & Ruth. 243; 35 L.J.C.P. 184; 14 L.T. 484; 12 Jur.N.S. 432; 14 W.R. 586; affirmed (1867), L.R. 2 C.P. 311; 36 L.J.C.P. 181; 16 L.T. 293; 15 W.R. 434, Ex. Ch.; 36 Digest (Repl.) 46, 246.
- (2) *Thomas v. Quartermaine* (1887), 18 Q.B.D. 685; 56 L.J.Q.B. 340; 57 L.T. 537; 51 J.P. 516; 35 W.R. 555; 3 T.L.R. 495, C.A.; 36 Digest (Repl.) 7, 11.

- A (3) *Osborne v. London and North-Western Rail. Co.* (1888), 21 Q.B.D. 220; 57 L.J.Q.B. 618; 59 L.T. 227; 52 J.P. 806; 36 W.R. 809; 4 T.L.R. 591, D.C.; 36 Digest (Repl.) 156, 822.
- (4) *Yarmouth v. France* (1887), 19 Q.B.D. 647; 57 L.J.Q.B. 7; 36 W.R. 281; 4 T.L.R. 1, C.A.; 36 Digest (Repl.) 135, 710.

B **Appeal** by special leave from an order of the Supreme Court of Canada (DUFF, ANGLIN, MIGNAULT, and MALOUIN, JJ.; IDINGTON, J., dissenting), reversing an order of the Court of the King's Bench for the province of Quebec (Appeal Side).

The appellant, plaintiff in the action, claimed damages for negligence, the negligence alleged being the dangerous condition of a stairway upon the respondents' property in Rockliffe Park, in the province of Ontario, where the applicant's wife sustained injury by slipping on steps covered with ice and falling.

C *Pritt* for the appellant.

Glyn Osler, K.C., and *H. C. Walker* (both of the Canadian Bar) for the respondents.

May 20. **LORD SHAW.**—There has in this case been very considerable difference of opinion among the learned judges in Canada. The judgment in the case was pronounced on April 23, 1923, in the Superior Court by DEMERS, J., after a trial without a jury. It was in favour of the appellant and awarded to him a sum of \$4,607. That judgment was appealed to the Court of King's Bench for Quebec, Appeal Side. The court affirmed DEMERS, J., but DORION and HOWARD, JJ., dissented. On a further appeal to the Supreme Court of Canada by the respondents these judgments were reversed and judgment given for the respondents, IDINGTON, J., dissenting. The action is a claim for damages for negligence in respect of an accident to the wife of the appellant, who slipped upon certain steps on the respondents' property. The steps were covered with ice and she fell heavily and sustained serious injury. It is clear that in such a case great weight must attach to the views and verdict of the judge who tried the case.

F The facts as to the place of the accident are, shortly, as follows: The line of the defendants' tramway passes over a portion of ground on the south bank, but considerably above the level, of the Ottawa River and known as Rockliffe Park. Gatineau Point is a village on the north side of the Ottawa River, opposite a part of Rockliffe Park, where the bank rises steeply to the ground belonging to the defendants. That ground has no boundary fence upon it towards the river. In winter passengers proposing to travel by the tramway cross the river on the ice.

G In summer they are landed at a wharf at the bottom of the slope ex adverso of the tramway property. From that they climb up to the edge of the property. There are at several points courses of steps with regard to which no responsibility attaches to the defendants. At the edge of the tramway property, however, a course of steps had been placed; two or three of these at the top were actually upon tramway ground, and from that point to the tramway line and platform was a

H distance of 80 ft. in a straight line over ground which sloped slightly up to the rail level. Manifestly for the convenience of tramway passengers, the company had built a series of concrete steps so that passengers coming up the steps from the river crossed straight to the tramway line, but for a portion of the way had the benefit of this flight. These simple facts seem, on the mere statement of them, to constitute something very like an unmistakable invitation by the respondents to passengers from Gatineau to come up to their tramway by the route thus

I formed. The public so interpreted the position. The facts as to the actual use made of this convenient access are strong. It was habitually used, not by one or two passengers, as if by way of adventure, but by between 700 and 800 tramway passengers per day. It was, in short, their ordinary access to the tramway line, and this use must of course have been known to the defendants and their representatives. In the opinion of the Board, the appellant's wife, who was one of these passengers, must be regarded as an invitee, and the law applicable to the case is the law of responsibility in an invitee's case.

In the arguments before the Board it was not denied that, upon the day of the accident, the steps of the tramway property were in a bad condition and dangerous through the gathering of water, which in the occasional thaw flowed down the slope of the tramway property on to the steps and was there congealed by frost. No prohibition or warning against use was made, nor were any of the things done which were mentioned in the evidence as reasonable to be done in order to avert the danger, namely, chopping the ice, clearing it away, or spreading sand or cinders upon the steps. For the convenience of persons using the stair there was a handrail. The woman kept hold of this, but slipped so suddenly that she had no power to maintain her weight and she fell and was injured. The case is, accordingly, that of an invitee who comes on to property of the defendant owner and on an errand of business as his customer. The familiar rule as to an invitee is expressed by WILLES, J., in *Indermaur v. Dames* (1) (L.R. 1 C.P. at p. 288):

"We consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact."

The defendants' case, pleaded at their Lordships' Bar, was not that their property had been kept reasonably safe for such an invitee. On the contrary and throughout the case they maintained that they had exercised no care of the steps at all as they had no duty with regard to them. They, however, maintained that the woman had been guilty of contributory negligence, and it was specially urged that the maxim *volenti non fit injuria* applied to prevent her from recovering compensation. The defendants urged in the first place that, if the woman had avoided the steps, although these were hourly and generally used as already mentioned, and had gone round some considerable way upon a made road, which was in a safe condition for foot passengers, the accident would have been avoided. It seems at least doubtful whether this, in the circumstances, would have disentitled her to the legal rights of an invitee, but on this point it is unnecessary for their Lordships to pronounce, for they are of opinion that it is not proved that this round-about road would have been at all safer. The evidence inclines one to the belief that, constructed as it was upon a winding slope, its condition at that season of the year, namely in February, was longer and possibly as hazardous, if not more so, than the direct and accustomed route taken. The defence, however, above stated, remains quite apart from that point.

It is quite a remarkable circumstance that there is no trace of the defence of contributory negligence or *volenti non fit injuria* upon the respondents' pleadings. As, however, these subjects seem to have been fully argued in the courts below their Lordships will accordingly deal with them. The onus of establishing the plea of contributory negligence rests upon the defendants. In their Lordships' opinion this was a fair and most relevant subject for thorough and searching cross-examination of the appellant's wife, whose negligence the defendant company was alleging and endeavouring to prove. It is sufficient to say that the defendant company made no effort in this direction. The woman entered and left the witness-box without a question on the subject being put to her. It would rather appear that, at that stage of the case, the real contest between the parties was as to the actual situation of the steps, whether they were or were not on the defendants' property, and whether the defendants had any duty to keep these steps in a passable condition. Whatever the reason, the only actor who could have spoken of contributory negligence, namely the appellant's wife, had not the subject of her alleged blame put to her. The Board thinks that the learned trial judge very rightly held that contributory negligence had not been established. The truth is that this case has been, in its later stages, argued, as it was ably argued before

A the Board, as one in which the maxim *volenti non fit injuria* applied. In the view taken by the Board that maxim and the doctrine underlying it have not been correctly apprehended by some of the learned judges in the court below. This kind of problem is frequently before the courts. It is quite a mistake to treat *volenti non fit injuria* as if it were the legal equipollent of *scienti non fit injuria*. As BOWEN, L.J., expressed it in *Thomas v. Quartermaine* (2) (18 Q.B.D. at p. 696):

B "The maxim, be it observed, is not '*scienti non fit injuria*, but '*volenti*.' It is plain that mere knowledge may not be a conclusive defence. . . . The defendant in such circumstances does not discharge his legal obligation by merely affecting the plaintiff with knowledge of the danger. Knowledge is not a conclusive defence in itself. But when it is a knowledge in circumstances which leave no inference open but one, namely that the risk has been voluntarily encountered, the defence seems to me complete."

C A case very near the present on its facts is that of *Osborne v. London and North-Western Rail. Co.* (3), in which *Thomas v. Quartermaine* (2) was carefully founded on. The plaintiff was injured by falling on steps leading to the defendants' railway station. These steps the defendants had allowed to be slippery and dangerous. There was no contributory negligence on the part of the plaintiff, but there were other steps which he might have used (a direct analogy in fact with the present case), and he admitted that he knew the steps were dangerous and went down carefully holding the rail. The railway company was held responsible. WILLS, J., puts the matter thus:

E "I should have thought it necessary that the plaintiff should be asked more questions than he has been asked in cross-examination. It is clear from his evidence that he knew there was some danger, but the contention on behalf of the defendants, that this circumstance is sufficient to entitle them to succeed, entirely gives the go-by to the observations of LORD ESHER, M.R., in *Yarmouth v. France* (4) (19 Q.B.D. at p. 657). In the present case the plaintiff may well have misapprehended the extent of the difficulty and danger which he would encounter in descending the steps. For instance, he might easily be deceived as to the condition of the snow. I know quite enough about ice and snow to know how easy it is to make such a mistake and it is one that has cost many a man his life. In order to succeed the defendants should have gone further in cross-examination for, unless the question of fact had been found in their favour, the application of the maxim on which they relied could not be established. The county court judge has not found the fact the defendants need; and upon the present materials I am certainly not prepared to supply the deficiency."

G The law of Canada and England seems to be summed up in the leading proposition to WILLS, J.'s judgment:

H "If the defendants desire to succeed on the ground that the maxim *volenti non fit injuria* is applicable, they must obtain a finding of fact that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it."

I To apply these illustrations to the present case, there is no evidence whatsoever that the appellant's wife, holding on as best she could to the handrail, had full knowledge of the nature and extent of the danger; or that, knowing this, she freely and voluntarily, with full knowledge of the nature and extent of the risk she ran, encountered the danger. As to this it is to be noted that she was merely traversing the same steps and in the very same circumstances as many hundreds of tramway passengers. Probably the legal situation is answered by the observation already made that neither the woman's knowledge nor will was made the subject of cross-examination at all. It rather appears that the judgments, in so far as sustaining this defence, are based solely upon the fact that there was some danger from slipperiness apparent to anybody on the steps. Unless, however,

the defendant company, who had invited the woman to use that access and were accordingly bound to keep it reasonably safe, could establish that she fully knew and understood the nature and the extent of the danger and resolved voluntarily to undertake the risk, the defence fails. All that the defence put to the woman was whether she held on to the rail and should not have saved her fall in that way. They elicited the answer "Je le tenais, comme il faut," and there the defence founded on the maxim *volenti non fit injuria* came to an end.

Their Lordships will humbly advise His Majesty that the appeal should be allowed and the judgment of the Court of King's Bench and the judgment of the Superior Court restored. The respondents will pay the costs in the courts below and such costs of this appeal as the appellant, suing as a pauper, is entitled to.

Appeal allowed.

Solicitors: *Lawrence Jones & Co.; Blake & Redden.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

NASH v. GILES

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Salter, JJ.), November 9, 1926]

[Reported 96 L.J.K.B. 216; 136 L.T. 352; 91 J.P. 19; 43 T.L.R. 121; 25 L.G.R. 66]

Street—Repair—Public Health Acts—Expenses—Apportionment—Adjoining streets made up in one operation—Apportionment of total expenses on frontages on one street—Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 19.

A local authority, acting under s. 19 (1) of the Public Health Acts Amendment Act, 1907, required the respondent to do repairs to a street on which the respondent's premises abutted. The repairs were not done by the respondent, and the local authority did the repairs to the street, but at the same time did repairs to a street at right angles to it. They included in one account the expenses of the repairs to the two streets, and, purporting to act under s. 19 (2) of the Act of 1907, demanded from the respondent payment, not of an amount bearing to the expense of repairing the street on which his premises fronted the proportion which the extent of his premises bore to the total extent of all the premises fronting that street, but of a sum bearing to the total expenses of both streets the same proportion as that which the extent of his premises bore to the total extent of all the premises fronting on the two streets.

Held: the sum demanded was not arrived at by the method prescribed by s. 19 (2) of the Act of 1907, but was arrived at by a wrong method, and, therefore, the authority was not entitled to recover it from the respondent.

Notes. As to making up streets under the Public Health Acts Amendment Act, 1907, see 19 HALSBURY'S LAWS (3rd Edn.) 450, 451; and for cases see 26 DIGEST 530 et seq. For the Act of 1907, see 19 HALSBURY'S STATUTES (2nd Edn.) 183.

Case Stated by Hampshire justices.

The appellant, Ernest Nash, on behalf of the Fleet Urban District Council, preferred a complaint against the respondent, Colonel Frank Lucas Giles, of Thurlston, Victoria Hill Road, in the district of the local authority, for non-payment of the sum of £35 12s. 6d., being expenses incurred by the local authority in repairing

A Victoria Hill Road, which had been duly demanded from the respondent and not paid by him.

At the hearing it was admitted or proved that on Nov. 17, 1925, it was made to appear to the local authority that Victoria Hill Road, which was not a highway repairable by the inhabitants at large, was in a dangerous condition and in urgent need of repair. The respondent was the owner of premises known as "Thurlston," which abutted on the road. The Public Health Acts Amendment Act, 1907, was in force in the district. On Nov. 26, 1925, a notice under the Act was duly served upon the respondent requiring him to execute repairs. The respondent did not comply with the notice and the work was done by the local authority. At the same time the local authority also did repairs to another street called Branksome Wood Road, which ran at right angles to Victoria Hill Road. The respondent's premises did not front, adjoin, or abut on Branksome Wood Road. The expense of the repairs to Victoria Hill Road and Branksome Wood Road was included in one account, and no separate account was kept of the repairs to each of the said roads. The expense of repairing both the roads was charged upon the respective owners, including the respondent, in proportion to the extent of their frontages to the roads. The respondent contended (*inter alia*) that the apportionment was absolutely bad and the local authority could not recover any part of the expenses because Victoria Hill Road and Branksome Wood Road were separate streets, and the expenses should have been separately apportioned. The justices upheld this contention of the respondent, and found as a fact that Victoria Hill Road and Branksome Wood Road were two separate streets within the meaning of the Act. They held that separate accounts should have been kept and separate apportionments should have been made, and that, consequently, the local authority's claim failed.

G. R. Blanco White for the appellant.

W. H. Moresby for the respondent.

LORD HEWART, C.J.—I think this is a perfectly clear case. The question arises out of a complaint preferred by the appellant against the respondent under s. 19 of the Public Health Acts Amendment Act, 1907. To put the matter shortly, repairs were required by the local authority to be done to a certain private street. The repairs were not done by the respondent, and the local authority thereupon proceeded to do repairs both to that street and to another street which ran at right angles to it. They did not keep separate accounts of the expenses of the repairs to each of the two streets, but mixed them up in one and the same account, and they called upon the respondent to pay a sum bearing to the total expenses of both streets the same proportion as that which the extent of his premises fronting, adjoining, or abutting on the one street bore to the total extent of all the lands and premises fronting, adjoining, or abutting on the two streets. It was not so much as suggested that the two roads were identical with regard to the nature of the repairs required to be done to them. The highest at which it was put was that the two roads were treated in the same manner, there was very little difference in the condition of the two roads before the works were commenced, and the cost to the owners, if the expense of repairing each road had been calculated separately, would have been approximately the same to the respective frontagers. That was how the case was presented to the justices, who were in effect told that the calculation of the amount due from the respondent had not been made on the proper basis, but that the sum claimed was approximately that which would be found to be due if the proper calculation were made. The justices upheld the contention of the respondent that the apportionment was bad, as separate accounts were not kept for the two roads. The argument which has been advanced before this court is that the justices mixed up in their minds what is required under s. 19 of the Public Health Acts Amendment Act, 1907, with the more formal allocation of expenses, called an apportionment, under s. 150 of the Public Health Act, 1875. There is, however, no magic in the word "appor-

tionment." What is referred to in s. 19 of the Act of 1907 is a sort of apportionment. How can the proper figure be arrived at except by a sort of apportionment? It may not be the same apportionment as that under s. 150 of the Act of 1875. The method may be different, but there must be an apportionment before it can be said that a particular person is liable to pay a particular sum. In the present case a sum was demanded, but that sum was a totally wrong sum arrived at on a wrong basis, because it was arrived at by mixing up the accounts of the repairs to the two streets. If that method of calculation is right, why stop at two streets? Why not mix up the accounts of the repairs to twenty streets? It is further suggested that the justices, instead of dismissing the only case put before them, should themselves have proceeded by an examination of the local authority's books, with the help of their officers, to arrive at an apportionment on the right basis. The justices, however, were neither asked to do that, nor had they any power to do it. In my view, the justices took the only course that was open to them in dismissing a complaint demanding a sum which never ought to have been demanded, and arrived at by a confused and unjustifiable method. The appeal therefore fails.

AVORY, J.—I am of the same opinion. It is plain that the amount which the local authority sought to recover was not the amount referred to in s. 19 (2) of the Public Health Acts Amendment Act, 1907. The amount which the local authority sought to recover was not in the proportion which the frontage of the respondent's premises bore to the total extent of the lands and premises fronting, adjoining, or abutting on Victoria Hill Road, but in the proportion which the frontage of the respondent's premises bore to the total extent of the lands and premises fronting, adjoining, or abutting on Victoria Hill Road and Branksome Wood Road. The justices had no jurisdiction to award the amount which the local authority sought to recover. I cannot accept the argument of the appellant's counsel that the justices ought not to have dismissed the complaint, but ought themselves to have made a proper apportionment. The justices had no power to assess damages as if they were a jury. Their powers were strictly limited by the provisions of the statute. They could only order payment of the sum claimed if it was found on the evidence to be payable.

SALTER, J.—I also agree. The amount which the local authority was entitled to recover was never proved, and, therefore, the claim failed. The amount which the respondent was called upon to pay was arrived at on a wrong basis, because it was partly in respect of repairs to a road which he was not and could not be called on to repair.

Appeal dismissed.

Solicitors: *Ernest Nash, Fleet; Tucker, Hussey & Martin, for Kempson & Wright, Farnham, Surrey.*

[*Reported by J. F. WALKER, Esq., Barrister-at-Law.*]

A

THE ST. GEORGE. GRANT AND ANOTHER v YACHT ST. GEORGE (OWNERS)

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P.), June 16, July 14, 27, 1926]

B

[Reported [1926] P. 217; 95 L.J.P. 181; 136 L.T. 252; 42 T.L.R. 766; 17 Asp.M.L.C. 164]

Shipping—Bottomry—Mortgaged ship—Validity of bond—Need for consent of mortgagee—Duty of lender to communicate with mortgagee—Ability to make advance—Director of company owning ship—Managing owner—Merchant Shipping Act, 1894 (57 & 58 Vict., c. 60), s. 34, s. 59.

C

By s. 34 of the Merchant Shipping Act, 1894, the mortgagee of a ship is not to be treated as the owner "except as far as may be necessary for making [the] mortgaged ship available as a security for the mortgage debt." This exception does not prevent a mortgaged ship from being bottomried, nor does it make the consent of the mortgagee a prerequisite of a hypothecation of the ship. Such an act is calculated to preserve the security of the mortgagee rather than to impair it.

D

While a lender on bottomry is under no obligation to communicate with the mortgagee of the ship, should he know that the mortgagee is more interested than anyone else in getting the ship home, he will do well to see that the mortgagee has notice of hypothecation if communication is practicable.

E

A director of the company which owns the ship, who is also registered under s. 59 of the Merchant Shipping Act, 1894, as managing owner of the ship, is not thereby disabled from making advances on bottomry.

Notes. As to bottomry, see 1 HALSBURY'S LAWS (3rd Edn.) 54–55, and 30 HALSBURY'S LAWS (2nd Edn.) 245–251. For cases see 1 DIGEST 121–126 and 41 DIGEST 268 et seq. For Merchant Shipping Act, 1894, see 23 HALSBURY'S STATUTES (2nd Edn.) 395.

F

Cases referred to:

- (1) *Collins v. Lamport* (1864), 4 De G.J. & Sm. 500; 5 New Rep. 177; 34 L.J.Ch. 196; 11 L.T. 497; 11 Jur.N.S. 1; 13 W.R. 283; 2 Mar. L.C. 153; 46 E.R. 1012, L.C.; 41 Digest 187, 267.
- (2) *Dickinson v. Kitchen* (1858), 8 E. & B. 789; 120 E.R. 293; sub nom. *Kitchen v. Irvine*, 28 L.J.Q.B. 46; 5 Jur.N.S. 118; 41 Digest 190, 295.
- (3) *Law Guarantee and Trust Society v. Russian Bank for Foreign Trade*, [1905] 1 K.B. 815; 74 L.J.K.B. 577; 92 L.T. 435; 21 T.L.R. 383; 10 Asp.M.L.C. 41; 10 Com. Cas. 159, C.A.; 41 Digest 187, 272.
- (4) *The Manor*, [1907] P. 339; 77 L.J.P. 10; 96 L.T. 871; 10 Asp.M.L.C. 446, C.A.; 41 Digest 186, 258.
- (5) *The Helgoland* (1859), Sw. 491; 5 Jur.N.S. 1179; 166 E.R. 1228; 41 Digest 286, 1432.
- (6) *The Gratitude* (1801), 3 Ch. Rob. 240; 165 E.R. 450; 41 Digest 292, 1518.
- (7) *The Royal Arch* (1857), Sw. 269; 30 L.T.O.S. 198; 6 W.R. 191; 166 E.R. 1131; 41 Digest 274, 1230.
- (8) *Droege v. Suart, The Karnak* (1869), L.R. 2 P.C. 505; 6 Moo.P.C.C.N.S. 136; 38 L.J.Adm. 87; 21 L.T. 159; 3 Mar. L.C. 276; 16 E.R. 677, P.C.; 41 Digest 291, 1509.
- (9) *The Hersey* (1837), 3 Hag. Adm. 404; 3 L.T. 825; 166 E.R. 455; affirmed sub nom. *Gore v. Gardiner, The Hersey* (1840), 3 Moo.P.C.C. 79, P.C.; 41 Digest 269, 1145.
- (10) *Australasian Steam Navigation Co. v. Morse* (1872), L.R. 4 P.C. 222; 8 Moo. P.C.C. N.S. 482; 27 L.T. 357; 20 W.R. 728; 1 Asp.M.L.C. 407; 17 E.R. 393, P.C.; 41 Digest 511, 3404.

I

- (11) *Wilkinson v. Wilton, The Bonaparte* (1853), 8 Moo.P.C.C. 459; 14 E.R. 175, P.C.; 41 Digest 279, 1313. **A**
- (12) *The Alexander* (1812), 1 Dods. 278; 165 E.R. 1310; 41 Digest 271, 1174.
- (13) *The Duke of Bedford* (1829), 2 Hag. Adm. 294; 166 E.R. 251; 41 Digest 286, 1418.
- (14) *Smith v. Bank of New South Wales, The Staffordshire* (1872), L.R. 4 P.C. 194; 8 Moo.P.C.C.N.S. 443; 41 L.J.Adm. 49; 27 L.T. 46; 20 W.R. 557; 1 Asp.M.L.C. 365, P.C.; 41 Digest 290, 1506. **B**
- (15) *The Ripon City*, [1898] P. 78; 67 L.J.P. 30; 78 L.T. 296; 46 W.R. 586; 14 T.L.R. 219; 8 Asp.M.L.C. 391; 41 Digest 187, 274.

Actions upon bottomry bonds.

In the first of these actions which were tried together, the plaintiff, William Alexander Grant, claimed the sum of £1,000 upon a bottomry bond, dated Nov. 4, 1924, and made at Balboa, Panama, by the master of the yacht *St. George*. In the second action the plaintiff, Major Archibald John Angus Douglas, claimed the sum of £2,000 upon a similar bond. By a mortgage dated Mar. 31, 1924, the *St. George* was mortgaged to Ernest Harry Gates to secure the sum of £25,000 advanced by him. The owners of the *St. George*, Research Expeditions, Ltd., did not appear, but the executors of Mr. Gates intervened and contested the validity of the bonds. **C**

Balloch for the plaintiffs in both actions.

Langton, K.C., and *J. B. Aspinall*, for the intervener, referred to *Collins v. Lamport* (1), *Kitchin v. Irvine* (2), *Law Guarantee and Trust Society v. Russian Bank for Foreign Trade* (3), and *The Manor* (4); ABBOTT ON MERCHANT SHIPPING (14th Edn.) at p. 202; *The Helgoland* (5). **D**

Cur. adv. vult.

July 27. **LORD MERRIVALE, P.**, read the following judgment.—These are actions brought by the respective plaintiffs to establish the validity of a bottomry bond for £2,000 in favour of the plaintiff Douglas, and a later bond for £1,000 in favour of the plaintiff Grant made by the master of the yacht *St. George* in the port of Balboa in the Republic of Panama on Nov. 14, 1924, by way of security, as is alleged by the plaintiffs, for moneys lent by them respectively upon terms of bottomry in order to enable the *St. George* to proceed from Balboa to Tahiti in course of a voyage from London by way of Panama to various points in the Pacific. The defendants, the owners of the *St. George*, do not contest the plaintiffs' claim. They have, in the circumstances of the case, no interest in the litigation. Both claims are contested by an intervener, the legal personal representative of Ernest Everard Gates, now deceased. Mr. Gates was mortgagee of the *St. George* for an amount which is, no doubt, largely in excess of the realised value of the vessel. She has been sold under order of the court and has produced £6,600. The alleged loans of the plaintiffs are not admitted; the necessity of borrowing is denied. The bonds are impugned also on the ground that no notice of the several transactions was given by the lenders or the master of the *St. George* to the owners of the vessel. The mortgagee, it is further contended, was the owner, and it is said that he had no notice and that no bottomry bond which impaired his security could be given without his authority. For want of such authority the bonds are said to be invalid. **E**

The litigation arises out of an ocean adventure uncommon in its character, mode of prosecution, and incidents. When these are known, it seems not to be out of keeping with other singularities of the enterprise that at a critical stage in the undertaking resort was had for its further prosecution to a mode of raising money out of common use at the present day and unfamiliar in current practice—borrowing on bottomry of the ship. There was formed in London in 1923 "to promote scientific research by expeditions to various parts of the world," the "Scientific Expeditionary Research Association." The association registered a private joint **F**

- A stock company with a capital of £3,000 for the purchase and fitting out of a ship for its expeditionary cruises. This ship was the *St. George*, a three-masted schooner with auxiliary engines. The first expeditionary cruise was planned for September, 1923. The itinerary from and to London included Teneriffe, the West Indies, Panama, Galapagos, Pitcairn, the Cook Islands, Tahiti, and the Marquesas, with a return voyage by Panama and the Azores—20,860 nautical miles and 304 days, of which 162 days were designed to be spent at sea and 136 on shore. For equipment expenses subscriptions from scientists and loans on security were obtained. Toward the necessary costs of the expedition passage money at the rate of £700 each was received from passengers. The number was not to exceed thirty; and, in fact, did not exceed six or seven. A contemplated further source of income of the company incidental to the cruise in question was the sale of cinema and publication rights, and among the staff of the expedition were various persons who were employed with a view to this possible means of profit. The passengers contract note described the passage money as a contribution to the expenses of the expedition, and provided that "no action for damages shall lie against the owners by reason of cancellation or alienation of the proposed cruise." It said further: "It is understood that repayment of deposit [i.e., 50 per cent. of the passage money] will be made in full if the expedition fails to proceed on the voyage."

- The objects of the company as stated in its memorandum of association included, besides the formation, management and control of expeditions to any part of the world for the purpose of scientific research, various commercial purposes including the business of shipowners, the carriage of passengers, acquisition and sale of concessions or licences, photography, cinematography, and taxidermy, and a multitude of other occupations capable of producing profit and loss. The purchase of the *St. George* and setting out of the expedition cost, it is said, from £30,000 to £35,000. Part of the outlay was advanced by a London bank on a guarantee. Mr. Gates, in whose right the intervener is acting, became guarantor, first of £20,000, and then of a further £5,000, and to secure his liability to the bank he took from the company the mortgage of the *St. George* which is relied upon in the intervener's pleadings. He received, also, the agreement under which the company was bound, whether he should or should not become liable under the guarantee, to account to him for a percentage of any profits derived by the company from the sale of cinematographic plans, photographs or exhibitions.

- The *St. George* set out upon her cruise in April, 1924, with supplies and funds which provided for her transit to Balboa. She arrived there in June, 1924. Three directors of the company were on board, one of them being the plaintiff, Douglas, who had also been registered under the Merchant Shipping Acts as managing owner of the ship. Her commander was an officer of naval experience, Captain David Blair. At Balboa the ship's available resources speedily became exhausted. The company's directors in London had been negotiating for further funds; they were in fact using all possible exertions in this behalf at all material times, before and until some months after the making of the bonds in question. As they informed their colleagues on the *St. George*, they had high expectations of success in this regard, but they wholly failed to secure funds. This failure led to applications locally at Balboa to various persons and ultimately to the several loans by the plaintiffs in respect of which, as is claimed, they took bottomry bonds. At the hearing of the cause every stage of the enterprise came under close examination on the various questions of necessity which arise in the case, with the result of making it clear beyond all reasonable doubt that it was only by means of moneys furnished by the plaintiffs to meet the extreme urgent difficulties of the company that the company's officers were enabled to proceed with the *St. George's* cruise in the Pacific.

The material facts as to the advances by the plaintiff can be concisely stated. At all times from June to November the company had the *St. George* ready for departure to the Pacific as soon as they could raise the requisite funds. By

arrangement between the directors in London and those on board short cruises from Balboa were planned and carried out—to Gorgona, Corba, Galapagos, and again to Gorgona. The first expedition to Gorgona exhausted all the company's available resources. The directors on board and the master borrowed from the plaintiff Grant £200 to enable them to arrange the trip to Corba. Mr. Grant lent the money on the credit of the company's undertaking, without any knowledge of bottomry or any mention of security. In September the second Gorgona cruise was planned. No funds were available for it or for any of the current expenses of the ship and her crew. On condition that the company would carry out the expedition to the Pacific Mr. Grant provided towards the ship's necessities for this voyage £250, which sum was duly expended upon provisions, coal, canal dues, seamen's advances and other necessary outlay of the vessel. The advance on August 22 was described by cable from the ship to the Board in London as "for present needs." The September advance was obtained by the master, at the Board's instance, and reported by him as being made "on the understanding we should continue to Tahiti." When the *St. George* returned from her second Gorgona expedition, at the end of October, 1924, the Board in London instructed the master to obtain £3,000 on bottomry bond, and stated to the master that this had been "advised by Siggs." As to this instruction and alleged advice more must be said later. Until at any rate late in September, 1924, the subject of bottomry was unknown to both the plaintiffs. Cable messages from the Board in London in October and November, 1924, led to the obtaining of information by the plaintiffs with regard to bottomry and prepared the way for an arrangement which was entered into about Nov. 5, 1924, whereby Mr. Douglas agreed to advance £2,000 on bottomry and Mr. Grant a further £550 to enable the *St. George* to proceed to Tahiti. In response to continued urgent representations by the Board in London of the desperate financial plight of the company and its inability to provide for overdue premiums upon the insurances of the vessel and allotments payable to dependants of the crew, Mr. Douglas also arranged an advance to the company in London by his bankers of a further £1,000, which the directors applied to the amount of £700 for these pressing needs. With the balance they met various small current expenses. The advance of £1,000 at Balboa agreed for by Mr. Douglas in November, 1924, was put to the ship's credit at Balboa on November 10. He made the advance on the promise that it should be secured by bottomry. Mr. Grant's loans in November were put to the ship's credit in Balboa—£500 on November 5, £50 on November 13. The respective bonds were executed by the master on November 14. Mr. Douglas's advance of £1,000 to the company in London became effective on November 12. The inclusion in the security of his two advances of £1,000 each was made in accordance with an arrangement he made with the master of the *St. George*. Mr. Grant lent the £500 which he provided on November 5 and the £50 which he provided on November 13 after a statement had been made to him that if he made them he would be given a bottomry bond for £1,000 to cover the sum total of his loans at Balboa. The sums of £1,000 and £550 which were paid into the bank at Balboa by Mr. Douglas and Mr. Grant in November, 1924, were disbursed by the master. Cash payments were made for provisioning and coaling the ship, advances to the men, canal dues, and daily outgoings; £113 5s. 2d. was appropriated to discharge an advance the master had made shortly before out of his own moneys to provide coals. The balance was left in the bank at Balboa, and appears to have been applied to complete the payment of the expenses incurred in order to enable the *St. George* to quit Balboa and proceed to Tahiti.

Before examining the various objections which are made to these bonds it will be useful to state shortly my understanding of the law which governs the case. The root of the matter seems to be that the power to effect bottomry arises when there is necessity, and not otherwise. LORD STOWELL cites and adopts in his judgment in *The Gratitude* (6) (3 C. Rob. at p. 266) a passage in which Bynkershoek sums up the principle of ancient maritime usage whereby a ship's master on his

A voyage had been from remote times empowered to deal with emergencies by hypothecating the ship "magistro peregre agenti permissum est navem ex causa necessitas obligare." Speaking in a time when necessity at sea arose in modes which are not common under the changed conditions of to-day, LORD STOWELL also said this (*ibid.*, at p. 288):

B "The law of necessity is not likely to be furnished with precise rules. Necessity creates the law; it supersedes rules; and whatever is reasonable and just in such cases is likewise legal."

The subject under consideration there was the extent to which the power to bottomry a ship's cargo is dependent upon previous communication of this need to the owners. Necessity in two particulars must be proved by a lender who claims upon bottomry. The first essential is to show the ship's need for the expenditure in order to complete the voyage from the foreign port; *The Royal Arch* (7) (18 Swa. at pp. 277, 278), *The Karnak* (8) (L.R. 2 P.C. at p. 512). The next to show that this necessity could only be met by hypothecating the ship: see also *The Hersey* (9) (3 Hag. Adm. at p. 408), ABBOTT ON SHIPPING (14th Edn.) p. 202.

D To whatever extent the validity of a bottomry bond depends upon notice of the intended transactions to be given to a person whose rights it will postpone or impair the condition which requires such notice seems to me to spring from the general principle that the power to effect bottomry depends upon necessity. As to owners it was said in *Australasian Steam Navigation Co. v. Morse* (10) that

"where there is a reasonable expectation that effective communication can be made the master must endeavour to obtain the owners' instructions."

E As to owners of cargo the judgment in *The Bonaparte* (11) laid down the rule that before making bottomry of cargo the master should satisfy the owners.

"It was his duty to communicate with the owners or at least to attempt to do so. The existence of this obligation had not always been recognised. When difficulties of communication and other causes of sudden and urgent necessity at sea led to insistence on the 'high and privileged nature' "

F (*The Alexander* (12)) of bottomry transactions, notice to mortgagees as a condition of bottomry of the ship appears not to have been invariably treated as essential. Text-writers have cited DR. LUSHINGTON's observation in *The Helgoland* (5) (Swa. at pp. 498, 499), that a lender on bottomry is under no obligation to communicate with the mortgagee of the ship, without due regard to the fact that the mortgage there under consideration was granted subsequently to the bottomry bond. In various reported cases, however, loans on bottomry have taken precedence of moneys due on previous mortgages; *The Duke of Bedford* (13); in *Smith v. Bank of New South Wales*, *The Staffordshire* (14), the subject of notice to mortgagees is discussed, and notice is not treated as immaterial, but the absence of notice in the circumstances of the case was held to be immaterial by reason of the fact that

H there was really no opportunity. Having regard to the principle which seems to me to underlie the authorities, I have considered that I ought to examine this case upon the footing that, as is said with regard to this matter by the learned editors of ABBOTT ON SHIPPING (3rd Edn.), p. 156:

I "If a lender should happen to know that the mortgagees are more interested than anybody else in getting the ship home, he will do well to see that they have notice of the necessity for hypothecation if communication is practicable."

"What is necessary" and "what is reasonable and just" were, as I have before mentioned, conditions of validity of bottomry bonds which LORD STOWELL laid down in *The Gratitude* (6).

In the light of the authorities there was, in my opinion, necessity at Balboa that those in charge of the *St. George* should raise money there if the ship was to continue her voyage. It was said at the hearing that the undertaking of the

company in this cruise was not of a commercial nature. I have indicated particulars in which it has that character. The documents show that the company had money-making aims in respect of possible sales and exhibitions of pictures and films, and carriage of passengers at substantial rates of charge. It is not clear either that, if this cruise had been abandoned at Balboa, the passengers would have had no claim to repayment of passage money. Further, the ship lay in a foreign port subject, as I suppose, to arrest and sale for all kinds of liabilities which were daily accumulating. There was necessity to take her on or bring her home. There was necessity at Balboa also, if money was to be obtained, to obtain it by hypothecating the ship, i.e., by bottomry. Every contemporary opinion of informed persons capable of advising seems to have been to that effect. The mortgagee's solicitors were of that mind; indeed the suggestion of recourse to bottomry appears to have originated with them.

In the case of the plaintiff, Douglas, objections were made that he could not lend on bottomry of the *St. George* because he was a director of the company and "managing owner." As director he was the owners' agent; his statutory position as managing owner did not in any sense vest the ship in him in point of property either at law or in equity. When it was said long since that an agent's advances on bottomry will be very carefully scrutinised, the reference was, I think, to a ship's agent, one of whose functions was to grant or obtain credit for the ship. I see no ground on which it can be said that Major Douglas was disabled from making such advances. I must hold him to have been in the circumstances a capable lender on bottomry of the ship.

The questions with which I have dealt arise upon the supposition that the case is one in which bottomry was possible. It was contended, however, on the intervenor's behalf, that any bottomry of the *St. George* was impossible because of the existence of the mortgage. This proposition depends upon the construction of the terms of s. 34 of the Merchant Shipping Act, 1894, which reproduces s. 70 of the Merchant Shipping Act, 1854. The section is in these words:

"Except so far as may be necessary for making a mortgage on the ship or share available as a security for the mortgage debt the mortgagee shall not by reason of the mortgage be deemed the owner of the ship or share, nor shall the mortgagor be deemed to cease to be the owner thereof."

The exception in the statute was said to exclude from the powers of a mortgagor in possession any dealing which makes the ship unavailable for the mortgagee's security. The argument was based upon cases like *Collins v. Lamport* (1), *Law Guarantee and Trust Society v. Russian Bank for Foreign Trade* (3), and *The Manor* (4), where the courts were invited to, and sometimes did, interfere, at the instance of mortgagees of ships, to protect mortgage securities which were imperilled by dealings of mortgagors in possession. More particularly, the argument depended upon a passage in the judgment of LORD WESTBURY, L.C., in *Collins v. Lamport* (1):

"As long . . . as the dealings of the mortgagor with the ship are consistent with the sufficiency of the mortgagee's security, so long as their dealings do not materially prejudice or detract from, or impair the sufficiency of the security of the vessel as conferred in the mortgage, so long is the Parliamentary authority given to the mortgagor to act in all respects as owner of the vessel."

These words were insisted upon in their tenor and implications as though they constituted an enactment of the legislature—which, of course, they do not. The judgment in *Collins v. Lamport* (1) does not, and so far as I know there is no judgment which does, determine that a mortgaged ship cannot be bottomried, or that consent of the mortgagee is a prerequisite of such a hypothecation. Generally the cases appear to me to proceed upon the hypothesis that, but for the intervention of the court, acts of the mortgagor might be effective in prejudice of the rights of the mortgagee. FLETCHER MOULTON, L.J., in his judgment in *The Manor* (4), says this:

- A** "It may well be that to allow a ship to become subject to a maritime lien may not be an infringement of the rights of the mortgagee even though that maritime lien ranks above claims under the mortgage."

By what means precisely, and at what point, the powers of a mortgagor in possession are intended to be confined or curtailed by the words of a statute I need not here attempt to determine. It appears to me incredible that the legislature, either in **B** 1854 or in 1894, intended by the words relied on for the interveners, to extinguish the powers of a ship's master to bottomry a distressed ship in case of need, or to subject a damaged ship to a possessory lien in order that she might be repaired. The language used is not apt for the purpose if it was meant to deprive masters of ships of powers which they notoriously had. Acts in the exercise of those powers seem to me not to be dealings by the mortgagor. Nor is it obvious that **C** they impair, or are calculated to impair, the security of the mortgagee. They are, perhaps, rather calculated to preserve it. In the well-known judgment of GORELL BARNES, J., in *The Ripon City* (15), a passage is found which militates against the argument of the intervener on this subject. The learned judge enumerates the classes of claims which give maritime liens—"bottomry, salvage, wages"—and others—and discusses, with s. 34 of the Act of 1894 before him, the grounds on which such claims take precedence of the rights of mortgagees, stating as the cause of such precedence that:

"The vessel is permitted by a party interested in her to be in another's possession, and employed so as to become subject to maritime liens."

- E** On the construction of the section, and in my view of the law applicable to the case it is impossible I should give effect to the contention of the intervener under the Merchant Shipping Act, 1894, s. 34.

An alternative proposition, which was glanced at in course of the argument upon s. 34, was that the court on examination of the particular transaction—as for example this—might hold it to be avoided by the statute as being, in fact, a dealing of the kind defined by the section. The relevant issue of fact was not **F** specifically formulated in this case, and upon the materials before me, I am by no means convinced that the resort of the master of the *St. George* to bottomry at Balboa was a dealing which made the ship unavailable for the mortgagee's security. All the proprietary interests concerned were being prejudiced by the situation from which the *St. George* was removed.

- G** [On the question whether the moneys lent were lent for and applied to the necessities of the *St. George* for the continuance of her voyage. His Lordship referred to the facts and said that £761 was the full amount in which the vessel could be deemed to stand charged by bottomry in favour of the plaintiff, Douglas, and that the bond of the plaintiff Grant ought to be held a valid security for advances of £550.]

- H** Solicitors: *Croft & Russell; Crawley, Arnold & Co.; Savory, Pryor & Blagden,* for *Wade, Tetley & Co., Bradford.*

[Reported by GEOFFREY HUTCHINSON, ESQ., Barrister-at-Law.]

BANK OF N. T. BUTTERFIELD & SON LTD. *v* GOLINSKY

[PRIVY COUNCIL (Viscount Haldane, Lord Atkinson and Lord Darling), June 4, 7, 1926]

[Reported [1926] A.C. 733; 95 L.J.P.C. 162; 135 L.T. 584]

Company—Lien on shares—Equitable charge over shares created by debtor shareholder—Equitable title of assignee.

Where there has been a transfer in equity, even although there has been no registration of the legal title, an equitable title can only be defeated by the setting up of a legal estate without notice.

Where, therefore, the holder of shares in a bank assigned his interest in the shares to the respondent as security for moneys advanced to him by the respondent, the respondent was not registered as a shareholder of the bank, and the bank later obtained judgment against the original holder of the shares and seized them under a writ of *fi. fa.*,

Held: the respondent had a good equitable title to the shares which could not be defeated by anything done until he was restricted in it by notice of somebody else's title subsequently obtained.

Notes. As to a company's lien on its shares, see 6 HALSBURY'S LAWS (3rd Edn.) 231, 232; and as to equitable assignments generally, see *ibid.*, vol. 4, p. 492 et seq. For cases see 8 DIGEST (Repl.) 573 et seq., and 9 DIGEST (Repl.) 353 et seq.

Case referred to:

(1) *Bradford Banking Co., Ltd. v. Briggs, Son & Co., Ltd.* (1886), 12 App. Cas. 29; 56 L.J.Ch. 364; 56 L.T. 62; 35 W.R. 521; 3 T.L.R. 170, H.L.; 9 Digest (Repl.) 355, 2277.

Appeal *ex parte* from a judgment of the Supreme Court of Bermuda in an interpleader action. The facts are fully set out in their Lordships' judgment.

Clayton, K.C., and *W. M. Hunt* for the appellant (the bank).

The respondent did not appear.

June 7. **VISCOUNT HALDANE.**—This is an appeal from a judgment of the Supreme Court of Bermuda. There were two fully paid shares in the appellant bank, which shares had been seized under a writ of execution, and they were claimed by the respondent, Golinsky, and by one Foote, and also by the bank, so far as its lien for alleged indebtedness was concerned. A summons was taken out under which an order was made that the title to the shares should be determined by the court, the respondent to be the plaintiff as regards his claim and the appellant bank and Foote the defendants. The purpose of the summons was to decide, in the circumstances to be referred to, which of these three parties had the better title to the shares. The decision of the court below has been that the respondent, Golinsky, has the better title.

Golinsky's title arose in this way. He was an equitable assignee from one Moniz, assignee of a security for £350 and interest, and what he claimed was that his title to the £350 and interest came first. The assignment was made on Nov. 28, 1924, from Moniz to himself. It was not registered in the appellant bank register, but it was a good assignment in equity. Later on there were judgments against Moniz and there were various proceedings, not material to discuss, and, finally, on May 29, 1925, the appellant bank obtained judgment in an action against Moniz for a sum of over £1,000 and a writ of *fi. fa.* was issued against his chattels. Under that writ the Provost Marshal-General of the court seized the two shares which are the subject of these proceedings. There is no evidence at all to show whether, at the time of the assignment of Nov. 28, 1924, Moniz, the holder of the two shares, was indebted to the appellant bank, and, therefore, their Lordships have to take it that they are dealing with this case on the footing that the title set up by the bank is a title based upon their rights under their statute and byelaws

A in respect of liabilities that have subsequently emerged. Turning to these, they are said to show that, at any rate subsequently to the assignment to the respondent, the bank became creditors of Moniz and recovered judgment, and have a lien or right to payment out of the two shares, which is paramount to anybody else's title. The respondent, Golinsky, has not been registered, and his title is not one of which they are bound to take notice further than this, that a court of enquiry B would enforce it as amounting to a good right to a transfer if the equity existed in Golinsky.

Turning now in the first place to the statute of the bank (Bermuda 1904, No. 11), under which the bank was incorporated, the relevant section is s. 22, which provides that in the event of a seizure of the shares of the shareholder under an execution the shares and all dividends due on them are only to be available for C so much as remains

"beyond the amount of the then existing liabilities of the bank, direct and collateral, whether payable at the time of such notice or at any future time."

That is a kind of provision which was not unfamiliar in the old classes of banks, but it is sufficient to say that we have nothing to do with it here, because there D is no evidence of any liability of the bank which could be available to bind the shares. Turning to the byelaws the only two of importance are first, 44, which says:

"The directors may decline to register any transfer of a share made by a shareholder who is indebted to the bank."

No question arises as to that. Then byelaw 57 says:

E "The directors may deduct from the dividends payable to any shareholder all sums of money due by him to the bank on account of calls or otherwise."

There is no question of deduction from dividends here; therefore that article does not apply.

Their Lordships are, therefore, thrown back upon the general law, and the general law is that where there has been a transfer in equity, even although there has been F no registration of the legal title, then, as shown, for example, in the judgment of the House of Lords in *Bradford Banking Co., Ltd. v. Briggs, Son & Co., Ltd.* (1), the equitable assignee is entitled to say: I have got an equitable property which you cannot cut down by making any advance to or purchase from my assignor. I am, in equity, the person entitled, and unless you can set up a legal estate against me without notice, you cannot defeat that equitable title. On that principle the G learned judges in the court below came to the conclusion that Golinsky, the respondent, had got a good equitable title to these shares which could not be defeated by anything done until he was restricted in it by notice of somebody else's title subsequently obtained. After he had notice it would not have been open to him to expand his security or acquire further equitable title in derogation of the title of which he had notice, but until that happened he remained secure in possession of what he had already got. On that principle the learned judges in the court below determined this appeal, and their Lordships think that they so decided H rightly, and they will, therefore, humbly advise His Majesty that this appeal be dismissed.

Appeal dismissed.

Solicitors: *Sewell, Edwards & Nevill.*

I [Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

WEBSTER v. WEBSTER AND WILLIAMSON

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hill, J.), June 14, 21, 1926]

[Reported [1926] P. 198; 98 L.J.P. 97; 135 L.T. 670]

Variation of Settlement—Children—Protection of interests.

Though the tendency of the court may be to take a wide view of its power in varying marriage settlements, the cases show that the interests of the children of the marriage are the most important element for consideration. Where an ante-nuptial settlement provided that the income of the settled property should be settled on the husband for life, and then on the wife for life, and after the death of the survivor in trust for the children of the marriage, and did not provide for the contingency of one of the spouses dying and the survivor marrying again, the court, when varying the settlement after dissolution of the marriage, declined (while doubting whether in any case it had power to do so) to insert in the settlement a provision enabling the husband to appoint substantial portions of the trust funds to a future wife and future children. The husband's interest must be carved out of the first wife's interest and the interests of the children should remain unaltered, and, therefore, the settlement would only be varied by extinguishing the rights, powers, and interest of the wife as if she had died in the husband's lifetime.

Atkins v. Atkins and Urquhart (1), [1913] P. 211, not followed.

Notes. Distinguished: *Scollick v. Scollick*, [1927] All E.R.Rep. 523. Referred to: *Newson v. Newson*, [1934] All E.R.Rep. 523; *Best v. Best*, [1955] 2 All E.R. 839.

As to variation of settlements, see 12 HALSBURY'S LAWS (3rd Edn.) 451 et seq.; and for cases see 27 DIGEST (Repl.) 641 et seq.

Cases referred to:

- (1) *Atkins v. Atkins and Urquhart*, [1913] P. 211; 83 L.J.P. 18; 109 L.T. 640; 27 Digest (Repl.) 642, 6046.
- (2) *Dormer (otherwise Ward) v. Ward*, [1901] P. 20; 69 L.J.P. 144; 83 L.T. 556; 49 W.R. 149; 17 T.L.R. 12, C.A.; 27 Digest (Repl.) 648, 6110.
- (3) *Blood v. Blood*, [1902] P. 190; 71 L.J.P. 97; 86 L.T. 641; 50 W.R. 547; 18 T.L.R. 588; 46 Sol. Jo. 499, C.A.; 27 Digest (Repl.) 649, 6111.
- (4) *Whitton v. Whitton*, [1901] P. 348; 71 L.J.P. 10; 85 L.T. 646; 27 Digest (Repl.) 643, 6063.
- (5) *Hodgson Roberts v. Hodgson Roberts and Whitaker*, [1906] P. 142; 75 L.J.P. 48; 94 L.T. 621; 22 T.L.R. 395; 27 Digest (Repl.) 652, 6138.
- (6) *Sykes v. Sykes and Smith* (1870), L.R. 2 P. & D. 163; 39 L.J.P. & M. 52; 23 L.T. 239; 18 W.R. 984; 27 Digest (Repl.) 657, 6192.
- (7) *Crisp v. Crisp* (1872), L.R. 2 P. & D. 426; 42 L.J.P. & M. 13; 27 L.T. 428; 21 W.R. 79; 27 Digest (Repl.) 643, 6061.
- (8) *Forsyth v. Forsyth*, [1891] P. 363; 61 L.J.P. 13; 65 L.T. 556; 27 Digest (Repl.) 643, 6062.
- (9) *Hartopp v. Hartopp and Akhurst*, [1899] P. 65; 68 L.J.P. 33; 80 L.T. 297; 15 T.L.R. 168; 27 Digest (Repl.) 651, 6134.
- (10) *Maudslay v. Maudslay* (1877), 2 P.D. 256; 47 L.J.P. 26; 38 L.T. 323; 27 Digest (Repl.) 655, 6173.

Motion to vary a registrar's report on a petition for variation of an ante-nuptial settlement.

The husband and wife were married on Aug. 2, 1917, they and trustees having executed an ante-nuptial settlement on Aug. 1, 1917. There were two children of the marriage, who at the date of the petition for variation were aged seven and three respectively. On June 22, 1925, the husband obtained a decree nisi, and, on Jan. 11, 1926, a decree absolute, dissolving the marriage. On Feb. 8, 1926, he

A filed his petition for variation of the ante-nuptial settlement. The property settled consisted of one equal third part of trust moneys, stocks, and funds described in an earlier indenture of settlement made by the husband's parents, and was subject to the trusts of that settlement. The property was settled, as to the income thereof, on the husband for life and then on the wife for life, and, after the death of the survivor, in trust for all or such one or more exclusively of the others or other of the children or remoter issue of the then intended marriage between the husband and wife, with such trusts for advancement, &c., as the husband and wife jointly, or the survivor, should appoint, and in default, for all or any of such children, &c., under certain specified conditions. The wife brought nothing into the settlement. In his petition the husband prayed that the settlement might be varied by extinguishing all the rights, powers and interests of the wife as if she were dead and had died in the lifetime of the husband; by substituting for the words "said intended marriage," wherever the same occurred, the words "said intended marriage or any subsequent marriage of the husband"; and by inserting in the settlement a power for the husband, on any future marriage, to settle a life or any less interest in three-fourths of the trust fund upon any future wife. The registrar, in his report, submitted that the settlement should only be varied by extinguishing the rights, powers and interest of the wife as if she were dead and had died in the husband's lifetime. The husband now moved the court to vary the registrar's report (a) by inserting a power in the settlement for the husband on any future marriage to settle a life or any less interest in three-fourths of the trust funds upon any future wife, and (b) by inserting a power for the husband to appoint in favour of an only child of any such future marriage a portion of the trust funds not exceeding one third, or, if more than one child, not exceeding in the aggregate one moiety of the trust funds in favour of such children.

W. O. Willis, K.C. (Acton-Pile with him), for the husband, referred to Dormer v. Ward (2), Blood v. Blood (3), Whitton v. Whitton (4), Hodgson Roberts v. Hodgson Roberts and Whitaker (5), Atkins v. Atkins and Urquhart (1).

A. de W. Mulligan, for the children, also referred to Sykes v. Sykes and Smith (6), Crisp v. Crisp (7), Forsyth v. Forsyth (8), Hartopp v. Hartopp and Akhurst (9), Maudslay v. Maudslay (10).

Victor Russell for the wife.

Cur. adv. vult.

G June 21. **HILL, J.**—The settlement which the court is asked to vary is one which gives a life interest to the husband, then a life interest to the wife, and then creates a trust for the children of the marriage, with power of appointment among them, but not otherwise. It does not provide for the contingency of one of the spouses dying and the survivor marrying again. The wife submits that the settlement be varied only by extinguishing her rights as if she were dead. The husband asks that the variation should go beyond that and provide for something not contemplated by the settlement, viz., a possible future marriage of the husband. He H wants a limited power of appointment in favour of a future wife and children of a future marriage.

I It was contended for the children that the court (i) has no power to do it, and (ii) if power exists, ought not to do it. No case has been found in which such a variation of settlement was ordered, except *Atkins v. Atkins and Urquhart* (1), where there was no argument as to the power of the court and none of the cases was cited. Counsel for the children supported the proposed variation. I cannot regard such a decision as a binding authority. In my opinion, it is contrary to the general sense of the cases in which the question of variation has been argued and made the subject of considered judgments. I think that during the last thirty or forty years the judges have been inclined to take a wider view of the power of variation than that taken by LORD PENZANCE and SIR R. PHILLIMORE, but throughout the decisions the interests of the children of the marriage are regarded as the most important element for consideration. In *Forsyth v. Forsyth* (8) SIR F. JEUNE

put it as high as that the court has no power to deprive infant children of any interest which they may have under the settlement. It follows, therefore, that the husband's interest must be carved, so to speak, out of the wife's interest, that no interest of his shall survive the wife's interest, and that the interest of the children shall remain the same as it was before.

In *Whitton v. Whitton* (4) there was in the settlement a power to appoint to a second spouse, and so in *Hodgson Roberts v. Hodgson Roberts and Whitaker* (5). In these cases SIR F. JEUNE and SIR GORELL BARNES respectively allowed a variation treating the acceleration of the children's interest as a quid pro quo for permitting the innocent spouse to exercise a power of appointment on a second marriage. What was done was merely to give the innocent spouse an acceleration of the power of appointment on a second marriage which he had under the settlement: see also *Hartopp v. Hartopp and Akhurst* (9). But, in the present case, if the wife had died, the husband would have had no power of appointment in favour of a second wife or children by her. The court is not asked merely to treat the wife as if dead and to accelerate a power which the husband would have in that event. It is asked to create a new power which is not contemplated by the settlement. I do not think the court ought to do that. I am inclined to say that the court has no power to do it, but I do not want in any way to limit the generality of the words used by SIR GORELL BARNES (in *Blood v. Blood* (3)) when he pointed out the importance of the court maintaining the fullest power to vary settlements. If the court has power to do it, I do not think the court ought to do it, and, therefore, I must confirm the report of the learned registrar.

Solicitors: *Webster & Webster; Withers, Benson & Co.*

[Reported by HERBERT ROLFE, Esq., Barrister-at-Law.]

THOMAS v. TODD

[KING'S BENCH DIVISION (Wright, J.), April 21, 22, 30, 1926]

[Reported [1926] 2 K.B. 511; 95 L.J.K.B. 808; 135 L.T. 377;
42 T.L.R. 494]

Company—Winding-up—Receiver under debenture—Liability—Contract entered into after beginning of subsequent winding-up.

The plaintiff, a musician, entered into an agreement with a company for the engagement of himself and his band. While his engagement was still running, the company got into financial difficulties, and the defendant was appointed its receiver and manager by a debenture holder under the terms of his debenture deed, which provided that the receiver was to be deemed the agent of the company. The company later went into voluntary liquidation, and after the commencement of the liquidation the receiver agreed to engage the plaintiff and his band on a week-to-week engagement.

Held: the right of the receiver to bind the company terminated on the commencement of the voluntary liquidation, and, therefore, the receiver was personally liable on the contract of engagement entered into after the commencement of the liquidation.

Notes. As to the liability of a receiver, see 6 HALSBURY'S LAWS (3rd Edn.) 503, 504; and for cases see 10 DIGEST (Repl.) 817 et seq. For Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

A Cases referred to:

- (1) *Gaskell v. Gosling*, [1896] 1 Q.B. 669; 65 L.J.Q.B. 435; 74 L.T. 674; 44 W.R.Dig. 132; 12 T.L.R. 335, C.A.; reversed sub nom. *Gosling v. Gaskell*, [1897] A.C. 575; 66 L.J.Q.B. 848; 77 L.T. 314; 46 W.R. 208; 13 T.L.R. 544, H.L.; 10 Digest (Repl.) 822, 5367.
- (2) *Midland Counties District Bank, Ltd. v. Attwood*, [1905] 1 Ch. 357; 74 L.J.Ch. 286; 92 L.T. 360; 21 T.L.R. 175; 12 Mans. 20; 9 Digest (Repl.) 566, 3734.
- (3) *Reigate v. Union Manufacturing Co. (Ramsbottom)*, [1918] 1 K.B. 592; 87 L.J.K.B. 724; 118 L.T. 479, C.A.; 9 Digest (Repl.) 566, 3735.
- (4) *Burt, Boulton and Hayward v. Bull*, [1895] 1 Q.B. 276; 64 L.J.Q.B. 232; 71 L.T. 810; 43 W.R. 180; 11 T.L.R. 90; 39 Sol. Jo. 95; 2 Mans. 94; 14 R. 65, C.A.; 10 Digest (Repl.) 834, 5463.

C

Action tried by WRIGHT, J., without a jury.

The plaintiff, who was the proprietor and conductor of a band of musicians known as the "London Band," entered into an agreement on Aug. 15, 1924, with the Grafton Galleries Club, Ltd. (henceforward referred to as "the company").

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Under the terms of that agreement the plaintiff undertook that he and his band would perform daily, including Sundays, at the company's premises between the hours of 8.30 p.m. and 2.30 a.m. The engagement, which was to commence on Sept. 8, was to continue for a period of three months, and the plaintiff was to receive, on every Saturday morning, a salary of £180 per week less certain stipulated deductions, the week being regarded as commencing on the Saturday morning and terminating on the following Friday. While this agreement was still running, the company got into financial difficulties. On Oct. 11, 1924, the defendant was appointed receiver and manager of the company by a debenture holder under the terms of his debenture deed which provided that such receiver was to be deemed the agent of the company. The defendant, after his appointment, interviewed the plaintiff and informed him that the original agreement could not continue. On Oct. 15 a new agreement was made, under which the plaintiff

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agreed that he and his band were to be employed henceforward on a week-to-week engagement, commencing on Saturday morning. On Monday, Oct. 27, the company went into voluntary liquidation. The band continued to play. On Saturday, Nov. 1, the plaintiff was paid for the previous week, and on that day he had an interview with the defendant's partner, Mr. Wilcock. There was a considerable conflict of testimony in regard to what took place at that interview, but the judge found as a fact that the defendant requested the plaintiff to continue his services as before, and that the plaintiff agreed. The plaintiff brought this action against the defendant for £180 salary for one week's engagement commencing Nov. 1 and ending Nov. 7, and also for a further £180, as representing salary for one week in lieu of notice, to which the plaintiff claimed to be entitled. The defendant denied that he had agreed to employ the plaintiff for the week in question, and alternatively contended that, if he did so agree, the agreement was made, not by the defendant personally, but as agent of the company.

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Sir Albion Richardson for the plaintiff.
S. L. Porter, K.C., and **E. G. Kimber** for the defendant.

G

WRIGHT, J.—The plaintiff in this case is Emlyn Thomas, who sues as proprietor of what is called the "London Band," a jazz band, which is employed at various clubs and other places of entertainment. The defendant, James Todd, is a member of a firm of accountants, and he is concerned in this matter as the receiver and manager under certain debentures made in favour of certain holders by the Grafton Galleries Club, Ltd., which got into financial difficulties. The debenture deeds are in common form. Under each deed the company, as beneficial owner, charges its undertaking "and all its property present and future including uncalled capital" in favour of the debenture holders in respect of certain advances with interest, and the charge created thereby was to be a first charge on

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all the property charged and a floating security. The other term of the deed to which I desire to refer is cl. 10. Under that clause: A

"The creditor may from time to time or at any time after the security hereby created shall have become enforceable as aforesaid appoint any person or persons to be receiver or receivers of the property hereby charged and may remove any such receiver and a receiver so appointed shall have power firstly to take possession of, collect, and get in the property charged by this debenture; and, secondly, to carry on or concur in carrying on the business of the company. . . . A receiver so appointed shall be deemed to be the agent of the company and the company shall be solely responsible for his acts or defaults and for his remuneration."

The effect of these provisions, which are in common form, is this. The appointment in this case was quite proper because circumstances had arisen in which the power to appoint became operative. The receiver so appointed was a servant of the company. The defendant, Mr. Todd, being appointed in that way, interviewed, among other people, the plaintiff, Mr. Thomas, told him that he was receiver and manager, and proceeded to conduct the affairs of the company. I refer to the defendant throughout, but, as a matter of fact, the business was conducted on his behalf by one of his partners, Mr. Wilcock, and when I refer to the defendant, in each case Mr. Wilcock was the gentleman who actually conducted the transaction. The defendant saw Mr. Thomas on Oct. 15 and said that, in the circumstances, the agreement of Aug. 15, 1924, which was then current, could not continue and that some new arrangement must be made. I find that it was eventually agreed that as and from Oct. 15 the plaintiff was engaged for one week certain and that at the end of any week, that is to say, on any Friday, if nothing more was said, his engagement would automatically cease. On Oct. 27, 1924, the Grafton Galleries Club, Ltd., went into voluntary liquidation after the company had passed an extraordinary resolution in which it was stated that the company was no longer, by reason of its liabilities, able to continue its business, and it was resolved that it should be wound-up and a liquidator appointed. October 27, 1924, was a Monday, and the band was engaged for the week which had commenced the previous Saturday, and it continued to play. On Friday, Oct. 31, the secretary of the club telephoned to the plaintiff, and said something to him on the telephone to the effect that the club was closing down the following day, the Saturday. Nothing was said to the plaintiff, as I find, which would indicate that his services were not further required. I find that the plaintiff, while not entitled to a week's notice, is entitled to the week's salary for the week commencing on Nov. 1 and ending on Nov. 7, 1924. That will be a sum of £180, subject to the abatement provided for in the contract of Aug. 15, 1924. That sum I find on the evidence before me is £39 5s., and the result is that I find, subject to the question of law which arises, that the plaintiff is entitled to the sum of £140 15s.

The question of law is: Is the defendant liable at all in this action? That seems to involve a question on which I have not been referred to any express decision, nor have I been able to find any express decision. The only liquidation with which I am concerned in this action is the voluntary liquidation which I have already referred to as commencing on Oct. 27, 1924. It is true that at a somewhat later date—on Nov. 8, 1924—a petition to wind-up the company was presented, and an order for compulsory winding-up was made on Nov. 25, 1925. That does not concern me, because those dates lie outside the relevant period. I have, therefore, to consider what is the position of the defendant. The agreement which I have found was made between the plaintiff and the defendant on Oct. 15 was made by the defendant as agent for the company, exercising his power under his appointment under the debenture deed. What happened to his position when the company went into voluntary liquidation on Oct. 27? The first question to decide is whether his authority to bind the company came to an end by reason of the voluntary

A liquidation. If the liquidation had been compulsory, it appears to be quite clear that the authority of the receiver and manager to bind the company would have been terminated thereby. That was decided, or at least assumed, by the House of Lords in *Gosling v. Gaskell* (1), which affirmed the dissenting judgment of RIGBY, L.J., in the Court of Appeal. It certainly seems curious, seeing that debentures are constantly in the same form as the debenture in question here, that the point
B now before me has not been decided. I have found a reference to this matter only in *BUCKLEY ON COMPANIES* (9th Edn.) at p. 239, when at footnote (q) it is said that the above decision "does not decide that a voluntary winding-up would necessarily have the same consequences." That language may seem to indicate that the same consequence might and perhaps would follow in the case of a voluntary winding-up. I think the matter must be determined by considering the terms of
C the debenture deed and the nature of a voluntary liquidation. I have come to the conclusion that the right of the receiver to bind the company terminated on the commencement of the voluntary liquidation.

I have referred to cl. 10 (2) of the deed, and I consider the words "to carry on or concur in carrying on the business of the company" there used as having reference to the carrying on of the business as a going concern; and by s. 184 of the Com-
D panies (Consolidation) Act, 1908, it is provided that the company shall, from the commencement of the winding-up, cease to carry on its business except so far as may be required for the beneficial winding-up of the company [see now Companies Act, 1948, s. 281]. I think that the result of the section is to revoke the receiver's authority to bind the company by a contract made to carry on the business because, as I have said, that authority is limited to carrying on the business as a going
E concern. The result, if this view be correct, is identical with what is expressed by RIGBY, L.J., in *Gosling v. Gaskell* (1) as being the ratio decidendi in reference to a compulsory winding-up. His language is:

"The company was incapacitated by the winding-up order from carrying on business, and the receiver could not create debts which would be provable in the liquidation against the unmortgaged assets of the company."
F Section 184 of the Act of 1908 with reference to a voluntary winding-up corresponds with s. 151 (1) (b) of the Act with reference to a winding-up by order of the court [see now s. 245 (1) (b) of the Act of 1948], and I do not think that the necessity under the latter section for the sanction of the court, or committee of inspection, affects the principle which is involved in the matter I am now consider-
G ing. In a voluntary winding-up the liquidator alone can carry on the business of the company, and, therefore, he does not need the sanction of the court to do so (see s. 186 (3) and (4) of the Companies (Consolidation) Act, 1908) [see now s. 303 (1) (b) of Act of 1948]. I may also refer to the language of LORD WATSON in *Gosling v. Gaskell* (1), the case I have already referred to, where he says, in regard to the compulsory winding-up there in question ([1897] A.C. at p. 587):

H "The company, when in liquidation, although by no means defunct, could no longer act by its directors, and appoint or employ agents capable of binding the corporation or its estate, and was represented by the liquidator who could not himself carry on the business without the special leave of the court."

Apart from the words relating to sanction by the court, I think the same sanction would apply to the case of a voluntary liquidation in so far as affects the question
I which I am now considering. I may add that I have looked at *Midland Counties District Bank, Ltd. v. Attwood* (2) and considered that together with the observations made upon it by SCRUTTON, L.J., in *Reigate v. Union Manufacturing Co. (Ramsbottom)* (3), but I do not think it affects the conclusion at which I have arrived.

I hold, therefore, that the authority of the defendant to bind the company ceased on the commencement of the voluntary liquidation, that is to say, on Oct. 27, 1924. I further think that in these circumstances the contract which the defendant made with the plaintiff binds him personally. I think the position is that a contract was

made by the defendant at a time when he had no principal in fact—when he did not purport to be acting for any principal and when he was not thought by the plaintiff to be acting for any principal. Indeed, so far as the plaintiff was concerned, I am satisfied that he never thought of this question at all. He simply dealt with the defendant as the defendant, and, on the defendant's representation that he was receiver and manager, without considering any further aspect of the matter. It follows, I think, that the defendant, and the defendant alone, is personally liable. *B*
Gosling v. Gaskell (1), to which I have already referred, throws no light on this point, because in that case the receiver purported in express terms to act for the company when he had no authority to do so, and hence there was no contract at all, and the only possible liability would be that of the receiver for damages for breach of warranty of authority. That, however, is not the case here. The principle applicable to the present case is, I think, expressed in language which I may adopt with a slight variation, both in regard to application and in regard to terminology, used by RIGBY, L.J., in *Burt, Boulton and Hayward v. Bull* (4). What the learned lord justice said was ([1895] 1 Q.B. at p. 284):

“As soon as it appears that he has no principal, and is a receiver appointed by the court, it is implied, I think, when he enters into a contract, that it is a real contract, by which he binds himself personally.” *D*

That is an application of the general maxim of *ut res magis valeat*. The defendant, in my judgment, did make the contract. There was no one whom he was authorised to contract for—for whom he purported to contract—other than himself, and I see no reason why any other result should follow than that he should be bound by the contract he made. I, therefore, give judgment for the plaintiff for the sum of £140 13s. with costs. *E*

Judgment for plaintiff.

Solicitors: *Thorp, Saunders & Thorp; Wright & Webb.*

[Reported by T. R. FITZWALTER BUTLER, ESQ., Barrister-at-Law.] *F*

TOLLEMACHE v. INLAND REVENUE COMMISSIONERS *G*

[KING'S BENCH DIVISION (Rowlatt, J.), November 16, 17, 1926]

[Reported 96 L.J.K.B. 766; 136 L.T. 444; 43 T.L.R. 58;
11 Tax Cas. 277]

Surtax—Income for purposes of surtax—Taxpayer permitted to occupy land under discretionary power in will—Payment by trustees of rates and taxes—Payment by trustees (under discretionary power) of taxpayer's supertax—Total income of taxpayer. *H*

Lands were devised to trustees, who were directed to manage the estates and out of the income to pay all expenses and outgoings. The trustees were given a discretionary power to permit the appellant to occupy the lands during his life. The trustees allowed the appellant to occupy the lands, and they paid the rates and taxes. They also, under a power to apply income in their discretion for the benefit of the appellant, paid the appellants' supertax. *I*

Held: the annual value of the lands, the amounts paid by the trustees for rates and taxes, and also the amount of the supertax paid by the trustees, formed part of the appellant's total income for supertax purposes.

Notes. Considered: *Shanks v. I.R.Comrs.*, [1929] 1 K.B. 342. Approved: *Sutton v. I.R.Comrs.* (1929), 45 T.L.R. 565. Considered: *Stedeford v. Beloe*

- A** (1931), 47 T.L.R. 408; *Lindus and Hortin v. I.R.Comrs.* (1933), 17 Tax Cas. 442; *Johnstone Trust Settlement v. Chamberlain* (1933), 17 Tax Cas. 706; *Reed v. Cattermole*, [1936] 2 All E.R. 526. Referred to: *Lady Miller v. I.R.Comrs.* (1930), 15 Tax Cas. 25; *Nicoll v. Austin* (1935), 19 Tax Cas. 531.

As to gifts and discretionary allowances as part of total income, see 20 HALSBURY'S LAWS (3rd Edn.) 422; and for cases see 28 DIGEST (Repl.) 330 et seq.

B Cases referred to:

- (1) *Tennant v. Smith*, [1892] A.C. 150; 61 L.J.P.C. 11; 66 L.T. 327; 56 J.P. 596; 8 T.L.R. 434; 3 Tax Cas. 158, H.L.; 28 Digest (Repl.) 216, 916.
- (2) *Corke v. Fry* (1895), 3 Tax Cas. 335; 32 Sc.L.R. 341.
- (3) *I.R.Comrs. v. Wemyss* (1924), 8 Tax Cas. 551; 1924 S.C. 284; 28 Digest (Repl.) 350, *795.

C

- (4) *Re Llanover, Herbert v. Freshfield* (2), [1903] 2 Ch. 330; 72 L.J.Ch. 729; 88 L.T. 856; 51 W.R. 615; 19 T.L.R. 524; 47 Sol. Jo. 385; 44 Digest 536, 3524.
- (5) *Re Gibbons, Gibbons v. Gibbons*, [1920] 1 Ch. 372; 89 L.J.Ch. 148; 122 L.T. 710; 36 T.L.R. 203; 64 Sol. Jo. 274, C.A.; 40 Digest (Repl.) 800, 2807.

D

- (6) *Meeking v. I.R.Comrs.* (1920), 7 Tax Cas. 603; 28 Digest (Repl.) 331, 1468.
- (7) *Drummond v. Collins*, [1915] A.C. 1011; 84 L.J.K.B. 1690; 113 L.T. 665; 31 T.L.R. 482; 59 Sol. Jo. 577; 6 Tax Cas. 525, H.L.; 28 Digest (Repl.) 207, 874.
- (8) *M'Dougall v. Sutherland* (1894), 3 Tax Cas. 261; 21 R. (Ct. of Sess.) 753; 28 Digest (Repl.) 383, *834.

E

Case Stated under the Income Tax Act, 1918, s. 7 (6) and s. 149, by the Special Commissioners of Income Tax for the opinion of the King's Bench Division of the High Court of Justice.

At a meeting of the commissioners held at Liverpool on June 4, 1924, for the purpose of hearing appeals the Right Hon. Bentley Lionel John Tollemache (Lord Tollemache), hereinafter called the appellant, appealed against assessments to supertax in the sums of £17,434 and £18,000 for the years ending April 5, 1921, and April 5, 1922, respectively, made on him under the provisions of the Income Tax Acts. The question for the opinion of the court was whether the appellant was liable to include in his returns for supertax for the two years in question any of the sums mentioned below.

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By the will of the appellant's grandfather, the late Lord Tollemache, it was provided (inter alia) as follows:

G

"(a) I devise my mansion at Peckforton Castle in the county of Chester with the gardens parks and appurtenances thereto belonging and my mansion at Helmingham in the county of Suffolk with the gardens parks and appurtenances thereto belonging and all my manors lands and hereditaments in the counties of Chester and Suffolk respectively or elsewhere not otherwise disposed of by this my will (hereinafter referred to as my real estates) subject to all mortgages and incumbrances affecting the same unto and to the use of my trustees hereinbefore named in fee simple or customary fee simple upon the trusts hereinafter declared concerning the same (that is to say) upon trust that my said trustees shall upon my death enter into possession of my said real estates and shall during the life of my grandson Bentley Lionel John Tollemache [the appellant] and also if the limitation in tail male hereinafter directed to be made for the first and other sons successively of my said grandson Bentley Lionel John Tollemache shall fail or determine then in such case during the lives of the said Bentley Lionel John Tollemache and my grandson Denis Plantagenet Tollemache and the survivor of them stand possessed of my said real estates and the rents and profits thereof upon the trusts hereinafter mentioned. And I declare that my said trustees shall (during the life of the said Bentley Lionel John Tollemache or if the limitation in tail male to the first and other sons of the said Bentley Lionel John Tollemache shall fail or deter-

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I

mine then during the lives of the said Bentley Lyonel John Tollemache and Denis Plantagenet Tollemache and of the survivor of them) manage or superintend the management of my said real estates . . . and generally to deal with my said real estates as if my said trustees were the absolute owners thereof, and to exercise all the powers which by the Settled Land Act, 1882 to 1890, are conferred on a tenant for life in possession of land . . . and I hereby direct that my said trustees shall by and out of the rents profits and income of my said real estates . . . pay all the expenses incurred in the management thereof or in the exercise of any of the powers hereinbefore given to my said trustees or otherwise in relation to my said real estates and all outgoing not payable by any tenant or other person . . . and shall apply the residue of such net income or so much thereof as they shall in their uncontrolled discretion think fit for or towards the maintenance support and benefit of the said Bentley Lyonel John Tollemache during his life and his wife and children or any of them or for the benefit of any of my other children or issue or any one or more of such persons exclusively of the others or other as my said trustees shall from time to time in their uncontrolled discretion determine. And shall stand possessed of the surplus (if any) of such net income upon the trusts hereinbefore declared concerning the income of my residuary personal estate or as near thereto as circumstances will admit. (b) Provided always that it shall be lawful for my said trustees during the lifetime of the said Bentley Lyonel John Tollemache to permit him or his wife or any of his children to occupy and enjoy the said mansions or either of them with the furniture and effects therein and the gardens parks and appurtenances upon such terms as aforesaid and if the aforesaid limitation in tail mail to the first and other sons of the said Bentley Lyonel John Tollemache shall fail or determine then after the death of the said Bentley Lyonel John Tollemache and during the lifetime of the said Denis Plantagenet Tollemache to permit him or his wife or any of his children to occupy and enjoy the said mansions or either of them with the furniture and effects therein and the gardens parks and appurtenances upon such terms as aforesaid.

The trustees at all material times permitted the appellant to occupy Peckforton Castle under the provision of the will quoted in para. (b) above. The trustees paid to the appellant an allowance of £600 per month under the provision of the will quoted in para (a) above, and it was admitted by the appellant that this sum, together with the appropriate addition for income tax, should be included in his supertax returns. The annual value of Peckforton Castle for the purposes of assessment to income tax under Sched. A of the Income Tax Acts for each of the years ended April 5, 1920, and April 5, 1921, was £859 5s., and the appellant was assessed to income tax under Sched. A in respect of the said premises for each of those years. The following were the items the inclusion of which in the supertax returns was disputed, and which accordingly were submitted for the opinion of the court:

	1920-1	1921-2
(i) Annual value of Peckforton Castle	£859 5 0	£859 5 0
(ii) Rates, &c., on Peckforton Castle, paid by trustees	£303 6 7	£141 3 5
(iii) Appellant's supertax, paid by trustees ...	{ £2,798 4 6 £2,000 0 0	

The payments under heads (ii) and (iii) were made by the trustees direct.

The commissioners were of opinion that the annual value of Peckforton Castle and grounds should be included in the supertax return, and that the supertax payments made by the trustees on behalf of the appellant were clearly payments made for his benefit, and that those payments should also be included.

The commissioners were further of the opinion that since the appellant was the occupier of Peckforton Castle, he was liable for the rates and taxes thereon, and

A the payment of those by the trustees was a payment on his behalf. The amount should therefore also be included in the supertax return.

Latter, K.C., and Cyril King for the appellant.

The Solicitor-General (Sir Thomas Inskip, K.C.) and Reginald Hills for the Crown.

B The following cases were referred to: *Tennant v. Smith* (1), *Corke v. Fry* (2), *I.R.Comrs. v. Wemyss* (3), *Re Llanover*, *Herbert v. Freshfield* (4), *Re Gibbons*, *Gibbons v. Gibbons* (5), *Meeking v. I.R.Comrs.* (6), *Drummond v. Collins* (7).

ROWLATT, J.—The question seems to me to be an extremely simple one. The position, as I understand it, in all these cases, is this: There is a house, and it is assessed under Sched. A, and that is all the income tax that that house bears.

C In considering a question of rebate or, in the case of a rich man, supertax, one has to find out what is the total income of the person who is living in the house, and then comes the question: Are those annual profits and gains, which are represented by the annual value of the house, his income, so as to swell his total income from all sources, or are they the profits and gains of somebody else, so that they do not come into his total income at all, although he may have the saving to his private purse of having the house put at his disposal? That is all. D The question is, who really has the profits? Of whose income are the profits and gains assessed under Sched. A a part? That is all.

In *Tennant v. Smith* (1) the bank manager's house was assessed under Sched. A in the hands of the bankers. The bank manager was assessed on his salary, £300, with some commission which he got, some £15, and some income of his own, some £57, or something more, plus income tax which had been deducted, so that his income was £374, without counting the house. He asked for a rebate because that was his whole income, and it was said: "No; there is the house too, which brings it above £400." Although the trustees had paid the Sched. A assessment, he had the benefit of the house, and therefore it was not to be said that his income was under £400; not that he could be assessed on £400 and more, but

E the question was whether it could be said (unless the trustees were not assessed) that his total income did not fall short of £400 a year, because the trustees' interest under Sched. A ought to be treated as his. That is what I should have thought the point was, and LORD MACNAGHTEN says in his judgment that the idea of saying that in addition to the tax on the house under Sched. A he is to suffer another tax, because he lives in it, under Sched. D or Sched. E is a "fanciful notion."

G In all these cases, as I have said, the question is: Of whose income are these profits or gains part? In three Scottish cases, *Tennant v. Smith* (1), the Free Church minister's case (*M'Dougall v. Sutherland* (8)), and the Established Church minister's case (*Corke v. Fry* (2)), the question was whether the subject's occupation was merely the occupation, of which a familiar example is the servant's occupation of his master's house, i.e., there was no occupation at all, as in the case of a gardener or a chauffeur who may be given quarters by his employer. H A place of residence, provided for you, saves your pocket, but as LORD MACNAGHTEN pointed out, what the income tax hits is not what is saved your pocket, but what goes into your pocket. In the Scottish minister's case, *M'Dougall v. Sutherland* (8), it was held that the minister was like an English parson; the house was his and he could do what he liked with it, and it was not a question of his living there I as a gardener or a chauffeur lives. It was his house for the time being. Therefore that case was decided the other way.

In this case there is no question of there being the relation of employer and employed. The question here is simply whether the appellant is to be considered to be in a position analogous to that of a person who is simply lent a house, or in the position of it being his house while he is living in it, for this purpose. It was urged in this case that Sched. A was conclusive, because he had been assessed to Sched. A and therefore he could not get out of it. I am not going to decide whether an assessment under Sched. A is conclusive for this purpose of the

question whether the person assessed is the right person to be treated as entitled to these properties. The question would require a good deal of argument, and it might lead to far-reaching results. In this case, and I am bound to say that I think it is very clear, the appellant had this house under the will. The benefit which he had of living in the house was not analogous to a loan or anything of that sort. He simply took it under the will. It is true that the trustees had a discretion to permit him to live there or not during his life; they could permit him or his wife or any of his children to live there. If they did not do that, they could let it or they could sell it; certainly they could not use it themselves, but under the will they were to do one of those two things, and it seems to me that, when they permitted the appellant to live there, then he took it under the will, as long as he was there. Under the will he had a right to expect that the trustees would exercise their discretion. They exercised it, and, for the time when he has been there, it has been his to live in, to put it shortly. It seems to me that that is the principle that was laid down in *Drummond v. Collins* (7). When the trustees in that case exercised their discretion to send moneys, the moneys came to the recipients under that will, and I think the same principle applies here. Mr. Solicitor said that, in his view of the will, when the trustees had given this permission they could not recall it and turn him out, on the construction of the will. I am not going to express any opinion on that. I decide the case on the footing that they could turn him out, at some sort of reasonable notice of their intention, which they would have to give in carrying out the directions of the will. They could turn him out, but, in the year in question, which was the year before the year of assessment, they have not turned him out. He has been there, I think, under the will, as Lord Tollemache, living in the house of his ancestors, and it is grotesque, in my judgment, on the facts to say that he is there in the position of a gratuitous licensee, which is really what it comes to.

I asked junior counsel for the appellant why it was the appellant paid supertax on the income which they have given him in their discretion, and counsel very candidly said he thinks he might have appealed against that, too. It is the same question. They can give him an income, and they can give him the house. When he has had it, he has had it under the will, and he has not had it as a matter of generosity or charity or in any other form at all. I think, therefore, that this house has quite clearly been a source of annual profits and gains, which are his annual profits and gains, and that is really the question. The only difficulty which I have felt is the *Wemyss Case* (3), and it has caused me a very great deal of difficulty. There is a distinction in that there was in that case a very extraordinary clause of forfeiture. With great submission, I myself do not see why the existence of a clause of forfeiture, before the forfeiture occurs, has anything to do with the question as to the occupation of or interest in the lands; but certainly the judges laid great stress on that circumstance—all of them—and with some hesitation I think I am justified in distinguishing that case. I think what gives me a clear guide in the matter is the reasoning of LORD LOREBURN and LORD PARKER and, I think, the other noble and learned Lords, too, in *Drummond v. Collins* (7). The commissioners felt that the difficulty of the *Wemyss Case* (3) was insuperable, and they decided the case on an argument based on the Settled Lands Acts. I have not heard anything of that argument here, and I say nothing about it.

As regards the rates, it is quite clear that the appellant was in rateable occupation, and though the trustees have paid his rates, they have simply paid his liability, and therefore the payment must be treated as part of his income. As to supertax, the question is hardly arguable. It sounds curious that a man should be taxed on his supertax, but that is not an accurate way of stating it. The trustees have paid a liability of his, and those sums have added to his income. In the result, this appeal must be dismissed.

Solicitors: *Hasties*; Solicitor of Inland Revenue.

Appeal dismissed.

[Reported by J. S. SCRIMGEOUR, Esq., Barrister-at-Law.]

HARTLAND v. DIGGINES

[HOUSE OF LORDS (Viscount Cave, L.C., Lord Atkinson, Lord Shaw, Lord Sumner and Lord Darling), January 22, 1926]

[Reported [1926] A.C. 289; 95 L.J.K.B. 392; 134 L.T. 492; 42 T.L.R. 262; 70 Sol. Jo. 344; 10 Tax Cas. 247]

Income Tax—Income—Payment of employee's income tax—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Rules applicable to Sched. E, r. 1, r. 4 (3).

The appellant was employed by a limited company and paid a salary of £500 per annum. In addition the company, voluntarily and not under any agreement with the appellant, had for many years paid the income tax exigible on the appellant's salary, such tax amounting in the year of assessment to £80 5s. The appellant was assessed to income tax in the sum of £580 5s. under the Income Tax Act, 1918, Sched. E. On the question whether the £80 5s. was rightly included in the assessment,

Held: the £80 5s. was "profits," "perquisites" or "emoluments" within the Rules applicable to Sched. E, r. 1 and r. 4 (3), and liable to income tax as assessed.

Decision of the Court of Appeal, [1925] 1 K.B. 372, affirmed.

Notes. The Income Tax Act, 1918, Sched. E, was replaced by the Income Tax Act, 1952, s. 156. The Rules applicable to Sched. E are contained in Sched. 9 to the Act of 1952.

Considered: *Jaworski v. Institution of Polish Engineers of Great Britain*, [1950] 2 All E.R. 51. Referred to: *Michelham's Trustees v. I.R.Comrs.*, *Lady Michelham's Executors v. I.R.Comrs.*, [1930] All E.R.Rep. 680; *Nicholl v. Austin* (1935), 19 Tax Cas. 531; *Weight v. Salmon* (1935), 19 Tax Cas. 174; *I.R.Comrs. v. Pearson*, *I.R.Comrs. v. Pratt*, [1936] 2 All E.R. 731; *Reed v. Cattermole*, [1937] 1 All E.R. 541.

As to charge to tax of money's worth as an emolument of office, see 20 HALSBURY'S LAWS (3rd Edn.) 312; and for cases see 28 DIGEST (Repl.) 222 et seq.

Cases referred to:

- (1) *Tennant v. Smith*, [1892] A.C. 150; 61 L.J.P.C. 11; 66 L.T. 327; 56 J.P. 596; 8 T.L.R. 434; 3 Tax Cas. 158, H.L.; 28 Digest (Repl.) 216, 916.
- (2) *Herbert v. McQuade*, [1902] 2 K.B. 631; 71 L.J.K.B. 884; 87 L.T. 349; 66 J.P. 692; 18 T.L.R. 728; 4 Tax Cas. 489, C.A.; 28 Digest (Repl.) 225, 973.
- (3) *Samuel v. I.R.Comrs.*, [1918] 2 K.B. 553; 88 L.J.K.B. 588; 119 L.T. 542; 34 T.L.R. 552; 7 Tax Cas. 277; 28 Digest (Repl.) 331, 1467.
- (4) *Hudson v. Gribble*, *Bell v. Gribble*, [1903] 1 K.B. 517; 72 L.J.K.B. 242; 88 L.T. 186; 67 J.P. 85; 51 W.R. 457; 19 T.L.R. 260; 1 L.G.R. 292; 4 Tax Cas. 522, C.A.; 28 Digest (Repl.) 246, 1088.
- (5) *North British Rail. Co. v. Scott*, [1923] A.C. 37; 92 L.J.P.C. 16; 128 L.T. 394; 39 T.L.R. 66; 67 Sol. Jo. 122; 8 Tax Cas. 332, H.L.; 28 Digest (Repl.) 240, 1050.
- (6) *Blakiston v. Cooper*, [1909] A.C. 104; 78 L.J.K.B. 135; 100 L.T. 51; 25 T.L.R. 164; 53 Sol. Jo. 149; 5 Tax Cas. 347, H.L.; 28 Digest (Repl.) 226, 976.

Appeal by the taxpayer from the decision of the Court of Appeal (SIR ERNEST POLLOCK, M.R., WARRINGTON and SCRUTTON, L.JJ.), reported [1925] 1 K.B. 372.

At a meeting of the Commissioners of Income Tax on public offices or employments of profit in the City of London, held on June 13, 1921, at Gresham College, Basinghall Street, in the City of London, Harry Hartland, of No. 138, Leadenhall Street, appealed against an assessment to income tax made on him under Sched. E for the year ending on April 5, 1919, in the sum of £580 5s. The appellant was throughout the year of assessment in the employ, as their accountant, of the New

Zealand Shipping Co., Ltd. The assessment appealed against included, in addition to the appellant's salary of £500, a further sum of £80 5s. arising in the following way. It had been the custom of the company since 1912 to pay every year the income tax in respect of the salaries of all its employees, including the appellant, and for the year of assessment the amount so paid was included in the working accounts of the company under the heading "Income tax; staff," and had been allowed as a trade expense and deducted in arriving at the profits of the company for the year of assessment. The sum of £80 5s. was the sum so paid by the company in respect of the salary of the appellant. The company entered into no agreement either verbally or in writing with the appellant as to the payment of income tax in respect of his salary, but the company had in fact paid and borne the income tax in respect of the appellant's salary since 1912.

It was argued for the appellant that the income tax was paid in respect of the office held by him in the company and not on his behalf as an individual, and that the payment was not a money payment or a payment convertible into money and formed no part of his salary or income and was therefore not assessable under the Rules applicable to Sched. E. It was further argued that even if it could be assumed that the income tax paid became part of the appellant's income he was entitled to have it deducted under the words of the first rule for charging the duties under Sched. E in s. 146 of the Income Tax Act, 1842, which are as follows :

"After deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament where the same have been really and bona fide paid and borne by the party to be charged"

the duty being payable or chargeable by virtue of the Finance Act, 1918. For the inspector of taxes it was contended that the income tax paid and borne by the company was paid and borne on behalf of the appellant in respect of the appellant's salary and was income of the appellant even if the payment was voluntary, that it was income that came to him by virtue of his office, and that the assessment was rightly made.

The following cases were referred to in the course of the arguments : *Tennant v. Smith* (1), *Herbert v. McQuade* (2), *Samuel v. I.R.Comrs.* (3), *Hudson v. Gribble*, *Bell v. Gribble* (4).

The commissioners were of opinion that the appeal failed and they confirmed the assessment. The only question for the court was whether, in arriving at the assessment appealed against, there had been rightly included the sum of £80 5s. The Court of Appeal held, affirming the decision of ROWLATT, J., that the payment of the income tax by the company was a profit of the office of the appellant, and the position of the employee was not in any way altered whether or not the sum was paid on his behalf by a contract with his employers or under statute or merely voluntarily.

A. M. Latter, K.C., and *G. M. Edwardes Jones, K.C.*, for the appellant, the taxpayer.

The Attorney-General (Sir Douglas Hogg, K.C.), *the Solicitor-General (Sir Thomas Inskip, K.C.)* and *Reginald Hills*, for the respondent, were not called upon to argue.

VISCOUNT CAVE, L.C.—At first sight this appeal seemed to involve questions of a merely technical character and of trifling importance, and I confess that I was surprised that in respect of a dispute involving a liability of something less than £20 the appellant should not have been content with the decision of the High Court and of the Court of Appeal; but we are now informed that this is a test case and that possibly explains the matter. In any case it is necessary to deal with the points that have been raised.

From the facts found in the Case stated by the commissioners it appears that the appellant was throughout the year of assessment in the employ of a shipping company as their accountant, and that his salary was £500 a year, but that it had

A been the custom of the company since 1912 to pay every year the income tax of the salaries of all its employees, including the appellant, and that the amount so paid in respect of the appellant's salary for the year preceding the year of assessment was £80 5s. The company had entered into no agreement, either verbal or in writing, to pay income tax on the appellant's salary, but in fact it has been paid by them year after year since 1912. On those facts the appellant was assessed to

B income tax under Sched. E for the year ending April 5, 1918, on a sum of £580 5s., being the £500 his regular salary, plus the £80 5s. representing the year's payment for income tax, and to that assessment he objects. No question is raised as to figures. The Income Tax Act, 1842, provides that the duty under Sched. E is to be payable "for all salaries, fees, wages, perquisites or profits whatsoever accruing by reason of" the office held by the person to be charged; and by r. 4 (3) of Sched. E

C "perquisites" are to be deemed to be "such profits of offices and employments as arise from fees or other emoluments." The question therefore is whether the additional £80 5s. comes within the description of "profits," "perquisites" or "emoluments" in that schedule. If it does come within that description, it is plain that it is rightly added to the salary for the purpose of assessment. That appears from *Samuel v. I.R.Comrs.* (3) with reference to supertax, and *North British Rail. Co. v. Scott* (5), and from other decisions.

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But is it a profit, a perquisite, or an emolument? That the payment is voluntary makes no difference; that appears plainly from *Blakiston v. Cooper* (6). But it is said—and this was the main argument used on behalf of the appellant—that the sum is not an emolument because it was not paid to the appellant or at his request, although, in fact, it was paid regularly over a series of years. I do not

E agree with that argument. There was that continuity in payment to which reference was made in *Blakiston v. Cooper* (6), and the effect of the payment was in practice and in fact to relieve the appellant year after year from his liability for the payment of the tax. It is true that the appellant did not receive cash in his hands, but he received money's worth year after year. This being so, I cannot

F resist the conclusion that the payment was, in fact, part of his profits and emoluments as an officer of the company for which he has been properly assessed to tax. For these reasons I move your Lordships that this appeal be dismissed with costs.

LORD ATKINSON.—I agree.

LORD SHAW.—After reading the judgment of the learned Master of the Rolls I felt that the case of the appellant was hopeless. I agree with that judgment and

G also with the judgment which your Lordship has just delivered.

LORD SUMNER.—I agree.

LORD DARLING.—I agree.

Appeal dismissed.

H Solicitors: *Thomas Eggar & Son; Solicitor of Inland Revenue.*

[Reported by EDWARD J. M. CHAPLIN, ESQ., Barrister-at-Law.]

FROME UNITED BREWERIES CO., LTD., AND ANOTHER v. BATH JUSTICES

[HOUSE OF LORDS (Viscount Cave, L.C., Lord Atkinson, Lord Shaw, Lord Sumner and Lord Carson), March 25, May 7, 1926]

[Reported [1926] A.C. 586; 95 L.J.K.B. 730; 135 L.J. 482;
90 J.P. 121; 42 T.L.R. 571; 24 L.G.R. 261]

Licensing—Bias of justices—Compensation authority—Refusal by licensing justices to renew licence—Reference to compensation authority—Resolution by justices to instruct solicitor to oppose renewal before authority—Same justices sitting as members of compensation authority.

Every member of a body engaged in a judicial proceeding must be able to act judicially, and if a member of such a body is subject to a bias (whether financial or other) in favour of or against either party to the dispute, or is in such a position that a bias must be assumed, he ought not to take part in the decision or even to sit on the tribunal. This rule has been asserted, not only in the case of courts of justice and other judicial tribunals, but in the case of authorities which, though in no sense to be called courts, have to act as judges of the rights of others. It necessarily follows that a member of such a body as that described cannot be both a party and judge in the same dispute, and that, if he has made himself a party, he cannot sit as a judge, and, if he does so, the decision of the whole body will be vitiated.

At a general annual meeting of licensing justices the question of the renewal of a licence was referred to the compensation authority with a report that in the opinion of the justices the licensed premises were redundant. At a subsequent meeting the justices passed a resolution directing their clerk to instruct a solicitor to appear before the compensation authority and oppose the renewal of the licence on their behalf. This was done, and the solicitor duly appeared before the compensation authority on behalf of the justices. Seven justices, four of whom had been parties to the decision to instruct the solicitor, sat as members of the compensation authority. The final decision of the authority to refuse the licence was arrived at by five of the justices, two having left during the hearing, and of those five two had signed the resolution to instruct the solicitor.

Held: while the compensation authority was not a "court" they were performing a judicial act, for it was their duty, after hearing evidence and listening to arguments, to pronounce a decision which might vitally affect the interests of persons appearing before them; accordingly, they were bound to act judicially, and to address their minds to the issue before them with impartiality and fairness, and if there was a real likelihood of bias on the part of any justice he should not sit; in the present case the justices who had arranged for the solicitor to be instructed had become to a certain extent prosecutors and judges in the same cause; and a writ of certiorari must issue to quash their decision.

Decision of Court of Appeal, [1925] 1 K.B. 685, reversed.

Notes. Distinguished: *R. v. Leicester Justices, Ex parte Allbrighton*, ante, p. 191. Referred to: *R. v. Camborne Justices, Ex parte Pearce*, [1954] 2 All E.R. 850.

As to disqualification of justices for bias, see 22 HALSBURY'S LAWS 527-529, 536, 578, and *ibid.*, vol. 25, 131 et seq. For cases see 30 DIGEST (Repl.) 54, 55, and 33 DIGEST 288 et seq. For Licensing Act, 1953, see 33 HALSBURY'S STATUTES (2nd Edn.) 142.

A Cases referred to:

(1) *R. v. Cheshire Licensing Justices, Ex parte Kay's Atlas Brewery, Ltd.*, [1906] 1 K.B. 362; 75 L.J.K.B. 290; 94 L.T. 412; 70 J.P. 172; 54 W.R. 482; 22 T.L.R. 238; 50 Sol. Jo. 207, D.C.; 30 Digest (Repl.) 54, 407.

B

(2) *R. v. L.C.C., Ex parte Akkersdyk, Ex parte Femenia*, [1892] 1 Q.B. 190; 61 L.J.M.C. 75; 66 L.T. 168; 56 J.P. 8; 40 W.R. 285; 8 T.L.R. 175, D.C.; 33 Digest 103, 698.

(3) *R. (Monaghan County Council) v. Local Government Board* (1900), 34 I.L.T. 196.

(4) *R. v. Sunderland Justices*, [1901] 2 K.B. 357; 70 L.J.K.B. 946; 85 L.T. 183; 65 J.P. 598; 17 T.L.R. 551; 45 Sol. Jo. 575, C.A.; 30 Digest (Repl.) 25, 164.

C

(5) *Colchester Brewing Co., Ltd. v. Tendring Licensing Justices*, [1916] 2 K.B. 126; 85 L.J.K.B. 1001; 114 L.T. 1017; 80 J.P. 313; 32 T.L.R. 401, C.A.; 30 Digest (Repl.) 57, 426.

(6) *R. v. Lee* (1882), 9 Q.B.D. 394; 47 J.P. 118; 30 W.R. 750, D.C.; 33 Digest 297, 119.

D

(7) *Leeson v. General Council of Medical Education and Registration* (1889), 43 Ch.D. 366; 59 L.J.Ch. 233; 61 L.T. 849; 38 W.R. 303, C.A.; 34 Digest 544, 30.

(8) *R. v. Rand* (1866), L.R. 1 Q.B. 230; 7 B. & S. 297; 35 L.J.M.C. 157; sub nom. *R. v. Rand, R. v. Bradford Justices*, 30 J.P. 293; 33 Digest 292, 84.

E

(9) *R. v. Hertfordshire Justices* (1845), 6 Q.B. 753; 1 New Mag. Cas. 183; 1 New Sess. Cas. 470; 14 L.J.M.C. 73; 4 L.T.O.S. 291; 9 J.P. 198; 9 Jur. 424; 115 E.R. 284; 33 Digest 289, 45.

(10) *R. (John McEvoy) v. Dublin Corpn.* (1878), 2 L.R.Ir. 371.

(11) *Re Local Government Board, Ex parte Kingstown Comrs.* (1885), 15 L.R.Ir. 150; affirmed 18 L.R.Ir. 509.

F

(12) *Sharpe v. Wakefield*, [1891] A.C. 173; 60 L.J.M.C. 73; 64 L.T. 180; 55 J.P. 197; 39 W.R. 561; 7 T.L.R. 389, H.L.; 30 Digest (Repl.) 12, 51.

(13) *Rooke's Case* (1773), Lofft, 244; 98 E.R. 632; 30 Digest (Repl.) 280, 481.

(14) *R. v. Myer* (1875), 1 Q.B.D. 173; 34 L.T. 247; 40 J.P. 646; sub nom. *R. v. Harrison*, 24 W.R. 392; 33 Digest 294, 100.

(15) *Boulter v. Kent Justices*, [1897] A.C. 556; 66 L.J.Q.B. 787; 77 L.T. 288; 61 J.P. 532; 46 W.R. 114; 13 T.L.R. 538, H.L.; 16 Digest 99, 6.

G

(16) *R. v. Manchester Justices*, [1899] 1 Q.B. 571; 68 L.J.Q.B. 358; 80 L.T. 531; 63 J.P. 360; 47 W.R. 410; 15 T.L.R. 201; 43 Sol. Jo. 278, D.C.; 16 Digest 99, 9.

(17) *Leeds Corpn. v. Ryder*, [1907] A.C. 420; 76 L.J.K.B. 1032; 97 L.T. 261; 71 J.P. 484; 23 T.L.R. 721; sub nom. *Leeds Corpn. v. Woodhouse*, 51 Sol. Jo. 716, H.L.; 33 Digest 295, 105.

H

(18) *R. v. Fraser* (1893), 9 T.L.R. 613; 37 Sol. Jo. 685; 57 J.P.Jo. 500, D.C.; 33 Digest 298, 129.

Appeal from an order of the Court of Appeal (BANKES and SCRUTTON, L.JJ., ATKIN, L.J., dissenting) reported sub nom. *R. v. Bath Compensation Authority*, [1925] 1 K.B. 685.

I

Application was made at the general annual licensing meeting for the county borough of Bath on Feb. 8, 1924, on behalf of the licensee and the Frome United Breweries, Ltd., for the renewal of the licence of the Seven Dials Hotel, which was the property of the brewery company. The question of the renewal of the licence was referred to the adjourned meeting of the licensing justices, which was held on February 22. At that meeting the question of the renewal of the licence to the premises in question was referred by the licensing justices then present to the compensation authority of the county borough pursuant to s. 19 of the Licensing (Consolidation) Act, 1910, [see now Licensing Act, 1953, s. 15] with a

report which stated that in their opinion the licence was not required. On May 9 a meeting of the compensation authority was held, at which it was decided to proceed upon the report. On the same day a meeting of the licensing justices sitting in transfer sessions was held, and the justices there present considered the advisability of the licensing justices being represented before the compensation authority. A resolution was then passed instructing the clerk to write to a solicitor named in the resolution asking him whether he could appear for the licensing justices, and, in the event of his agreeing to act, to instruct him. The resolution was signed by the five justices present. The solicitor did consent to appear and was duly instructed by the clerk to the justices. The principal meeting of the compensation authority was held on June 13, when seven justices were present, four of whom at the meeting of the licensing justices on May 9 had signed the resolution instructing the clerk to obtain the services of the solicitor, and the solicitor who had been instructed on behalf of the licensing justices appeared on their behalf. The solicitor appearing for the owners and licensee objected to any of the justices who had sat at the general annual licensing meeting, on the occasion when the licence was referred, sitting as members of the compensation authority upon the ground that they had instructed a solicitor to oppose the renewal on their behalf. The objection was overruled. The hearing proceeded and ultimately after hearing evidence the compensation authority decided to refuse the renewal of the licence subject to compensation. All the seven justices present at the principal meeting took part in overruling the objection of the solicitor for the owners and licensee. Five of the seven took part in the final decision to refuse the licence. Of these five three had been parties to the decision on February 22 to refer the licence, and two of these had signed the resolution authorising the employment of the solicitor. In the Court of Appeal it was held by BANKES and SCRUTTON, L.JJ., ATKIN, L.J., dissenting, affirming the decision of the Divisional Court, on an application for certiorari, (i) that having regard to the long course of legislation on this particular subject and the decision in *R. v. Cheshire Licensing Justices, Ex parte Kay's Atlas Brewery, Ltd.* (1), which had stood unchallenged for so long, they were unable to say that the fact that the majority of the justices on the occasion in question had sat at the licensing sessions, and had referred the licence for compensation, was of itself sufficient evidence of bias on their part; and (ii) that the fact that a majority of the members of the compensation authority who refused the licence had signed the resolution to employ a solicitor ought in the circumstances not to be held to be a disqualification. The applicants appealed.

Macmorran, K.C., Croom-Johnson, and L. C. Graham Dixon for the appellants.
Holman Gregory, K.C., and Wethered for the respondents.

The House took time for consideration.

May 7. The following opinions were read.

VISCOUNT CAVE, L.C.—Bath is a county borough, and, accordingly, the licensing justices of the borough for the purposes of the Licensing (Consolidation) Act, 1910, consist of a borough licensing committee appointed by the borough justices, and the compensation authority consists of the whole body of borough justices. The licensing justices held a meeting on Feb. 22, 1924, and, acting under s. 19 of the Act of 1910, referred to the compensation authority the question of the renewal of certain old on-licences, including the licence of the Seven Dials Hotel; and in accordance with the Act they made a report to the compensation authority, in which they stated the special circumstances connected with each of the refused houses. On May 9, 1924, the licensing justices met and passed the following resolution:

"That the clerk be instructed to write Mr. A. E. Withy asking whether he would be prepared to act for the licensing justices in opposing the renewals of licences referred to the compensation authority, and in the event of his agreeing to act, to instruct him."

A The solicitor named accepted the instructions, and at the principal meeting of the compensation authority, which was held on June 13, 1924, he duly appeared for the licensing justices and opposed the renewal of the licence of the Seven Dials, which was refused. The justices present at the principal meeting when this decision was reached, included two justices who had been present at the meeting of the licensing justices on May 9 when the instructions to oppose the

B licence were given. At the hearing on June 13, objection was taken to those justices sitting and adjudicating, but the objection was overruled. On July 15, 1924, the King's Bench Division granted a rule nisi for a writ of certiorari to remove the proceedings of the compensation authority into that court on the ground that the four justices referred to were disqualified by interest from adjudicating in the matter, but on argument the rule was discharged by a Divisional

C Court, and their decision was confirmed by the Court of Appeal, ARKIN, L.J., dissenting. The owners and licensee of the Seven Dials have now appealed to this House.

If there is one principle which forms an integral part of the English law, it is that every member of a body engaged in a judicial proceeding must be able to act judicially; and it has been held over and over again that, if a member of such a

D body is subject to a bias (whether financial or other) in favour of or against either party to the dispute, or is in such a position that a bias must be assumed, he ought not to take part in the decision or even to sit upon the tribunal. This rule has been asserted, not only in the case of courts of justice and other judicial tribunals, but in the case of authorities which, though in no sense to be called courts, have to act as judges of the rights of others. Thus in *R. v. L.C.C., Ex parte Akkersdyk, Ex parte Femenia* (2), where a committee of the London County Council had recommended that a certain music and dancing licence should not be granted, and some members of the committee had instructed counsel to represent them before the county council to oppose the application for the licence, it was held that the presence at the hearing of those members of the committee who had instructed counsel to oppose the application vitiated the proceedings, and a

E rule for a mandamus to hear and determine the application according to law was made absolute. In an Irish case, *R. (Monaghan County Council) v. Local Government Board* (3), where the authority concerned was the Local Government Board of Ireland, a similar decision was reached. Instances of the application of the like rules to licensing justices in England are *R. v. Sunderland Justices* (4) and *Colchester Brewing Co., Ltd. v. Tendring Licensing Justices* (5). From the

G above rule it necessarily follows that a member of such a body as I have described cannot be both a party and a judge in the same dispute, and that if he has made himself a party he cannot sit or act as a judge, and if he does so the decision of the whole body will be vitiated. Thus, in *R. v. Lee* (6), where a member of the sanitary committee of a town council who had taken part in directing a prosecution sat and adjudicated upon the charge, the conviction was quashed; and similar

H decisions were given in *Leeson v. General Council of Medical Education and Registration* (7), and in the above cited case of *R. v. London County Council, Ex parte Akkersdyk, Ex parte Femenia* (2).

It appears to me that these considerations are decisive of the present case. The Bath justices, when sitting as the compensation authority under the Licensing Act, 1910, may not be a court; but they are performing a judicial act, for it is

I their duty, after hearing evidence and listening to arguments, to pronounce a decision which may vitally affect the interests of the persons appearing before them. This being so, the justices who are members of the authority are bound to act judicially and not to sit if they are subject to that which in *R. v. Rand* (8) (L.R. 1 Q.B. at p. 233) was referred to by BLACKBURN, J., as a real likelihood of bias; and I cannot doubt that in the case of those three justices who took part in instructing a solicitor to oppose the renewal of the licence of the Seven Dials such a real likelihood of bias existed. It is said that the justices in question did not themselves instruct the solicitor, but only directed their clerk to do so; but this

appears to me to be an unreal distinction. Two of the justices passed and signed the resolution directing their clerk to instruct Mr. Withy to oppose the renewal of the licence, and he did accordingly as their representative appear before the compensation authority and oppose the renewal. I fail to see how, under these conditions, the justices who had instructed him and whom he represented could be free from all suspicion of bias when sitting to adjudicate upon his argument.

The Court of Appeal appears to have felt the force of these considerations, and BANKES, L.J., said in terms that, apart from the peculiar constitution of the compensation authority and the statutory provisions as to its powers, he would have had no hesitation in holding that the facts of the present case did disclose a real likelihood of bias; but, nevertheless, the majority of the court held that the ordinary rule was excluded by the special terms of the statute. With the greatest respect for the opinion of the learned lords justices who took that view, I am unable to agree with it. It may be that the statute contemplates that members of the renewal authority—in this case the borough licensing committee—may sit as members of the compensation authority. Certainly there is no provision to the contrary; and s. 6 (5) [see now Licensing Act, 1953, Sch. I, Part II, para 1, proviso] expressly provides that the justices of a non-county borough may appoint one of their number to act with reference to the renewal of a licence in the borough as a member of the county compensation authority. Possibly it was considered that the question which the licensing justices have to decide, namely, whether the renewal of certain licences shall be referred for consideration, is different from the question which has to be determined by the compensation authority, namely, whether the licences shall be renewed, and that a magistrate who has joined in referring a licence may nevertheless, when acting judicially on the evidence brought before the compensation authority, come to the conclusion that the same licence ought not to be refused. But, assuming this to be so, it by no means follows that a justice who is actively opposing the renewal of a licence can adjudicate upon the question of renewal. No doubt, the statute contemplates the possibility of the licensing authorities appearing before the compensation authority and taking part in the argument; for it is provided by s. 19 (2) that the compensation authority shall give any person appearing to them to be interested in the question of the renewal of a licence, "including the licensing justices," an opportunity of being heard [see now s. 15 (2) (b) of Licensing Act, 1953]. But the statute nowhere says that justices who elect to appear as opponents of the renewal and take active steps (such as instructing a solicitor) to make their opposition effective, may nevertheless act as judges in the dispute; and in the absence of a clear provision to that effect I think that the ordinary rule, that no one can be both party and judge in the same cause, holds good. For these reasons I am of opinion that in the circumstances proved in this case the refusal to renew the licence of the Seven Dials cannot stand, and accordingly that the orders of the Court of Appeal and of the Divisional Court should be set aside, and the order nisi made absolute with costs here and below.

LORD ATKINSON.—The relevant facts have been stated already. I shall only re-state such of them as are needed to make what I am about to say intelligible. The appeal raises an important question, namely, whether the licensing justices of a county borough like the county borough of Bath, who, on consideration by them, in accordance with the provisions of the Licensing (Consolidation) Act, 1910, of an application for the renewal of an old on-licence, are of opinion that the application requires consideration on grounds other than those on which the renewal of such a licence can be refused by themselves, and have referred the matter to the compensation authority with their report, are entitled to act as members of the compensation authority, and join in determining whether the licence so referred shall be refused or granted, notwithstanding that they have theretofore instructed a solicitor to appear on their behalf before the body of which they themselves have in fact become members, and oppose the renewal of that licence.

A An application was, on Feb. 8, 1924, made by the appellants to the annual general licensing meeting of the licensing justices for the city of Bath for a renewal of an old on-licence for a hotel named the Seven Dials Hotel, of which the appellant company are the owners and the appellant, Abel Cornelius Ashman, is the licensee. At this meeting the question of the renewal of the licence of this hotel was adjourned for consideration, on the ground of the alleged redundancy of the licensed premises in the borough, to an adjourned meeting of the licensing justices to be held on Feb. 22, 1924. At this adjourned meeting the licensing justices unanimously decided to refer the consideration of the renewal of the licence to the compensation authority of the county borough as provided by s. 19 of the Act of 1910. The licensing justices present on that occasion who took part in that decision were the following six gentlemen, namely: Lieut.-Col. Egbert Lewis (chairman), Sidney William Bush, James Henry Colmer, Charles Cowley, Edward Shewring, and Frederick William Spear, and one lady, Mrs. Selina Long. The licensing justices, in pursuance of s. 19 (1), duly prepared their report and furnished it to the compensation authority touching the licences so referred. It was signed on their behalf on April 30, 1924, by E. Newton Fuller, described as clerk to the renewal authority. I think it well to quote at length the portion of it which refers to the Seven Dials Hotel for which Abel Cornelius Ashman had held a licence for the ten immediately preceding years:

E "At the general annual licensing meeting holden at the Guildhall, Bath, on the 9th day of Feb., 1924, and by adjournment on the 22nd day of Feb., 1924, for the above-named licensing district, we being the renewal authority for the said district decided to refer to you under s. 19 of the Licensing (Consolidation) Act, 1910, the question of the renewal of the licence held in respect of the premises specified below. [Here followed the specification.] In connection with the question so referred we report that we are of opinion from the evidence laid before us that the licence of the house mentioned above is not required, having regard to the number of licensed houses in the neighbourhood and the character and necessities of the neighbourhood in which the premises are respectively situated.

F "Seven Dials.—There are nine other houses within two hundred yards, seven of which are fully licensed houses and the other two beer-houses. One of the fully licensed houses is a free house, most of the other houses have better accommodation, and the trade done in them is larger, as appears from the number of persons who have entered during certain hours. This house is stated by the police to be difficult of supervision from a police point of view. There is a large yard in the rear to which other persons have access. This yard has gates and a door opens into it from the house. The licensee states that the yard provides stabling for four or five horses, one being accommodated there permanently, and that he provides food for horses occasionally, also that there is a shed in which motor cycles are stored. The licensee also states that there are eight bedrooms available for letting, but of these it has been ascertained that only four are furnished, three being occupied by the licensee and his family and the fourth, which is very small, being used as a dressing room. The remaining four, which are on the top floor and are in poor condition, are used as lumber rooms."

G The "licensing justices" were the borough licensing committee: see ss. 2 (3) and 3 of the Licensing (Consolidation) Act, 1910, [see now s. 2 (3) of the Licensing Act, 1953].

H This report, founded, of course, on sworn evidence, is so complete, so full and precise in all its details, that it is obvious that no advocacy was needed to bring home its meaning or the views of its authors to the minds of the members of the compensation authority to whom it was addressed and who would have to consider it. Yet at a meeting of the licensing justices for the city of Bath, held on May 9, 1924, Lieut.-Col. Lewis (in the chair), Mr. E. A. Bagshawe, Mr. Bush,

Mr. Colmer, and Major Reilly being also present, a resolution was passed to the effect that their clerk be instructed to write Mr. A. E. Withy, solicitor, asking him whether he would be prepared to act for the licensing justices in opposing the renewals of licences referred to the compensation authority, and in the event of his agreeing to act, to instruct him. The clerk of the renewal authority carried out his instructions to the letter. He, by letter dated May 10, 1924, applied to Mr. Withy as he was directed. In this letter the two following paragraphs occur:

"The compensation authority, at a meeting held yesterday, decided to proceed upon the report of the renewal authority, and I am instructed to ask whether you would be prepared to act for the licensing justices in opposing the renewals of the licences. I shall be much obliged if you will kindly let me know, and on hearing from you that you will act, I will send you a copy of the renewal authority's report and any other particulars you may require."

Mr. Withy was not to be confined to arguing on the terms of this report, but was to receive all additional information that might be available, if he desired it, to oppose the renewal of the appellant's licence and thereby to support the decision of his clients. When, on June 13, 1924, the question touching the renewal of the appellants' licence came on for consideration in the courthouse at Bath before the compensation authority, the proceedings took a shape resembling more than anything else a bitter legal dispute between the inflamed advocates of two hostile litigants. The appellants were represented by their solicitor, the licensing justices by Mr. Withy. The tribunal was composed of seven members. Four of these seven—namely, Lieut.-Col. Lewis, Mr. Bagshawe, Mr. Bush, and Major T. W. T. Reilly—were members of the renewal authority which had made the before-mentioned report, and had retained Mr. Withy to oppose the renewal of the licences. Mr. Reginald Wansbrough, solicitor, appeared for the present appellants. On hearing Mr. Withy state that he appeared for the licensing justices to oppose the appellants' application before the compensation authority for a renewal of the appellants' licence, he was asked by the appellants' solicitor if he appeared for all of them, to which he replied that he did. Thereupon Mr. Wansbrough protested vehemently against any of the members of the renewal authority sitting as members of the compensation authority to decide the case, in view of the fact that they were represented by their own solicitor, who had been instructed by them to oppose the renewal of the licence; and submitted to the tribunal that it was contrary to law that a member of that tribunal should sit to decide whether the contentions of their own retained solicitor were correct or not. The chairman then, Mr. Wansbrough states, said that the members of the renewal authority had not personally intervened, but that Mr. Withy had been instructed by their clerk. Mr. Wansbrough further states that after hearing the arguments addressed to the compensation authority by the two solicitors, the seven justices constituting the court retired; that on their returning into court the chairman announced that they had overruled the objection; that thereupon two of the seven members retired, leaving five members, who continued to sit and ultimately decided the case. He (Mr. Wansbrough) states that he has ascertained that the members who gave the decision were Mr. Bagshawe (in the chair), Lieut.-Col. Lewis, Mr. Bush, Mr. Spear, and Mr. Hope, the first three of whom were members of the renewal authority. Mr. Wansbrough, in his affidavit sworn on July 10, 1924, states that of the seven members of the compensation authority who decided this case, Mr. Bagshawe, Lieut.-Col. Lewis, Mr. Bush, and Major Reilly were amongst the licensing justices who had referred the application of the appellants to the compensation authority for a renewal of the licence for his hotel. Messrs. Bagshawe, Bush, Colmer and Cowley in their affidavits make each the same two points. They admit that at the meeting on May 9 they supported the resolution that the clerk be instructed to obtain the services of Mr. A. E. Withy because they considered it advisable that the licensing justices should be represented before the compensation authority. They each and all omit to say why they thought so, but

A they make the rather ridiculous point that they took no part in personally instructing Mr. Withy, that no communication, direct or indirect, touching the renewal of these licences passed between him and them. That may well be, but they all admit they were present at the meeting at which was passed the resolution requiring the clerk to ascertain if Mr. Withy would act for the licensing justices to oppose the renewals of the licences referred to the compensation authority, and in the event of his agreeing to do so to instruct him. Mr. Withy did agree to act, and Mr. Fuller did instruct him, and he did appear before the compensation authority for them. Mr. Fuller has made a lengthy affidavit, in which he states that when he received Mr. Withy's reply that he would act for the licensing justices, he gave him instructions, as he had been ordered to do. He furnished him with a copy of the report of the licensing justices relating to the Seven Dials Hotel, and produced for his inspection the notes of the evidence taken by Mr. Fuller at the hearing on Feb. 24, 1924, in reference to the Seven Dials Hotel and requested him to obtain from the police any further particulars which he might require or desire. The licensing justices who were parties to the passing of the resolution above-mentioned on May 9, 1924, constituted Mr. Fuller their agent to instruct Mr. Withy as their solicitor to act for them in the manner stated, and are as responsible for his action as if they had instructed him themselves directly.

B They also stated that the objection raised by the appellants' solicitor, as to their taking part in the proceedings, was overruled by the justices so sitting after considering the judgment of the court in *R. v. Cheshire Licensing Justices, Ex parte Kay's Atlas Brewery, Ltd.* (1), and that their subsequent decision to refuse the renewal of the appellants' licence was taken after fully considering the evidence and arguments addressed to them for and against the renewal of the appellants' licence. This last case is, however, on the facts quite distinguishable from the present. It arose in the borough of Hyde, which is not a county borough. Mr. Blackwell, a justice of the peace of that borough, was a licensing justice and also a member, appointed by the justices of Hyde, on the committee of quarter sessions. He took part in the proceedings of both committees dealing with the refusal to renew the licence for the Grapes Inn, Hyde, the renewal of which was refused. The feature which markedly and happily distinguished that case from the present case is this, that Mr. Blackwell had taken no part whatever in instructing counsel to appear for the justices of Hyde to oppose the application, and never had assumed the position of a litigant enforcing by his own advocate his own views and aims in opposition to the advocate of the opposing litigant, and naturally desiring, as hostile litigants usually do, that his own contention might succeed and his opponent's fail. But that is precisely what each of the justices who acted as members in this case did. That is the position they each assumed. Mr. Danckwerts, K.C., who in the above-mentioned case appeared for the justices, in his opening argument said:

H "No doubt on general principles justices who instruct counsel to appear for them to oppose a renewal would be debarred from adjudicating on the question, but in this case Mr. Blackwell took no part in instructing counsel."

There is nothing to distinguish counsel from solicitor in relation to this point. Again, LORD ALVERSTONE, C.J., found great difficulty in deciding this case, and did not appear to be quite satisfied that the conclusion to which he came was right.

I In argument on behalf of the respondents much reliance was placed upon the fact that under s. 19 (2) of the Act of 1910 the compensation authority might, if they thought it expedient, after giving the persons interested in the licensed premises an opportunity of being heard, and unless it appeared to them unnecessary, after giving a similar opportunity to any other person appearing to be interested in the question of the renewal of the licence of those premises, including the licensing justices, refuse the renewal of any licence. The words "including the licensing justices" merely mean that the licensing justices are to get an opportunity of being heard similar to that accorded to the other members of the

class in which the statute has included them, namely, the class of persons appearing to the compensation authority to be interested in the question of the renewal of the licence of the premises. It could not possibly have been intended by this statute to authorise a practice which would, I think, be inconsistent with the proper administration of justice, namely, that a licensing justice, one of the members of the compensation authority, should, on a given occasion, descend from the Bench, give his evidence on oath, and then return to his place upon the Bench to give a decision possibly based on his own evidence. Nor do I think it could ever have been intended by this provision to authorise the adoption of a practice in a magisterial court according to which one of the presiding justices could descend from the Bench to the Bar, and having delivered as an advocate an argument in support or justification of a decision to which at an earlier stage of the proceedings he had been a party, then resume his position on the Bench, and make an ultimate decision of the kind he had from the Bar urged the Bench to adopt. Such a practice would, I think, destroy all public confidence in the impartial administration of justice in the magistrates' courts. It would naturally be considered an abuse by the justice of his position if he had recourse to it. But how is the thing changed in nature and character, or in effect on the administration of justice, if the magistrate does not leave the Bench, nor act the part of advocate himself, but retains a solicitor to urge upon a Bench composed in part of his own clients to combine to support a decision those clients have already made?

The first question for the decision in the case is: Was the act of the compensation authority in refusing a renewal of the licence applied for by the appellants a judicial or merely an administrative act? And, second, if it was a judicial act, were the members of that authority who took part in it, or any of them, actuated by bias or were they not? I use the words "any of them" in this connection advisedly because it was decided in *R. v. Hertfordshire Justices* (9), that if one of the magistrates who heard a case at sessions be interested in the issue the court is improperly constituted, and an order made in the case would be quashed on certiorari. In such a case it was held to be no answer that there was a majority of the justices presiding in favour of the decision arrived at without reckoning the vote of the interested party, nor was it of any effect that the latter party withdrew before the decision was made, if it appeared that he had joined in discussing the matter with the other magistrates. This case was decided by LORD DENMAN, C.J., PATTESON, COLERIDGE, and WIGHTMAN, JJ. It is quite true that, though the compensation authority does not fix the amount of compensation an owner or licensee is to receive for the loss inflicted upon him by being deprived of his licence, yet it does make the decision of that body the thing from which the right to proper compensation flows as a necessary result. And the compensation authority determines how the amount allocated by the Commissioners of Inland Revenue shall be divided among the people interested in the licensed premises. In that process it necessarily decides on the conflicting pecuniary claims of persons according to their respective legal rights in the subject-matter. Some of the authorities, which I think it well to cite, deal with each of these points. Before dealing in detail with them, I think one should bear in mind what is the real nature of the decision of the compensation authority. It was, in effect, a decision confiscating a substantial interest of the appellants in their own property. It is common knowledge that an hotel is of much more value if licensed to sell intoxicating liquors than if not so licensed. If, therefore, the compensating authority makes a decision, the consequence and direct effect of which is to deprive the owner of the house of the privilege of carrying on therein a business of a certain kind, the loss of which privilege lessens the value of his house to a considerable extent, then the decision involves in a sense a compulsory diminution or confiscation of the subject's property. That should be done, if at all, properly and in due form of law. The fact that the public good may follow is no excuse for committing an illegality to secure it.

A One of the best definitions of a judicial act as distinguished from an administrative act is that given by MAY, C.J., in the Irish case of *R. (John McEvoy) v. Dublin Corpn.* (10). There, though the borough fund of the corporation was otherwise sufficient for all legitimate purposes, it was rendered insufficient by reason of illegal payments having been made out of it, and other sums having been improperly charged upon it, and the corporation levied a borough rate to make
B up the deficiency. It was held upon an application for a certiorari that the rate was illegal and that all orders and resolutions of the corporation imposing it, and the precepts to the collector-general to levy it, should be quashed. MAY, C.J., said (2 L.R.Ir. at p. 376):

C "It has been contended that in this case no certiorari can issue to remove the borough rate, and this point must be first considered. It is established that the writ of certiorari does not lie to remove an order merely ministerial, such as a warrant, but it lies to remove and adjudicate upon the validity of acts
D judicial. In this connection the term 'judicial' does not necessarily mean acts of a judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others. And if there be a body empowered by law to inquire into facts, make estimates to impose a rate on a district, it would seem to me that the acts of such a body involving such consequences would be judicial acts."

E This definition was apparently approved of by PALLES, C.B., in *Re Local Government Board, Ex parte Kingstown Comrs.* (11), and also in *R. (Monaghan County Council) v. Local Government Board* (3). In this last-named case the point to be decided arose on s. 115 (18) of the Local Government (Ireland) Act, 1898, which provided, among other things, that any existing officer transferred under the section was to hold his office by the same tenure as theretofore, and, while performing the same or analogous duties, should receive not less remuneration than theretofore,
F and if by reason of any alteration of boundary or other thing done by or in pursuance of the Act his duties were increased or diminished, the officer should be bound to perform those duties, and should receive such increase or diminution of remuneration in proportion to such increase or diminution of his duties as the Local Government Board might determine. It was held that the acts done by the Local Government Board fixing the remuneration a transferred officer was
G to receive was a judicial act, and that this action could be reversed by the court on certiorari if they exceeded their jurisdiction. In many modern cases it has been decided that with regard to granting licences the council are acting judicially.

There is a close resemblance between *R. v. L.C.C., Ex parte Akkersdyk, Ex parte Femenia* (2) and the present case. There the London County Council had delegated, as they were by the Local Government Act, 1888, empowered to do,
H the hearing of applications for licences for music and dancing to a committee of the council. This committee sat on Oct. 1, 1891, at Clerkenwell Sessions House, on which occasion Akkersdyk and Femenia applied for licences for music and dancing for the two premises, the Angel and Crown public-house and the Rose and Crown public-house, belonging to Femenia. The two cases were heard together. Both sets of premises had been previously licensed. Evidence was given
I touching both houses, and in each case a majority of the committee voted against granting the licence, which was accordingly refused, the applicants being informed they were to apply to the council. On Oct. 23, 1891, the London County Council sat at Spring Gardens, the two applicants appeared before the council, and renewed their application for licences for music and dancing. It then appeared that four members of the London County Council, all of whom were members of the committee, and had voted with the majority of the committee against the applications for licences, and three of whom were present at the meeting of the council, were represented before the council by a barrister, instructed by a solicitor, who opposed

the granting of the licences. Ultimately the council by a majority resolved to refuse the licences. In marked contrast to the present case, however, none of the members who were represented by counsel voted on the decision. A rule nisi had been granted on the application of Akkersdyk calling on the council to show why a writ of mandamus should not be issued commanding the council to hear and determine according to law the application of Akkersdyk for a licence for music and dancing in respect of his premises, the Angel and Crown public-house, and a similar rule was granted on the application of Femenia, the landlord of a public-house called the Rose and Crown. Both cases were heard together. Mr. Poland, Q.C., and Mr. Avory, as he then was, appeared for the London County Council to show cause. Their argument was that the London County Council acted within their rights, and that the resolutions refusing these licences were valid, but that it must be conceded that if a similar state of facts had occurred with regard to justices sitting at quarter sessions the proceedings would have been invalid, but that the council in that case were acting in the performance of administrative, not of judicial, duties; that the council was a body which was elected, and candidates were entitled to stand as advocating particular views and opinions. A. L. SMITH, J., delivered the judgment. It is a long and elaborate judgment, and is characterised by the knowledge of legal principles and sound common sense which always distinguished his judgments. He said ([1892] 1 Q.B. at p. 193):

"The real question we have to determine is whether the London County Council have heard and determined Akkersdyk's application according to law; if yes, then the rule must be discharged; aliter if they have not."

He says ([1892] 1 Q.B. at p. 195):

"Mr. Poland argued that the London County Council were an elected body, and not justices sitting in quarter sessions, and in this we agree. It is true that, by the statute 25 Geo. 2, c. 36, justices, and now, by the Local Government Act, 1888, the county council are authorised to grant or refuse a licence as they 'in their discretion shall think proper'; but the discretion is to be exercised, as LORD HALSBURY puts it, in *Sharpe v. Wakefield* (12) ([1891] A.C. at p. 179), 'according to the rules of reason and justice.'"

It might be well to set out the entire paragraph in which these words occur. He said:

"An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and 'discretion' means when it is said that something is to be done within the discretion of the authorities, that that something is to be done according to the rules of reason and justice, not according to private opinion; *Rooke's Case* (13); according to law, and not humour."

A. L. SMITH, J., continues:

"In our judgment, the London County Council are adjudicating as to whether a man is or is not to be deprived of his licence; to use the words of COTTON, L.J., in *Leeson v. General Council of Medical Education and Registration* (7), 'Though not in the ordinary sense judges, they have to decide judicially as to whether or not the complaint made is well founded.'

In our judgment, when so acting, they are not emancipated from the ordinary principles upon which justice is administered in this kingdom, and which are, as it has been well said, founded on its very essence. It is conceded by Mr. Poland that, if the London County Council adjudicated in a matter of a music and dancing licence against an applicant without hearing him, such an adjudication could not stand. He also admitted that if any of the council adjudicating had a pecuniary interest in the subject-matter, such adjudication also could not stand. Then why is an adjudication in which gentlemen have acted both as judges and accusers at the same time to be upheld? There is a sequence of authority holding that it cannot be, and it suffices to quote a

A passage from the judgment of COTTON, L.J., in the case above named, in which he says:

'Of course the rule is very plain that no man can be plaintiff, or prosecutor, in any action, and at the same time sit in judgment to decide in that particular case, either in his own case or in any case, where he brings forward the accusation or complaint on which the order is made.'

B And yet this is precisely what, in the present case, the three councillors have done."

But it was argued that after it had appeared that they were, in fact, both accusers and judges, they no longer took part in the deliberations of the council. The learned judge then referred to what BLACKBURN, J., said in *R. v. Myer* (14) (1 Q.B.D. at p. 177):

C "It is now said that Mr. Myer, although he sat as one of the justices on the bench, took no part in the matter. We cannot go into that question. The question is, Was he so interested in the matter as that he ought not to have sat?"

D In the present case no question of this kind can arise, as it is admitted that all justices interested retired together and discussed the case. The rule for a mandamus to hear and determine both cases according to law was accordingly made absolute.

Nine years later the same learned judge who delivered the judgment in the last-mentioned case (he had meanwhile become Master of the Rolls) delivered the leading judgment in *R. v. Sunderland Justices* (4), in a court consisting in addition to himself of VAUGHAN WILLIAMS and STIRLING, L.JJ.

E In that case, which is a most important one, the corporation of Sunderland purchased for improvement purposes certain premises licensed for the sale of intoxicating liquors. The corporation then entered into an agreement with a brewery company by which the company undertook to pay to the corporation a certain sum of money in the event of the company obtaining a licence for the sale of intoxicating liquor for certain premises belonging to them, and the corporation agreed to close the licensed premises they had purchased, and not to make or allow to be made any application for a renewal of a licence in respect of them. Certain justices for the borough, who were also members of the borough council, had taken an active part in the council in support of the proposal that the above-mentioned agreement should be entered into by the corporation. These justices subsequently sat on the hearing of an application on behalf of the brewery company to the licensing committee for a licence in respect of the before-mentioned premises, which was granted. On the application to the confirming authority under the Licensing Act, 1872, for confirmation of the grant of the licence to the company, the same justices again sat to hear the application, which was granted. On an application for a certiorari to bring up and quash the order confirming the grant of the licence, it was held that there being a real likelihood of bias on the part of the above-mentioned justices with regard to the subject-matter of the application to the confirming authority, the writ of certiorari should issue. A. L. SMITH, M.R., said ([1901] 2 K.B. at p. 364):

I "It appears to me that in cases where the decision of justices is impeached on the ground of a bias such as is suggested in the present case, the decision must really turn on the question of fact, whether there was or was not under the circumstances a real likelihood that there would be a bias on the part of the justices alleged to have been so biased. If there is such a likelihood, then it is clearly in accordance with natural justice and common sense that the justices likely to be so biased should be incapacitated from sitting."

He refers to *R. v. Rand* (8) and *R. v. Myer* (14), and points out that the decision in *Boulter v. Kent Justices* (15) only related to the proceedings before the licensing committee, not to the meeting of the confirming authority; that the House of

Lords held that the licensing meeting was not a court of summary jurisdiction and that CHANNELL, J., deciding *R. v. Justices of Manchester* (16), held that certiorari would lie to bring up an order made by the justices as the confirming authority under the Licensing Acts. He says he agreed with CHANNELL, J., in the conclusion at which he arrived, and, on the grounds which he gave for it. VAUGHAN WILLIAMS, L.J., agrees with CHANNELL, J., on the point. After dealing with the facts at some length, A. L. SMITH, M.R., states the conclusion at which he has arrived in these words:

"There is strong evidence that certain members of the borough council, who, being justices, afterwards sat at the licensing meeting, and as members of the confirming authority, took a very keen and lively interest in getting the agreement, by which this arrangement was carried into effect, adopted by the corporation. It is impossible to read the report of the speech made by the chairman of the highway committee, at the meeting of the borough council at which the question whether the agreement should be entered into was discussed, without seeing that he took an active interest in getting the proposed agreement adopted by the council. Another member of the council, who was also a justice for the borough, moved the resolution for acceptance of the tender made by Duncan and Dalgleish, Ltd. Both these gentlemen, as well as other members of the borough council, subsequently sat on the licensing committee, when the licence in respect of the brewery company's premises in Pallion Road was granted, and again, as members of the confirming authority, when it was confirmed."

He then adopts and applies to the facts the rule laid down by BLACKBURN, J., in *R. v. Rand* (8), and ultimately holds that the appeal should be allowed, and the rule for a certiorari be made absolute. VAUGHAN WILLIAMS, L.J., puts the test in a forcible and practical form. He said:

"Can it be said here that there was nothing more than a mere possibility or suspicion that these justices would be biased? We must judge this matter as a reasonable man would judge of any matter in the conduct of his own business. Can one doubt that a reasonable man as a matter of business would, under the circumstances of this case, infallibly draw the inference that the justices who had negotiated and brought about this agreement would have a real bias in favour of granting the licence to Duncan and Dalgleish, Ltd., the parties to it?"

In the present case I cannot account for the action of the licensing justices immediately after they had decided to refuse the renewal of these two licences in directing that a solicitor should be retained to oppose the renewal of the licences by the confirming authority, the compensation authority, without apparently any qualification, and without any reference to anything which might turn up at the hearing before the latter authority. The licensing justices obviously took up the position towards the applicants for those licences of hostile litigants and sustained that character to the end. They thus became at once to a certain extent prosecutors and judges in the same cause, and by their act gave to any reasonable man with knowledge of the facts grounds for the inference that they were, in what they did, not actuated by a sincere desire to secure the impartial administration of the law in the matter of the renewal of these licences, but were, for some cause or other, biased in their efforts to defeat the appellants' applications. If that conclusion does them an injustice they have themselves to blame, because they have omitted to give any reason which will bear examination for departing from what is, I understand, the usual practice, and appointing a solicitor to appear on their behalf before a judicial tribunal of which they are members. I concur with ARKIN, L.J.'s judgment, which I think is quite convincing. I think the appeal succeeds; that the order of the Court of Appeal should be reversed; that the order of the King's Bench Division be discharged, and that the writ of certiorari should issue.

A LORD SHAW.—I concur.

LORD SUMNER.—In the Court of Appeal **BANKES**, L.J., says at the end of his judgment ([1925] 1 K.B. at p. 703):

B “Under the circumstances, I do not think that it would be fair to the justices to say that instructions given, whether to the police or to a solicitor, ought to be regarded as an indication of such a real likelihood of bias as would entitle a court to interfere. The real cause of complaint, to my mind, is that the justices who acted as the renewal authority acted again as members of the compensation authority. If, under the circumstances, the court cannot interfere to prevent this, it appears to me to be a case of straining at a gnat after swallowing a camel to complain of the appearance of the solicitor.”

C On the other hand, in his dissenting judgment, **ATKIN**, L.J., observes:

“The question therefore is: Was there or was there not in the circumstances a real likelihood that there would be bias on the part of some of the justices who were parties to the decision? The justices have to decide judicially whether a particular licence should be renewed upon evidence given upon oath. They have already caused an advocate to be instructed to oppose the renewal and to call evidence in support of the opposition. Can there be two reasonable answers to the question whether there is a real likelihood that they would be biased in favour of the arguments and evidence which they have caused to be adduced and in favour of the decision which they have retained an advocate to support?”

E These two passages define by their contrast the issue, narrow perhaps, but very important, which your Lordships are now called upon to decide.

I think more has been made than was necessary of the precise terms in which the status of justices sitting as the compensation authority under the Licensing (Consolidation) Act, 1910, ought to be described. They do not constitute a court of law. Those members of it, who have themselves reported to it on the redundancy of a specific licensed house, prefer no charge against its owners or occupiers, nor do they prosecute anyone before a tribunal of which they are members. There is no lis pending in a court nor any contestation between parties, when the renewal justices make their report to the compensation authority, and the authority determines the question of renewing the licence. The subject-matter of the proceedings is administrative; it is governed by a statutory code and, consistently therewith, by established legal practice. It has been the intention of the legislature that in dealing with such matters the licensing and compensation authorities should have the benefit of the personal knowledge and experience of individual justices. Be it so. There is authority for all this, which I forbear to cite in detail. On the other hand, it is none the less true that the matter for decision affects the property of the owner and the livelihood of the occupier of the premises both of whom in this case objected to the proposed refusal to renew the licence. Whether or not such a refusal, when accompanied by a right to compensation, is a serious grievance or a grievance at all is not the question. It was the duty of the compensation authority on the occasion in question to address their minds to the issue with impartiality and fairness, and there is jurisdiction in the High Court, in one form of procedure or another, to set aside their decision, if there has been a failure to do so. The question is what in such things impartiality and fairness are, and whether in this particular case the matters objected to constitute a failure in that regard, so as to justify resort to the jurisdiction.

I The matter of complaint is sufficiently normal and nothing is alleged that is personally derogatory to any of those concerned. On Feb. 22, 1924, having previously heard evidence on oath, the licensing justices decided to refer the question of the renewal of the licence for the Seven Dials to the compensation authority. At a subsequent meeting they directed their clerk to instruct an eminent solicitor

of Bath to act for them in opposing the renewal of this and other premises. Though I do not wish to suggest that, by merely following the words of the Act, the licensing justices would have avoided all offence, I think it remarkable that they have departed from them in this resolution. The solicitor is not merely to apply to be heard in respect of the interest of the licensing justices in the question. He is to be instructed to oppose the renewal. It is one thing to say: "See that our point of view is clearly explained." It is quite another to say: "Fight the application and try to make our opinion prevail." The form of the resolution is, I think, strong evidence of the determination of the licensing justices to be of the same opinion still. I pass by the point that the retainer was that of the clerk to the justices and not that of the justices themselves, for I think it is an empty quibble, but it may be material on the question of bias or of the real likelihood of bias, that none of the justices, whose action is complained of, took any personal part in the preparation of the instructions. The clerk furnished the solicitor with a copy of the licensing justices' report to the compensation authority, showed him the notes of the evidence which he had taken at the hearing, and requested him to apply to the police for any further particulars he might require or desire. At the sitting of the compensation authority the solicitor attended, stated that he appeared to represent the licensing justices, and, when the evidence was called and the case was argued, took such part as he thought fit. I assume that he was scrupulous to do no more in the way of pressing his opposition to the renewal than was legitimate in an advocate instructed to oppose. I assume also that within these limits he used all the powers of persuasion and argument with which he was presumably gifted. If so, his appearance in such a capacity could not but affect the minds of those to whom he addressed himself, and among those justices whose decision he was thus endeavouring to influence were those, or some of those, who had directed that he should be retained to appear for them to oppose the renewal. I think that the licensing justices thus placed themselves in a dilemma. If the appearance of the solicitor was not to affect their minds, this must be because they paid no attention to him, their minds being already made up. On the other hand, if it was, they had themselves taken very effective steps to ensure that their open minds would be finally determined in the direction already settled.

The Licensing (Consolidation) Act, 1910, by s. 19, provides that licensing justices, on an occasion on which they report particular premises to the compensation authority, are entitled to be represented, which includes professional representation, and, in the case of a county borough as Bath is, it further provides in effect that the justices who have sat to hear and determine the original application for renewal shall be qualified to sit and take part in the hearing and determination of the matter when it comes before the compensation authority on the reference. The Act does not say that they are bound to do either of these things. It does not say whether the power to be represented and the power to be present and to vote are cumulative or alternative. It does not define for what purposes either of these provisions is made. I do not wish to say that, as a matter of construction, these provisions are merely alternative. I think the real question is whether anything can be collected from them which will have the effect of ousting the jurisdiction of the High Court, which is exercisable in cases of bias or of reasonable likelihood of bias in the minds of those renewable justices who sit and vote as members of the compensation authority. That there may be inconvenience unless both powers are exercised, I think may sometimes be the case. There may be difficulty in obtaining the attendance of a quorum of justices to sit on the compensation authority if the licensing justices who have reported to it all stay away. There may be some disadvantage to the applicants for renewal if they do not hear at the authority's meeting some public statement from a representative of the renewal justices to supplement what is stated in the report or may be surmised from the course which the proceedings before the renewal justices may have

A taken. It does not, however, appear to me that either kind of disadvantage is really frequent or serious.

What, then, is the real likelihood of bias in the minds of members of the compensation authority who have previously sat at the renewal sessions and have voted to refer the licence as redundant when such a course as is here in question is pursued. It would be pedantic to expect that a justice who has recently held

B the Seven Dials to be redundant must come to the compensation meeting with his mind as open as if it had never formed any opinion at all. Nevertheless, he has to take part in a hearing *de novo*, where fresh evidence may be given or old evidence may be improved or shaken by new considerations, and he ought to be capable of giving and to be likely to give these things his best attention. He is not to be predisposed to leave all that sort of thing to be settled between the

C solicitor who opposes for him and those colleagues who have not been into the matter before. A justice may, perhaps, be entitled to say that in mind and manner he must be taken as he is, and that if his mental outfit is less than judicial the responsibility rests with those who by recommending his appointment to the commission of the peace have made him so much more than he previously was. About public-houses opinion runs high; there are persons to whom all public-

D houses seem redundant, and in practice all sorts of views are represented. On this occasion I express no opinion as to the likelihood of bias in the minds of those whose consciences require them to attend such proceedings in order to give votes which are always foregone conclusions. Another question now arises. In such a case as the present, what is likely to be the effect produced by the appearance of an eminent solicitor on behalf of the renewal justices? Several results

E occur to me. A justice who has joined in directing the retainer may say to himself: "Our case is in his hands. It is for him to satisfy the members of the committee who have not been into this before. I am convinced whatever happens." Again he may say: "I voted against the Seven Dials before. I did not like the house, though I own I did not quite know why, but this gentleman's speech puts the objection admirably, and I need trouble no more about the matter." Half a

F dozen other things may be put, all leading to his voting as before and acting on the compensation authority more as a dormant partner than as an open mind. It is quite true, on the other hand, that if no solicitor were instructed the same justice might still act and think in the same way. He might be himself as persuasive an advocate, when the members of the compensation authority retire to consult, as the solicitor could have been during the actual hearing. Again it is

G quite true that he may be specially on his guard, just because he has been into the matter before and has made up his own mind and has decided that a solicitor shall be engaged to make up his colleagues' minds in the same direction. He may, on the other hand, have forgotten all about it, and be able to take in the whole thing afresh. He may even change his mind and his vote too. Without intending the least disrespect to any of the justices of the county borough of Bath, I

H think the latter series of mental operations distinctly less probable than the former, and consequently that, in the circumstances of the case there existed in the justices whose conduct was impugned such a likelihood of bias as the parties interested in the renewal could not justly be called upon to risk.

As to authorities, I think that *Cheshire Licensing Justices, Ex parte Kay's Atlas Brewery, Ltd.* (1), cannot be treated as deciding that, in connection with licensing business, the determination of justices is not open to review where they have been biased or likely to be biased. This duty to act honestly is not confined to mere abstinence from pecuniary corruption. They must use the impartiality and fairness which are characteristic of an honest judge. It is thus that I understand LORD LOREBURN's language in *Leeds Corp'n. v. Ryder* (17) ([1907] A.C. at p. 423). If the judgment now appealed against be affirmed, it is in effect a disapproval of the case of *Akkersdyk* (2), an authority of considerable standing, and, as I venture to think, a sound one. I do not think that the words of s. 19 (2)

"and, unless it appears to the compensation authority unnecessary, any other persons appearing to them to be interested in the question of the renewal of the licence of those premises (including the licensing justices)"

can either be regarded as a statutory recognition of such an "interest" in the licensing justices as puts all questions of bias on the one side, nor does it constitute the compensation authority the sole guardian of the other interested parties against the risk that the interest of those justices may be unduly predominant. If, as *Colchester Brewing Co., Ltd. v. Tendring Licensing Justices* (5) shows, the compensation authority itself, as a whole, was bound to act judicially on the occasion in question; presumably each member was bound to act in that manner also. I find nothing in the Act which makes any exception of the justices whose report was referred to the meeting, or authorises them to be biased or to be likely to be biased, when others may not be so. If bias in such a case was inevitable, of course the Act, in making them members of the compensation authority, would have made that authority pro tanto a biased body, whose conduct could not be impugned on that ground, but it is not. Counsel for the respondents, in an attractive and original argument, advanced the proposition that the statute, taken as a whole and in the light of the previous law which it was passed to amend, had some such a view in contemplation. The Act was passed to ameliorate the situation arising from the legal power of licensing justices to refuse renewals and their inability to provide for any compensation. In these circumstances it might have been expected that if any control over their actions was contemplated, other than that expressly introduced under the scheme of the Act, some express provision would have been made for it. On the contrary, s. 6 (5) seems to be inconsistent with any power of review. The legislature, knowing the conflicts that will arise where pecuniary interests are affected as well as matters of social regulation and moral conduct, perceived that a complete absence of any bias, or at any rate of any appearance of it, was unattainable; that under the jealous eyes of partisans, always critical and often censorious, justices would never get complete credit for impartiality, and that it was better to be content with the substance than to strive for an impossible perfection of form. This novel argument I have not been able to accept, nor, with all respect to those who hold the contrary view, do I think it conclusive to dwell on the administrative character of the compensation authority to the exclusion of any consideration of bias. Accordingly, I think the appeal succeeds. Your Lordships were not asked to deal with the form of the remedy sought by the brewery company. Although it is discussed by ATKIN, L.J., I offer no opinion upon it now.

LORD CARSON.—I also am of opinion that this appeal succeeds. There is no doubt some difficulty in laying down any fixed rule as to bias in cases where magistrates under the Licensing Acts are frequently compelled to mix up what might be called administrative with what might be called judicial action. This arises from no fault of the magistrates, upon which the legislature have cast the burden of carrying out the question of the renewal of licences by a statutory code which they are, of course, bound to obey, and no doubt, as LORD SUMNER has pointed out, it was the intention of the legislature that in dealing with such matters the licensing and compensation authorities should have the benefit of the personal knowledge and experience of individual justices. This consideration, however, must not be held to relieve them from their duty to conduct their proceedings and arrive at decisions which affect property and rights in accordance with well-established rules laid down for the purpose of procuring a fair and unbiased judgment. It may be, as BANKES, L.J., has said in the passage quoted by LORD SUMNER that the real cause of complaint is that the justices who acted as the renewal authority acted again as members of the compensation authority, but that cannot be avoided because the legislature has so ordained. That, however, is not to my mind a reason for saying that the magistrates are not to abstain from any action which might indicate a likelihood of bias, and the fact

A that there is no *lis*, or what might be called any case existing between parties, affords no justification for not insisting upon the very elementary rule that a man cannot act as a judge and as an advocate in carrying out the duties cast upon him. The question in the present case: Can magistrates who have appointed a solicitor to put forward and insist upon certain decisions already come to by justices, act as members of the compensation authority which is to give the final decision? Is there in such a case such a likelihood of bias as entitles the court to interfere? I think one has only to state the proposition to show how futile the whole inquiry would become, and how unsatisfactory, I might almost say farcical, it must appear in the eyes of those whose property is to be affected, if any such course should be considered legal. As was said by LORD BLACKBURN in *R. v. Rand* (8):

C "The only way in which the facts could affect their impartiality would be that they might have a tendency to favour those for whom they were trustees; and that is an objection not in the nature of interest, but of a challenge to the favour."

In my opinion, the case is a stronger one than that of *R. v. Fraser* (18), where **D** a magistrate who was a member of a particular council of a religious body, one of the objects of which was to oppose the renewal of licences, was present at a meeting at which it was decided that the council should oppose the transfer or renewal of the licences, and that a solicitor should be instructed to act for the council at the meeting of the magistrates when the case came on. A solicitor was so instructed, and opposed the particular licence and the magistrate sat on **E** the Bench and took part in the decision. The court in that case came to the conclusion that the magistrate was disqualified on account of bias, and that the decision to refuse the licence was bad. No one imputed *mala fides* to the magistrate, but CAVE, J., in giving judgment, said:

F "The danger was, what would be likely to endanger the respect or diminish the confidence which it was desirable should exist in the administration of justice."

WRIGHT, J., stated that, although the magistrate had acted from excellent motives and feelings, he still had done so contrary to a well-settled principle of law, which affected the character of the administration of justice. The case also seems to me to be covered by the judgment in the case of *Akkersdyk* (2), and I see no ground for departing from the views there laid down. I am therefore of opinion, **G** as I said before, that this appeal succeeds.

Appeal allowed.

Solicitors: *Godden, Holme & Ward*, for *Wansbrough, Robinson, Tayler & Taylor*, Bristol; *Church, Adams, Tatham & Co.*, for *Withy & King*, Bath.

[*Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.*]

Re BOOTH. BOOTH v. BOOTH

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P.), March 16, 17, 18, 1926]

[Reported [1926] P. 118; 95 L.J.P. 64; 135 L.T. 229; 42 T.L.R. 454]

Will—Soldier's will—"Actual military service"—Soldier making ready to sail to scene of warlike operations—Period of validity of will—Wills Act, 1837 (7 Will. 7 & 1 Vict., c. 26), s. 11.

A soldier, while, with his regiment, in the course of making ready under orders to go on board a troopship to reach the scene of military operations, and probably on the day before embarkation, signed a document in the following terms: "I leave everything I have to my wife absolutely." The document was witnessed by one person.

Held: at the time of executing the document the soldier was "in actual military service" within s. 11 of the Wills Act, 1837, and the document was valid as a soldier's will.

Held, further: the period of validity of a soldier's will is not subject to the limitation of twelve months after its execution which was placed by Roman law on the validity of the will of a legionary, and so the will does not become inoperative at the end of that period.

Will—Revocation—Accidental destruction—Acquiescence by testator.

A will was destroyed accidentally by fire. There was evidence that thereafter the testator considered the question what testamentary dispositions he should make, but he took no definite step to revoke the will and there was no evidence that he had any revocatory intention.

Held: any acquiescence there was on the part of the testator in the position resulting from the destruction of the will did not result in its revocation.

Notes. As to soldiers' wills, see 16 HALSBURY'S LAWS (3rd Edn.) 176–179, and as to revocation, see *ibid.* (2nd Edn.), vol. 34, p. 73 et seq. For cases see 39 DIGEST 333 et seq., 44 DIGEST 315 et seq. For Wills Act, 1837, see 26 HALSBURY'S STATUTES (2nd Edn.) 1926.

Cases referred to:

- (1) *Mills v. Millward* (1889), 15 P.D. 20; 59 L.J.P. 23; 61 L.T. 651; 44 Digest 360, 1940.
- (2) *In the Goods of Hiscock*, [1901] P. 78; 70 L.J.P. 22; 84 L.T. 61; 17 T.L.R. 110; 39 Digest 334, 202.
- (3) *Shearman v. Pyke* (1724), mentioned in 3 Curt. at p. 539; 2 Notes of Cases at p. 334; 7 Jur. at p. 541.
- (4) *Bowles v. Jackson* (1854), 1 Ecc. & Ad. 294; 164 E.R. 170; 39 Digest 334, 201.
- (5) *Gattward v. Knee*, [1902] P. 99; 71 L.J.P. 34; 18 T.L.R. 163; 86 L.T. 119; 46 Sol. Jo. 123; 39 Digest 334, 197.
- (6) *In the Goods of Gordon* (1859), 2 Sw. & Tr. 622; Sea & Sm. 141; 29 L.J.P.M. & A. 67; 164 E.R. 1139; 23 Digest 262, 3213.
- (7) *In the Goods of Coleman*, [1920] 2 I.R. 332; 39 Digest 337, *e*.
- (8) *In the Estate of Gossage*, *Wood v. Gossage*, [1921] P. 194; 90 L.J.P. 201; 124 L.T. 770; 37 T.L.R. 302; 65 Sol. Jo. 274, C.A.; 39 Digest 338, 245.
- (9) *Gill v. Gill*, [1909] P. 157; 78 L.J.P. 60; 100 L.T. 861; 25 T.L.R. 400; 53 Sol. Jo. 359; 44 Digest 360, 1941.
- (10) *Drummond v. Parish* (1843), 3 Curt. 522; 2 Notes of Cases, 318; 1 L.T.O.S. 207; 7 Jur. 538; 163 E.R. 812.
- (11) *In the Goods of Thorne* (1865), 4 Sw. & Tr. 36; 34 L.J.P.M. & A. 131; 12 L.T. 639; 11 Jur.N.S. 569; 164 E.R. 1428; 44 Digest 176, 53.
- (12) *Re Kitchen*, *Kitchen v. Allman* (1919), 35 T.L.R. 612; 39 Digest 334, 206.

- A** **Probate Action** in which the plaintiff, Frances Jane Whish Booth, widow of Thomas George Booth, who died on Sept. 19, 1924, propounded a written will alleged to have been made in 1882 by the deceased while a soldier in actual military service, under which she claimed to be the universal legatee and devisee. She claimed to have the contents of the will established and to have a grant of letters of administration of the estate of the deceased bearing date Dec. 9, 1924, revoked.
- B** The two defendants were the heir-at-law and the executrix of a deceased brother and sole next-of-kin of the deceased, and other parties interested on intestacy were cited.

The contents of the will in substance and effect were stated in the pleadings to have been as follows :

- C** "I leave everything I have to my wife absolutely. I hope she will have regard to my sister Mary. (Signed) T. G. Booth, Payr. 46 Regt. (Witnessed by) . . . Pay Sergeant, Regimental Pay Office, Gibraltar, 1882."

The will was stated to have been accidentally destroyed by fire in the year 1916, or, alternatively, lost. There was no evidence of its contents other than that of the plaintiff. The heir-at-law pleaded that the will was not duly executed, and, in the alternative, that it was destroyed and revoked by the deceased. He did not admit its contents as alleged, and he relied upon the presumption of law that the will was destroyed by the deceased *animo revocandi*. The second defendant did not admit that the deceased made any will as alleged, but, if he made such a will, she put the plaintiff to proof that it was made in actual military service, denied its alleged contents and that it was valid and subsisting at the date of the death, and alleged revocation *animo revocandi*. It appeared from the evidence that in 1882 the deceased, then Captain Booth, was paymaster of the 46th Foot at Gibraltar, whence he went with his regiment to Alexandria, Egypt, about July 14, 1882, in connection with hostilities caused by the rebellion of Arabi Pasha. Just before his departure Captain Booth wrote a letter, since destroyed, to his wife in England, saying :

- F** "I am just off to Egypt with my regiment, and send you my will, with fond love. Will write when I get to Egypt."

The plaintiff stated that the will was written on stamped government paper, and that it read, in effect, as in the pleadings. When she received it she put it in an old wooden plate chest which was kept in a locked closet in a spare bedroom at Hawstead House, the matrimonial home. This house was burned down in April, 1916, and the will was supposed then to have been destroyed in the flames. Between the date of the fire and the deceased's death in 1924, however, he frequently said to the plaintiff in the course of conversation: "You've got my will," to which she would reply that the will was burnt, but the deceased did not seem to believe her. Other witnesses also spoke to conversations with the deceased which indicated that he seemed to believe the will still to exist, while there was further and conflicting evidence indicating that the deceased, on the contrary, considered that there was no effective will in existence after the fire. When the deceased died, the plaintiff, under the impression that, as the will had been burnt, it was no longer valid, did not at first mention it to her solicitors, as she considered that there was an intestacy. She, therefore, obtained a grant of administration and steps were taken to devolve the realty upon the heir-at-law. Shortly afterwards, however, she read in a newspaper the report of a case in which HORRIDGE, J., pronounced for a will which had been lost. She thereupon took advice and commenced this action. In 1882 a soldier's will only passed personalty, but, by the operation of the Wills (Soldiers and Sailors) Act, 1918, s. 3 (1), at the date of the testator's death in 1924, it passed, if effective, realty also, which was the greater part of the estate.

Sir Ellis Hume-Williams, K.C. (with him J. H. Watts), for the first defendant, the heir-at-law, referred to *Mills v. Millward* (1), *In the Goods of Hiscock* (2).

H. W. Barnard for parties cited.

Clifford Mortimer, for the defendant, Clara Elizabeth Booth (executrix of J. P. Booth), referred to *Shearman v. Pyke* (3); *INSTITUTES OF JUSTINIAN*, Book 2, Title XI (3); *Bowles v. Jackson* (4); *In the Goods of Hiscock* (2); *Gattward v. Knee* (5); *In the Goods of Gordon* (6); and the Wills Act, 1837, s. 20, and the Wills (Soldiers and Sailors) Act, 1918.

Bayford, K.C., and *Hodson* (with them *T. Bucknill*), for the plaintiff, referred to *In the Goods of Coleman* (7); *In the Estate of Gossage*, *Wood v. Gossage* (8); *Gill v. Gill* (9); *Mills v. Millward* (1).

LORD MERRIVALE, P.—This litigation arises in respect of the estate of an alleged testator who died in 1924 at the age of something more than eighty—eighty-one, I think, was his reputed age. There has been a grant of letters of administration to the widow whom he left surviving him. They had been married since 1879, and the widow, upon his death, obtained, by the usual means, an affidavit of intestacy and so forth, a grant of letters of administration. She now claims in this action to be the sole beneficiary under what is concisely called a soldier's will, which she alleges to have been duly made as a soldier's will in 1882, which she propounds, and which, it is said, was accidentally burned in 1916. It is said, on the part of the plaintiff, that her husband, as she believes, adhered to the intentions of his alleged will of 1882 down to the time of his death; and there is evidence and an amount of verisimilitude about it, which, if it stood alone, might well lead to that conclusion. It is said, on the other hand, that no doubt he believed he had made a soldier's will and was aware of the facts which led to the supposition that it had been accidentally burned in a fire in his house in 1916, but he was well content that it should be burned, and from that time onwards he treated himself as intestate, proclaimed that he was intestate, and ought to be deemed intestate. It is said, too, that what is alleged to have been a soldier's will made in 1882 under the privilege of persons engaged on actual military service is not proved in such a way that the court could safely act upon it. It is said: You, the plaintiff, whose reputation nobody assails, and as to whose good faith nobody raises any question, have formed a belief as to what was in the document which you kept for some years and which was burned, but it is not safe, you being the alleged sole beneficiary under the will which you propound upon your uncorroborated testimony, for such a document to be admitted to probate. Other very interesting questions of testamentary law are involved in this case, and I will refer to them presently, but what I have said is sufficient to show that it is a case with a good deal of human interest, that it touches various departments of testamentary law, and that it may be of considerable importance with regard to the military privilege of the making of an informal will when the soldier is on actual military service. It may be important, too, with regard to the effect of such a will, the extent of its operation, and the mode by which it may cease to operate. Those questions have been dealt with to some extent. One or two of them, which I conceive to be the most difficult, have been only glanced at, but some of them have been very fully argued, and I want to say that I am indebted to counsel for the thoroughness with which they examined the modern authorities.

The first substantial question in this case seems to me to be this: What was it that Col. Booth did in July, 1882? If he had died while he was on active service during what was called the Egyptian war, which began with the bombardment of Alexandria in 1882, would the Court of Probate then have properly admitted to probate what is alleged to be a military will? That raises two sets of questions. There is a set of questions involved in the inquiry whether the evidence of the plaintiff as to the document which she received can be accepted and ought to be accepted. What she says is that she received from her husband while she was in England, and he was serving with the 46th Regiment (2nd Battalion of the Duke of Cornwall's Light Infantry), a letter which enclosed what she described as his will, and what she says he described as his will. She says that in his letter he wrote to this effect: "I am just off to Egypt with the regiment and send my will,

A with fond love. Will write when I get to Egypt." She says that, enclosed with that, was a document which, according to the sworn evidence in this case, was in these terms as to its operative words: "I leave everything to my wife. I hope she will have regard to my sister Mary." She says that that was signed by the testator and witnessed by a pay-sergeant. He was paymaster of his regiment at that time, and he would have a pay-sergeant, of course, in his office. She describes the
B official paper upon which, in the regimental pay office, these documents had been written. It is pointed out that, in the statement of claim, the plaintiff stated that the operative words of the will were these: "I leave everything to my wife absolutely. I hope she will have regard to my sister Mary." That, it will be seen, differs in verbiage, but not in effect, so far as I apprehend the effect of the document, from what is stated by the witness upon her oath. It is said, too, that
C in the witness-box she omitted to append to the statement of the operative words as she alleges them a statement of the place and date of the supposed execution. I have considered those matters, and I have taken account of the plaintiff as a woman who has lived an honourable life and who alleged this will at a time when she supposed it had no efficacy at all, and left her the victim of her husband's intestacy; she set up the will as an ineffectual incident of the past. I am satisfied
D of the honesty of the plaintiff. I am satisfied that she received a letter such as she described, and that the document which it contained was a document purporting to be a soldier's will made in pursuance of the military privilege, and a document which, so far as it could have testamentary operation, bequeathed to her what could be disposed of by such an instrument, and I come to the conclusion that if in 1882, in the course of the campaign, the husband, Col. Booth, had lost his life,
E this will would have been without question admitted to probate as a soldier's will. This is the first step in the case.

Then comes these inquiries. Assuming it to have been a soldier's will, was it in operation at the time in 1916 when it is said to have been destroyed by fire? I find, in fact, that the document was accidentally burned in a fire, which was described by various witnesses, in Col. Booth's house, Hawstead House. I find
F also, that it had been kept down to that time as the will of Col. Booth; that he and his wife regarded it at that time as an effectual testamentary disposition; and that it was the only testamentary disposition he had made. There was called a clear-headed witness who had no interest in this matter and whose testimony, I think, was not seriously questioned, who described how, presently after the fire,
G Col. Booth told him of the destruction of a great many documents and that he feared his will had been destroyed in the fire, and he said that shortly afterwards, upon his inquiries, that he thought it must have been destroyed, or something to that effect. It could not be found. But the evidence, which I accept, of the plaintiff in respect of these matters, corroborated as it is in various quarters, satisfies me that Col. Booth and the plaintiff regarded this document as an effectual
H testamentary act down to its destruction by fire in 1916. There is a separate question whether the document was, in truth, operative as a will in 1916. I shall deal with that more at length.

There is another question with regard to the effect of conduct and declarations of Col. Booth between 1916 and 1924. As to them I must add a few more words to what I have said. There is a good deal of testimony which, upon the face of it, seems to be inconsistent and to reflect in a singular way upon the sincerity of the
I testator. The testimony, taking it at its face value, suggests that, to his wife, he was making comforting assurances that he believed that she had got his will and to her friends he was saying that she was secure. There is one statement that goes so far as to say that she would have Hawstead House, and there are other statements of that class. I am satisfied that Col. Booth did tell his wife in a jesting way that she had his will, and that at times he probably entertained a supposition that it might not have been destroyed. I cannot get beyond that. I cannot reject either the evidence of some of the witnesses that he spoke to them with regard to his testamentary position in a way which suggested that he had it

in his mind that he was not so content with the situation of things as he appeared to his wife to be. She was anxious, because she was sure the will was destroyed. He probably bantered her. He had given it into her care. He had not been quite sure that it had been destroyed. She believed it was in the house when it was burned, but there are happy accidents as well as unhappy accidents, and it may well be that he believed, at some times, that with her care of the matter and with her interest, she had taken care of it better than she supposed. But, at any rate, he discussed his testamentary position with members of both families. There are two parties of witnesses here. There are those who are on the side of the plaintiff, who come from her side of the house, and those who are on the side of the heir-at-law and the next-of-kin, who come from the Booth side of the house, and it may be that some honest differences are accounted for by that fact. Great care has to be taken in dealing with the evidence which is here under consideration. I have come to the conclusion that from 1916 to the time of his death the testator did not know whether his will was really in existence, that he believed it probably was not, and that in that state of things he occupied his mind from time to time with the question of what testamentary disposition he ought to make. I am satisfied that he did not come to any effective conclusion, that there was no decision of his which interfered with any legal efficacy which the will of 1882 may have had, if it had legal efficacy, at the time it was burned, or after the time when it was burned. I am inclined to think that counsel who addressed me upon the various problems of law inclined to this view from the turn their arguments took, assuming, of course, that I find that this in form was an effectual testamentary act in 1882.

I must go back to the effect of the alleged testamentary act in order to examine the arguments which were presented to me upon the footing that at the time this document was written the writer was not within the terms of s. 11 of the Wills Act, 1837, which regulates the soldier's privilege of making a will when on actual military service. That was fully debated. It is necessary to know when the alleged soldier's will was written. I come to the conclusion, in point of fact, that it was written when the 46th Regiment, in which the writer was, had received its orders for embarkation and was on the point of embarkation, and I am as well satisfied as one can be on matters which depend to some extent upon inference that the point of time at which it was written was substantially nearer to the moment of the embarkation than to the time at which the orders to prepare for embarkation were received. That was at a time practically coincident with the opening of hostilities; it was either some time on the 10th or early on July 11, 1882. I do not think that it is quite clearly determined by the evidence. It is stated at times to be on the 10th, but the orders were that the regiment was to be ready for embarkation on the *Mombasa* by dawn on the 14th. It was during that period, when the regiment was under those orders and was preparing for the embarkation on the trooper, that this document was written, and my own belief upon the subject is that it was probably written some time on the 13th. That tallies with the facts as I appreciate them, and with the making by a man of education, position in life, and some substance, of a military testament. It is quite clear that the man who wrote the document I find to have been written knew of the soldier's privilege of making a will.

What is the result of those findings? I was referred yesterday to two cases. One of them was *Bowles v. Jackson* (4), in which SIR JOHN DONSON expressed himself with regard to an alleged military testament said to have been made in the summer of 1839, that a man who had received orders to march for the purpose of joining forces outside the Presidency where he was, in order to assist in military operations in independent territory, where the military operations were, was not in expeditione, using a technical expression which has come to be familiar in the class of case. It is remarkable that SIR JOHN DONSON discussed the matter from two standpoints. He examined the facts first of all to see whether the alleged testator was inops concilii, which is an important element in the privileged soldier's knowledge, and then he considered whether the alleged testator was in expeditione,

A and found that, in fact, he had not actually set off, and so, although he had had his orders and was due to march with the forces with which he was engaged for the purposes of military operations, he was not engaged in actual military service. That, of course, is a finding of fact. It does not declare the law in any way except in so far as it illustrates it, but I think that if the ideas latent in that decision were to have their full effect here, the case would be an obstacle in the way of the plaintiff here.

B SIR JOHN DODSON, as those who are familiar with the practice of law in matters of probate well know, was an exceedingly learned lawyer in such matters—he was an eminent civilian—and if the case stood alone, very grave consideration must be given to it. It has been recognised as of authority with regard to the question when a soldier is deemed to be in expeditione.

A decision of SIR HERBERT JENNER, another eminent civilian, was also relied upon, but the latter decision was not in point in the manner in which the decision in *Bowles v. Jackson* (4) was in point. That case is *Drummond v. Parish* (10), and is of a somewhat earlier date. The question there arose with regard to an officer who was not under orders for active service, who was, in fact, stationed at a military station in this country, and who purported to exercise the military privilege, apparently under a supposition which had some accuracy at that time,

D that every soldier was in actual military service, and that every soldier who was with the army and not retired had the privilege of making a military testament. That idea seems to have had some accuracy, judging not only by that case but by other cases of which counsel know. That case throws no real light upon the matter. The discussion in it is of importance, and it is important, too, with regard to another aspect of the case which I must consider presently, but *Bowles v. Jackson* (4) is the case of authority which can properly be cited in favour of the defendants.

I have to see upon the principle and with regard to the instances which occur in the decisions of learned judges, not whether the officer in question in *Bowles v. Jackson* (4), was in actual military service—that is settled beyond all question—but whether Col. Booth, when he wrote the paper in question, was in actual military service. There is a great deal more of modern authority on that subject. There is *In the Goods of Thorne* (11). SIR JAMES WILDE attended to the case with all his wonted care in order to make sure whether the soldier in question was in expeditione. The fact of the matter was that there were military operations by Her Majesty's forces against the King of Ashanti, which was up-country beyond the Gold Coast, an independent native power, inland in the Gold Coast, and separated by long stretches of forest from the Gold Coast.

G The officer in question was at the Gold Coast. He had been ordered there with a detachment of his regiment from the West Indies to reinforce Her Majesty's troops on the Gold Coast, and on arriving on the Gold Coast he joined the expedition formed to march into the interior. While he was there, and when he was simply attached to a military formation in the course of preparation, he wrote the paper in question. SIR JAMES

H WILDE held that the facts brought the case within the privilege defined by s. 11 of the Wills Act. I think that is a strong decision in favour of the plaintiff's proposition here. Then there is *In the Goods of Hiscock* (2). That was the case of a member of the volunteer forces in this country during the South African War against the Boer Republic in 1899 and subsequent years, who had, it was said, volunteered and gone into barracks with a view to his dispatch overseas to fight

I in South Africa. It must be borne in mind that in all these cases the military situations which admit of technical description are usually described in popular terms. In the discussion of them in cases relating to soldiers' wills, the discussion is sometimes misleading. The word "mobilised" gets into the decision as though "mobilised" was a term of art in the law, or even a term of art among military men. I do not believe it is either. But it is misleading when expressions are used as though they connoted inevitably a particular state of facts. What has to be looked at is the position of Hiscock, because SIR FRANCIS JEUNE, P., held that Hiscock was on actual military service when he was in barracks, he having volun-

teered. The facts I take to have been these. He had been a member of the volunteer force, enlisted with the limited liability to military service which then existed in respect of members of the volunteer force. He had enlisted in the regular army with a view to serving in South Africa. That was his technical position as I understand it, and as a soldier in the regular army he was in barracks with a view at the proper time to be embarked for South Africa, and there to take part in the military operations. SIR FRANCIS JEUNE, P., held that he was entitled to the military privilege. It is not necessary to discuss the terms of the judgment, the rejection of one test and the acceptance of another. The conclusion is that the soldier in barracks in England, before he was actually ordered for embarkation, was in expeditione. That is a stronger case than the present one.

Then there is *Gattward v. Knee* (5). That also arose out of the events of the South African War. The man whose dispositions were in question was a private in the King's Royal Rifles, which, at that time, were in Calcutta, and at a time when, as he said, they were "just off to South Africa for the Boer War." It was held by SIR FRANCIS JEUNE that that paper clearly was a testamentary disposition within the privilege. Col. Booth, in the present case, wrote the paper in question when he was just off from Gibraltar for Alexandria by way of Malta. I do not need to apply the case. Then there is *Re Kitchen, Kitchen v. Allman* (12), which was a case arising out of the European War of 1914-1918, and to which it is not necessary to refer in detail further than to say this. The testator became a soldier in February, 1917, spent his life in barracks until September, and was told on Sept. 4 to hold himself in readiness to go overseas. On Sept. 5 he went on what was called overseas leave, and at the same time, while he was on overseas leave, in preparation for joining the forces overseas, he wrote the paper in question. It was held to be a military testament.

There are other cases. The instances I have given do not exhaust the list, but I think they help to give a clear view as to when a soldier may be said to be on actual military service. I am not seeking to attempt definitions here. In my view, the time spent in the hearing of cases in attempting definitions is sometimes not well spent. If mobilisation were the test. Col. Booth was mobilised, he and his regiment were in course of making ready under orders to go on board a troopship for the purpose of reaching the scene of operations. That, in my judgment, is actual military service within the meaning of the phrase in the Wills Act. He personally was involved actively in the military operations which were then in progress. That can safely be said.

There is a work which is not of authority in the technical sense, but is of interest here, and that is the *MANUAL OF MILITARY LAW*, which shows when those responsible for the discipline of the army regard the soldier as being engaged on active service. It is fairly well known that a soldier on active service, by the code of military discipline, if he be guilty of some offences against the military law, incurs the extreme penalty, whereas if he were not on active service, the penalty would be comparatively light, so the military definition of active service is of great technical importance to the soldier apart from the question whether he is on actual military service so that he can make a will. I find in the *MANUAL OF MILITARY LAW*, 1914, this note to s. 189 of the Army Act:

"Troops under orders to proceed to the seat of war are attached to and form part of a force which is engaged in operations against the enemy even before embarkation."

The cogency of that observation is seen when upon reference to s. 189 it is found that the expression "on active service," as applied to a person subject to military law, means whenever he is "attached to or forms part of a force which is engaged in operations against the enemy." Then, he is not merely in actual military service, but on active service and subject to that rigorous treatment which military discipline directs. That is the military view. I make no apology for introducing the matter, because SIR FRANCIS JEUNE, who for a long time was Judge Advocate

A General, did the same thing in *Hiscock's Case* (2). I do not found my judgment upon it. I found my judgment upon the law, but that is a fact of military practice which is not immaterial in order to see whether the cases ought to have, and properly have, the effect which I take them to have. And so, on the debated question whether Col. Booth, at the time he wrote this paper, was on actual military service within the meaning of s. 11 of the Wills Act, I find without doubt B that he was.

That being so, what results from that state of things during the period after 1882? He came back safely from the war. He survived forty-two years. He prospered in a modest way, so that, either with his wife's assistance or by one means or another, he had amassed a modest fortune of £11,000 or £12,000, which is the subject of this litigation. It is necessary to see what happened after this

C military testament was effectually made, to see whether it was in operation at the time of the death of the testator. The matter was dealt with in two, if not three ways. It was said that the testator knew that the document was burned and the phrase was used that he "ratified its destruction." There is no doubt what is meant. What is meant is that, believing himself to be intestate, he acquiesced in intestacy. That is the meaning of what was submitted to me in the expression

D that he ratified what had been done. That he ratified what had been done was contended upon the footing of *Mills v. Millward* (1), where the sister-in-law of the alleged testatrix, in a fit of temper, had thrown the will into the fire, the testatrix had condoned the offence as it were, and had forgiven the sister-in-law. It was said that the burning of the will was a destruction of the will which, if she had done it herself, would have been an act of revocation under the Wills Act, and, as

E she adopted it, it amounted to ratification. The view of BUTT, J., was that whether such suggested ratification was tantamount to destruction by the testator was a matter as to which he held very much doubt. I doubt very much whether that was a tenable argument in any circumstances. The learned judge refrained from deciding whether that could be ratification, or whether that could be a destruction by the testatrix within the meaning of the Wills Act. BARGREAVE DEANE, J., came

F to deal with the same subject in *Gill v. Gill* (9) and he had no doubt that it could not. He said this:

"If it was not done with the testator's authority at that time, no amount of authority afterwards can be brought into play so as to ratify it. If a testator under such circumstances desired that the act of destruction, performed without his authority at that time, should prevail he had it in his power to effectually revoke his will in accordance with the provisions of the Wills Act."

G So I am satisfied that the argument of ratification, or adoption, of the accidental destruction of the will by fire so as to bring the case within the operation of the appropriate section of the Wills Act, 1837, is not sound. It cannot prevail. This was not a destruction of the will by "burning, tearing or otherwise destroying" by H some person in the testator's presence and by his direction.

That does not dispose of the difficulties in the case. A further question was raised with regard to the events since 1916. Counsel for the executrix of J. P. Booth submitted that the privilege which the soldier has under the Wills Act, 1837, as he had under the Statute of Frauds, is virtually identical with the privilege of the Roman legionary and that it is subject to the same limitations. The contention

I is that, on the authority of *Drummond v. Parish* (10), a case before SIR HERBERT JENNER FUST in 1843, it ought now to be held that the civil law must be resorted to in order to ascertain the meaning of the provisions first of the Statute of Frauds and then of the Wills Act whereby there exists the military testamentary privilege. It is a courageous proposition. I doubt whether until this week anybody has ever previously suggested that a soldier's will expired and became inoperative at twelve months from the date of its being made, but there is language in the judgment of SIR HERBERT JENNER FUST which forms a basis for the argument. The judgment abounds in learning with regard to the civil law. I need not diverge into that topic.

What I have to ascertain is what is the law of England applicable to soldiers' wills, and I have to see whether it has been decided that the military testamentary privilege here is an adoption of the terms of the Roman law, with the limitation apparently incorporated in those terms, that a soldier's will should operate for twelve months. I confess if I had taken a different view from the one I take as to the English authority for the proposition, I should have liked the subject of the true terms of the Roman law more thoroughly investigated, because I find in passages of authority in Roman law—passages in the *Digest* and elsewhere—with regard to the period during which a soldier might make a will, that he might apparently make a military will for twelve months after he had, to use the English expression, left the colours, and after he had been released from active service, and I am not at all sure that the proposition for which *SIR HERBERT JENNER FUST*'s authority is cited, is consistent with that view. *SIR HERBERT JENNER FUST* founded himself upon a passage in *SIR LEOLINE JENKINS*' preface to his life. *SIR LEOLINE JENKINS*, as everybody knows, was probably the most eminent authority upon the Roman and civil law in this country in the seventeenth century. He was a very eminent man who was not only a distinguished lawyer, but who was in his time an ambassador—two very great offices. *SIR HERBERT JENNER FUST* says this (3 *Curt.* at p. 531):

"It appears from the preface to the Life of *SIR LEOLINE JENKINS* that he claimed to himself some merit for having, during the preparation of the Statute of Frauds, obtained for the soldiers of the English Army the full benefit of the testamentary privileges of the Roman Army. Therefore, I think it is quite clear that the principle of the exception was borrowed from the civil law, and in order to ascertain the extent and meaning of the exception, the civil law may be fairly resorted to."

That was presented to me in the fairest possible way, and must be dealt with, but I have to see what other knowledge there is as to the part of *SIR LEOLINE JENKINS* in the creation of the military privilege, and for that purpose I refer to the Statute of Frauds itself, in the framing of which *SIR LEOLINE JENKINS* is said by *SIR HERBERT JENNER FUST* to have had the effectual power which it is suggested he had. Section 23 of the Statute of Frauds provides:

"notwithstanding this Act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his movables, wages and personal estate as he or they might have done before the making of this Act."

There is not a word about the incorporation of the Roman civil law. It is not necessary for me to express the respect I feel for the memory of *SIR LEOLINE JENKINS*, or for anything which was said judicially by *SIR HERBERT JENNER FUST* in that region of law in which he so long exercised his abilities, but it seems to me that the proposition that the English law as to the soldier's military privilege is identical with the privilege of the Roman legionary is an entirely mistaken proposition. What were the testamentary rights which the soldier or seaman had under the English law before the Statute of Frauds? So far as I know, they were the privilege which was common to English subjects of making informal testamentary dispositions. The privileges may have been greater. It is not necessary to consider that. But that they were the privileges of the Roman law, with the limitations of the Roman law, I am not at all content to suppose and do not suppose. There is no case in our legal history that I am aware of, outside the judgments referred to—the judgment in *Drummond v. Parish* (10) and the case, which is referred to there, of *Shearman v. Pyke* (3)—which gives any colour to the supposition that a soldier's will becomes inoperative at the expiration of twelve months from its being made, and neither *Shearman v. Pyke* (3), the case cited in the judgment in *Drummond v. Parish* (10), nor *Drummond v. Parish* (10) is any authority for any such proposition. The question did not arise in either of those cases. I reject that argument.

There is this to be added—that by the statute of 1918 the legislature threw some

A light on the view which it held as to soldiers' wills and it is a view which reacts upon the various propositions made by counsel as to the implied revocation, or the revocation by ratified destruction, of the will in this case. Section 3 of the statute of 1918 provides that a testamentary disposition of any real estate made by a person within the privilege of the Wills Act, 1837, s. 11, who dies after the passing of the Act of 1918, shall, notwithstanding various disabilities,

B "be valid in any case where the person making the disposition was of such age and the disposition has been made in such manner and form that if the disposition had been a disposition of personal estate made by such a person domiciled in England or Ireland it would have been valid."

It will be seen there that the statute seems to be framed upon a view which ignores, if it does not negative, the supposition that the soldier's will expired in a limited time, or that a soldier's will was terminated by some mode other than that which applies to modern wills. It is a material section in this case, because upon its operation depends the question of whether the greater part of the estate of the testator is disposed of by the will of 1882. The will of 1882, when it was made, and when it was accidentally burned, did not dispose of anything but personalty. It is said here that by virtue of s. 3 of the Act of 1918 it disposes of the realty. That is a question of construction and administration, and I do not propose to say anything more about it. I refer to the matter only because of the light that the statute seems to throw upon the various propositions which I have discussed. Perhaps I ought to have said that *Bowles v. Jackson* (4), which I first mentioned and which is cited as an authority against the plaintiff in this case, is a case which also throws some light upon the views of civilians with regard to the proposition that English law follows the civil law in that the soldier's will ceases to operate at twelve months from the date of its being made. The will purported to have been made in 1839. The question as to its validity as a soldier's will arose in 1854, and in a court where SIR JOHN DODSON was presiding, and the advocates were such learned civilians as DR. R. PHILLIMORE, afterwards SIR ROBERT PHILLIMORE, and DR. JENNER, it did not occur to anybody that the soldier's will there in question had ceased to operate. It may be that the date of the death had something to do with that fact. It possibly had. I have not examined that case with any care.

On the main questions here I come to this conclusion, that the instrument sent by Col. Booth to the plaintiff from Gibraltar was a soldier's will; that it was written by him within the privilege reserved by the Wills Act and was effectual at that time to pass his personalty; that it remained effectual to his knowledge until 1916; that the fire in 1916 accidentally destroyed it, but that its destruction was not a destruction which he intended or desired, or upon which he founded any subsequent conduct; that his conduct from 1916 to 1924 does not prove any intention to deprive the will of 1882 of any operation which by law it had; that that will was in operation at the time of his death; and that I ought, therefore, now to decree its admission to probate in the words in which it was proved by the plaintiff in her evidence in the witness-box.

Solicitors: *Collyer-Bristow & Co.*, for *Partridge, Wilson & Co.*, Bury St. Edmunds; *Smythe & Brettell*; *Ince, Colt, Ince & Roscoe*; *Warren, Murton & Co.*

[Reported by HERBERT ROLFE, Esq., Barrister-at-Law.]

Re EARL OF CARNARVON'S CHESTERFIELD SETTLED
ESTATES
Re EARL OF CARNARVON'S HIGHCLERE SETTLED ESTATES

[CHANCERY DIVISION (Romer, J.), June 18, 23, 1926]

[Reported [1927] 1 Ch. 138; 96 L.J.Ch. 49; 136 L.T. 241;
70 Sol. Jo. 977]

Settled Land—Tenant for life—Agreement to sell subject to jointure to company—Inclusion of agreement in compound settlement—"Person of full age"—Company—Settled Land Act, 1925 (15 Geo. 5, c. 18), s. 19 (1), s. 20 (1).

A tenant for life of settled lands, which were subject to a jointure rentcharge, by a contract in writing agreed to sell his interest to a company. On a summons to determine who was the tenant for life for the purpose of the execution of the vesting deed required by the Settled Land Act, 1925,

Held: the words "person of full age" as used in the Act meant "person not being an infant," and a company was a "person of full age," but the agreement for the sale of the life interest was not one of the documents which constituted the compound settlement, and the tenant for life, notwithstanding such agreement, remained the tenant for life for the purpose of the execution of the vesting deed.

Settled Land—Tenant for life—Person having powers thereof—Purchaser of fee simple subject to jointure rentcharge—Settled Land Act, 1925 (15 Geo. 5, c. 18), s. 1 (1) (v), s. 20 (1) (ix).

Before the coming into force of the Settled Land Act, 1925, the tenant in tail of settled estates which were subject to a jointure rentcharge, executed a disentailing deed. By an agreement in writing he later agreed to sell the fee simple of those estates, subject to the rentcharge, to a company. On a summons to determine who was the tenant for life for the purpose of the execution of the vesting deed, it was admitted that the lands were not settled lands prior to the coming into force of the Settled Land Act, 1925, but became settled land by virtue of s. 1 (1) (v) of that Act.

Held: the company, being the person beneficially entitled to land for an estate in fee simple subject to the rentcharge, had the powers of a tenant for life under s. 20 (1) (ix), and, therefore, was the tenant for life for the purposes of the vesting deed.

Notes. Followed: *Re Alington and L.C.C.'s Contract*, [1927] 2 Ch. 253. Considered: *Re Pedley, Wallace v. Wallace*, [1927] 2 Ch. 168. Referred to: *Re Ogles Settled Estate*, [1927] 1 Ch. 229.

As to who is the tenant for life, see 29 HALSBURY'S LAWS (2nd Edn.) 673 et seq.; and for cases see 40 DIGEST (Repl.) 794 et seq.

Cases referred to:

- (1) *Re Marshall's Settlement, Marshall v. Marshall*, [1905] 2 Ch. 325; 74 L.J.Ch. 588; 93 L.T. 246; 54 W.R. 75; 21 T.L.R. 678; 49 Sol. Jo. 671; 40 Digest (Repl.) 791, 2731.
- (2) *Re Monckton's Settlement, Monckton v. Calder*, [1917] 1 Ch. 224; 86 L.J.Ch. 187; 115 L.T. 899; 40 Digest (Repl.) 791, 2732.
- (3) *Re Mundy and Roper's Contract*, [1899] 1 Ch. 275; 68 L.J.Ch. 135; 79 L.T. 583; 47 W.R. 226; 43 Sol. Jo. 151, C.A.; 40 Digest (Repl.) 866, 3384.
- (4) *Re Phillimore's Estate, Phillimore v. Milnes*, [1904] 2 Ch. 460; 73 L.J.Ch. 671; 91 L.T. 256; 52 W.R. 682; 48 Sol. Jo. 640; 40 Digest (Repl.) 846, 3231.
- (5) *Re Trafford's Settled Estates*, [1915] 1 Ch. 9; 84 L.J.Ch. 351; 112 L.T. 107; 40 Digest (Repl.) 846, 3230.

- A (6) *Re Lord Wimborne and Browne's Contract*, [1904] 1 Ch. 537; 73 L.J.Ch. 270; 90 L.T. 540; 52 W.R. 334; 48 Sol. Jo. 246; 40 Digest (Repl.) 827, 3023.

Adjourned Summonses, issued under s. 93 of the Settled Land Act, 1925, for the purpose of determining who were the tenants for life of Lord Carnarvon's two estates, respectively known as the Chesterfield and the Highclere estates, for the purposes of the execution of the vesting deeds required by the Act.

- B The Chesterfield estates were, under a settlement dated Aug. 6, 1874, settled to the use of the fifth Earl of Carnarvon during his life, with remainder to the use of his first and other sons successively in tail male, with power to appoint a rentcharge not exceeding £1,000 a year to any woman whom he might marry. In pursuance of this power the fifth earl, by a settlement made on his marriage dated June 25, 1895, appointed a yearly rentcharge of £1,000 to the use of his wife.
- C The lands were disentailed by the fifth earl and his son, who subsequently became the sixth earl, who executed a disentailing deed on Nov. 8, 1919, and on the following day executed a deed of resettlement, under which the estates were appointed subject to the jointure rentcharge, to the use of the fifth earl for life, with remainder to the use of the sixth earl for life, with remainder to the use of the first and other sons of the sixth earl successively in tail male. The fifth earl died on April 5, 1923, and Lord Carnarvon, the sixth earl, became tenant for life. By an agreement dated Aug. 10, 1925, Lord Carnarvon agreed to sell his interest, subject to the jointure, to the Carnarvon Estates Company, a company incorporated under the Companies Acts. The Highclere estates were by the settlement made on the marriage of the fifth earl in June, 1895, limited to such uses as the fifth earl should appoint for consolidating incumbrances, and subject thereto to the use that his wife, if she should survive him, should receive during the remainder of her life a yearly rentcharge of £2,000, and subject thereto to the use of her first and other sons successively in tail male. On the death of the fifth earl in April, 1923, Lord Carnarvon became tenant in tail subject to the jointure rentcharge, and on May 5, 1923, he executed a disentailing deed. On Aug. 10, 1925, he entered into an agreement in writing under which he agreed to sell his estate in fee simple,
- F subject to the rentcharge, to the Carnarvon Estates Company.

1. *The Chesterfield Estates.*

W. G. Hart for Lord Carnarvon.

Sanger for the trustees of the settlement of 1874 and of the re-settlement.

F. D. Morton for the company.

G 2. *The Highclere Estates.*

W. G. Hart for the trustees of the marriage settlement.

Sanger for Lord Carnarvon.

F. D. Morton for the company.

- H The following cases were referred to: *Re Marshall's Settlement*, *Marshall v. Marshall* (1), *Re Monckton's Settlement*, *Monckton v. Calder* (2), *Re Mundy and Roper's Contract* (3), *Re Phillimore*, *Phillimore v. Milnes* (4), *Re Trafford's Settled Estates* (5), *Re Lord Wimborne and Browne's Contract* (6).

Cur. adv. vult.

- I June 23. **ROMER, J.**, read the following judgment. These two summonses, which have been argued together, raise questions under the Settled Land Act, 1925, and I have to determine in respect of each of two distinct settlements, who is the tenant for life of that settlement. The first settlement is a settlement of the Chesterfield estates. Those estates were settled originally by a deed dated Aug. 6, 1874, under which the estates were limited to the fifth Earl of Carnarvon for life, with remainder to his first and other sons successively in tail male. By a settlement dated June 25, 1895, and made on the occasion of his marriage, the fifth earl, in exercise of a power in that behalf contained in the settlement of 1874, limited a jointure rentcharge to his wife. On Nov. 8, 1919, his eldest son, Lord Porchester, having attained the age of twenty-one years, the Chesterfield estates were disentailed by Lord Porchester with the consent of the fifth earl as protector,

and were resettled. The effect of the re-settlement, dated Nov. 9, 1919, was that, subject to the jointure rentcharge appointed under the deed of 1895, the Chesterfield estates were limited to the fifth earl for life—whether or not that was in restoration of his earlier life estate or not does not matter—with remainder to the sixth earl for life—that was Lord Porchester, who had disentailed—and then to the first and other sons of the sixth earl successively in tail male. The fifth Earl died on April 5, 1923. On Aug. 10, 1925, the sixth earl, being at that time the tenant for life of the Chesterfield estates, contracted to sell his life interest to a limited company, a corporation, and so matters remained until, on Jan. 1, 1926, the Settled Land Act, 1925, came into force. Having regard to that Act it has become desirable that a vesting deed should be executed vesting the legal estate in the Chesterfield estates in fee in the tenant for life.

The question to be determined is whether in the circumstances the sixth Earl of Carnarvon or the corporation to whom he has agreed to sell his life interest is the tenant for life? Now the determination of that question depends on just a few sections of the Act of 1925. Section 1 (1) states what constitutes a settlement, and there can be no question but that the Chesterfield estates are subject to a settlement which at any rate consists of the original settlement of 1874, the settlement of June, 1895, the disentailing deed of Nov. 8, 1919, and the re-settlement of Nov. 9, 1919. There can be no question but that those documents create a settlement within the meaning of s. 7 (1). Turning now to s. 19 I find that it says:

“The person of full age who is for the time being beneficially entitled under a settlement to possession of settled land for his life is for the purposes of this Act the tenant for life of that land and the tenant for life under that settlement.”

If then the compound settlement consists merely of the documents that I have mentioned there can be no question but that the sixth earl is the tenant for life of the settled estates. It is said, however, that the compound settlement does not consist merely of the documents that I have mentioned, but of those documents with the addition of the document under which the sixth earl parted in equity with his life estate in favour of the corporation, and that it is the company who under the settlement is beneficially entitled to possession of the settled land, not indeed for its own life but for the life of the sixth earl and that, that being so, and having regard to s. 20 (1) (v), the company has the powers of a tenant for life as being tenant for the life of another, that is to say, of the sixth earl, and that, having the powers of a tenant for life, it is for the purposes of this Act to be treated as being the tenant for life. That is by virtue of s. 20 (2), which provides:

“In every such case as is mentioned in sub-s. (1) of this section, the provisions of this Act referring to a tenant for life, either as conferring powers on him or otherwise, shall extend to each of the persons aforesaid.”

If that be so, it is said that the vesting deed to be executed in pursuance of para. 1 (2) of Sched. 2 to the Act must be made in favour of the company, inasmuch as by the vesting deed the legal estate has to be vested in the tenant for life or statutory owner. One of the objections made by the earl to that contention on behalf of the company is this. He says that both s. 19 (1) and s. 20 (1) apply in terms to persons of full age only and, that notwithstanding the Interpretation Act I am not entitled to treat those provisions as relating to a corporation, because the words “person of full age” necessarily refer to an entity that is capable of being a minor or having a minority, and a corporation is from the moment it comes into existence of full capacity and can have no minority. If that argument be well founded there are many important provisions not only in this Act but in the Law of Property Act, 1925, which came into force at the same time, which will be wholly inapplicable where interests in land are vested in corporations: see, for instance, s. 19 (5) and s. 1 (2) of Part 4 of the latter Act. But, in my opinion, the argument is unsound. The words “of full age” are not, so far as I know, technical words or words of art at all. I think it is obvious that throughout this Act, as

A indeed throughout the Law of Property Act, 1925, the words "of full age" are used in relation to a person in contrast with the word "infant," and that I ought to treat the words "of full age" as meaning no more than this, "not being an infant." That being so, inasmuch as the corporation in question is certainly not an infant, there is no reason why the corporation should not be a tenant for life under s. 19 or s. 20, assuming that it satisfies the other requisites of a tenant for life or of a person having the powers of a tenant for life.

B The claim on behalf of the company to be the tenant for life is founded solely on the contention that the agreement to sell the life interest of the sixth earl to the company is one of the documents constituting the settlement. I have to see whether that be so or not. This question does not turn solely on the provisions of the new Act; it seems to me that it turns also upon the provisions of the Settled Land Act, 1882, because if the contention of the company is sound then the company became tenant for life under the settlement as from Aug. 10, 1925, the provisions that I have read of s. 1 and ss. 19 and 20 of the new Act being substantially re-enactments of s. 2 (1), s. 2 (5) and s. 58 of the Act of 1882. In my opinion, the document by which the sixth earl contracted to sell his life interest to the company is not one of the documents that create or constitute the settlement, and I am led to that conclusion by the provisions contained in s. 50 of the Settled Land Act, 1882, and s. 104 (1) of the Act of 1925. Let me assume for the moment, contrary to my own opinion that this document, this agreement for sale is one of the documents or instruments under which an estate or interest in land "stands for the time being limited to or in trust for any persons by way of succession." If it be, I can see no answer to the contention that the company is the person who is for the time being under the settlement beneficially entitled to the possession of settled land for the life of another, not holding merely under a lease at a rent. But s. 50 of the Act of 1882 and s. 104 of the new Act provide as follows:

"The powers under this Act of a tenant for life are not capable of assignment or release, and do not pass to a person as being, by operation of law or otherwise, an assignee of a tenant for life."

F There is no question that before Aug. 10, 1925, the sixth earl was tenant for life. When he assigned or contracted to assign his life interest to the corporation it did not therefore acquire the powers of a tenant for life by the assignment or contract, though it might be that it acquired these powers by reason of other provisions of the Act, not indeed because the powers had been assigned to it but because the corporation has to be regarded as the tenant for life. But the sections go on to say that those powers which cannot be assigned "remain exercisable by the tenant for life after and notwithstanding any assignment." "The tenant for life" there must mean the tenant for life who is assigning his life interest, and he still remains, according to the wording of the Acts, "the tenant for life" and capable of exercising the powers of a tenant for life. It seems to me to follow from that that the legislature could not have contemplated that where a tenant for life assigns his life interest the document by which he assigns his life interest becomes one of the documents constituting the settlement, or that the assignee by virtue of that fact acquires the powers of a tenant for life under s. 58 of the Act of 1882 or s. 20 of the new Act. I hold, therefore, that this contract to assign the life interest of the sixth earl to the corporation is not one of the documents which constitutes the compound settlement. The corporation was not, by reason of the old Act, and is not by reason of the present Act, to be treated as the tenant for life under that settlement. The sixth earl is the tenant for life, and the legal estate in fee simple in the Chesterfield estates will have to be vested in him. So much for the Chesterfield settlement.

I have now to consider the other settlement, which is the settlement of certain property known as the Highclere estates made on the marriage of the fifth earl. The settlement was dated June 25, 1895, and by it the Highclere estates were limited to such uses as the earl should appoint for consolidating incumbrances

thereon and subject thereto to the use of the fifth earl for life, with remainder to the use that his wife if she should survive him should receive out of the premises during the residue of her life the yearly rentcharge of £2,000, and subject thereto to the use of the first and other sons of the marriage successively in tail male. The marriage took place on June 26, 1895, and the fifth earl died on April 5, 1923. Thereupon the sixth earl became tenant in tail male in possession, subject only to the jointure rentcharge in favour of his mother. On May 5, 1923, he disentailed, and then on Aug. 10, 1925, he entered into an agreement to sell his estate in fee simple to the corporation that I have already mentioned. There is no doubt, having regard to the provisions of s. 1 (1) (v) of the Settled Land Act, 1925, that the Highclere estates are now settled land, because s. 1 (1) provides as follows:

"Any deed, will, agreement for a settlement or other agreement, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, after the commencement of this Act, stands for the time being . . . (v) charged, whether voluntarily or in consideration of marriage or by way of family arrangement, and whether immediately or after an interval, with the payment of any rentcharge for the life of any person creates or is for the purposes of this Act a settlement."

But it is said by counsel for the sixth earl that even under the old law this land remained settled land notwithstanding the disentailing deed, and that the sixth earl was tenant for life of that settled property. It is, I think, necessary to decide whether that contention is sound or not, because if he was in fact tenant for life of the Highclere property immediately before Aug. 10, 1925, then it would follow that he could not assign his powers and, for the reasons that I have given in the judgment in the other case, it would follow that he would remain tenant for life notwithstanding the agreement for sale to the corporation. The result of such a conclusion would be somewhat far reaching, because it would seem to follow that in all those cases where before the Act of 1925 a person absolutely entitled subject to family charges had conveyed away portions of his land subject to the charge, giving a covenant to the various purchasers indemnifying them against the charge, the persons taking under those conveyances would not have been even in the position of being tenants for life. The vendor would have still remained the tenant for life under the old law—and it might be a matter of some difficulty to determine the relative position of the parties under the new Act, having regard to s. 20 (1) (ix), and the transitional provisions in Sched. 2. The difficulty would certainly not be diminished by the Law of Property Amendment Act, 1926.

I must, therefore, consider whether that argument is sound or not. If it be sound I must give effect to it, however inconvenient the result may be. It is based, in the first instance, on and it traces its origin to a decision of the Court of Appeal in *Re Mundy and Roper's Contract* (3). With the facts of that case I am not concerned. It is the judgment of LINDLEY, M.R., and CHITTY, L.J., that is important. Referring to s. 2 (1) of the Act of 1882, they say ([1899] 1 Ch. at p. 290):

"The right interpretation of the words 'stands for the time being limited to or in trust for any persons by way of succession' is a critical point in this case. The words have no technical force. I see no sufficient reason for restricting their meaning. I think that, according to the natural and ordinary meaning of the words, they include the case of a jointure and portions for younger children limited to arise on or after the death of a tenant for life, and the terms of years limited to trustees to secure them. The jointress and the portions take an interest in the land, and they succeed to their interests in the land 'on or after the death of the tenant for life.'"

It would be obvious from that passage that what the learned judges were dealing with was a case where interests in jointures or portions would arise—that is to say, where the interests would become interests in possession—at a date which had

A not yet arrived, and that they were of opinion that when the jointress or portioners became entitled in possession they then took an interest in the land by way of succession. They did not, I think, intend to hold that where subject to portions or a rentcharge vested in possession land is vested in a person in fee simple that land is settled land, or that when the jointure comes to an end, or the portions are raised and paid off, that person takes any interest in the land by way of
B succession. It is important to bear in mind exactly what those learned judges were dealing with.

I pass to *Re Lord Wimborne and Browne's Contract* (6), which was a decision of SWINFEN EADY, J. According to the headnote:

C "A testator devised freeholds to the vendor for life, with remainders in strict settlement. The property was subsequently disentailed, re-settled, and appointed so as to extinguish the vendor's life estate, but the original settlement created by the will was still subsisting in respect of a jointure and portions charged under the powers thereof:—Held, that the vendor could sell under the will alone, so that it was unnecessary to appoint trustees of the compound settlement created by the will and subsequent deeds."

D But in that case the vendor was originally tenant for life, and as such had power to charge a jointure for his wife and portions for his younger children. By his marriage settlement and in exercise of that power he charged the settled property with a jointure for his wife and portions for his younger children, and limited terms for securing the same. It does not appear when that jointure arose, but I have no doubt that the jointure arose and that the portions became raisable after
E the death of the tenant for life. So that there was a case similar to that with which the Court of Appeal were dealing in their judgment in *Re Mundy and Roper's Contract* (3). By virtue of the original settlement the jointure arose and the portions became raisable on the death of the vendor. During his life, therefore, the land still remained limited by that settlement to persons in succession, namely, to the wife and the children upon the death of the vendor. SWINFEN EADY, J., in that state of affairs, said ([1924] 1 Ch. at p. 541):

F "In the present case, the original settlement created by the will is still subsisting, as by reason of the jointure and portions charged and remaining to be raised thereunder the lands still stand limited to persons by way of succession under that instrument. . . ."

Then he refers to *Re Mundy and Roper's Contract* (3). The next case was *Re Phillimore's Estate, Phillimore v. Milnes* (4). That was a decision of FARWELL, J. In that case, by a deed dated Aug. 3, 1886, certain real and leasehold property was assured to trustees upon trust for such persons as P. should by deed appoint. By deed dated Aug. 4, 1886, P. appointed that this property should be held upon trust for himself for life, and after his death upon trust to pay certain annuities to five persons for their respective lives, and subject thereto in trust for P. absolutely.
G In effect, therefore, P. was absolutely entitled subject only to the trust to pay certain annuities to five persons for their lives after his death. Treating, therefore, P. as he ought to be treated, as a person absolutely entitled subject only to these annuities, the land was nevertheless settled land within the meaning of the Settled Land Acts for the reasons given in the judgment in *Re Mundy and Roper's Contract* (3). It was accordingly held by FARWELL, J., that the deeds of Aug. 3 and 4 and
H P.'s will under which P. had settled the estate in strict settlement formed a compound settlement and that the plaintiff, who was tenant for life under the compound settlement, could sell the property discharged from the annuities. A more important decision for the present purpose is that of *Re Marshall's Settlement, Marshall v. Marshall* (1). That was a decision of SWINFEN EADY, J. According to the headnote:

I "By a marriage settlement, land belonging to the settlor was assured to the settlor for life with remainder (subject to a jointure, portions and portions term thereby charged and limited) to the settlor in fee:—Held, that, notwith-

standing the merger of the life estate, the settlement was a settlement within s. 2 (1) of the Settled Land Act, 1882, and the settlor was life tenant within s. 2 (5)."

There, again, if the facts are looked at it will be seen that the estates were limited by a marriage settlement to the use of the husband for life, and after the determination of that estate to the use that, if the wife survive the husband, she should receive a jointure of £400 a year during her life. Then there was a term, which was limited, to commence from the decease of the husband, for the purposes of securing certain portions, and subject to that the land was limited to the husband in fee. The husband was desirous of selling part of the property under the powers of the Settled Land Act, and he took out a summons to determine whether he was the life tenant or a person having powers of a life tenant under the Act. There, in point of fact, of course, he was absolutely entitled subject only to the jointure and the portions and the term, all of which came into operation on his death. Meantime, he was entitled to receive the rents and profits during his life. SWINFEN EADY, J., followed *Re Mundy and Roper's Contract* (3) and came to the conclusion, as indeed he was bound to come to the conclusion having regard to that decision, that the land was limited to persons in succession and, therefore, settled property notwithstanding the fact that the husband was, subject to the annuity and portions, absolutely entitled in fee simple. It was a case very like *Re Mundy and Roper's Contract* (3), where the interest of the jointress and the interest of the portioners arose at a future date—namely, on the death of the husband. SWINFEN EADY, J., having decided that the land was settled land, found himself able to come to the conclusion that the husband was tenant for life of the settlement within the meaning of s. 2 (5) of the Act of 1882. If he had not arrived at that conclusion, then there was a settlement of which there was no tenant for life or person having the powers of a tenant for life, because there is no reference in s. 58 to a person who is absolutely entitled subject to family charges. It will be observed, however, that, according to the very words of the settlement there, the husband was entitled for his life to the rents and profits; it was not that he was entitled to them merely because he was the absolute owner subject to the jointure and the portions, there was an express limitation to him in the settlement during his life.

Then in *Re Trafford's Settled Estates* (5) WARRINGTON, J., had to deal with a somewhat similar case. There E.W.T. by his will, dated in 1889, devised certain freehold estates to the use of his son E.S.T. for life and from and after the decease of E.S.T. to the use of his first and other sons successively, according to their respective seniorities, in tail male with remainders over, and he charged his settled estates with the payment of certain annuities, some which were still subsisting. E.W.T. died in 1892. E.S.T., the tenant for life, died in 1912, and his eldest son, S.W.J.T., thereupon became tenant in tail in possession of the settled estates. On April 8, 1914, S.W.J.T. executed a disentailing deed, which was duly enrolled, limiting the settled estates to his own use in fee simple. On April 17, 1914—nine days afterwards—he exercised a re-settlement on his marriage of a part of the estates originally settled by the will to the use of himself for life with remainders over. So far as regards the part he re-settled there could be no question but that as from that time the property was settled land, and that he was the tenant for life under the settlement. But WARRINGTON, J., held, that as regards the property not comprised in the re-settlement the son could no longer exercise the powers of a tenant for life in respect of it, inasmuch as by virtue of the disentailing deed there was no longer any settlement of that property. He said ([1915] 1 Ch. at p. 13):

"The title of those estates at present [the property which had not been re-sold] is that, subject to the annuities still subsisting, the estates are limited to the applicant in fee."

Those were annuities not to arise at some future date, but annuities that had already arisen and were presently payable. WARRINGTON, J., went on (*ibid.*):

A "He desires to sell freed from the annuities created by the testator's will and can only do that if he can sell as a person having the powers of a tenant for life, and for that reason he seeks to have it decided that he has those powers. While he was tenant in tail in possession he came within the provisions of s. 58 (1) of the Settled Land Act, 1882."

B Of course, at that time the land was settled, not by reason only of the annuity existing in priority to the tenancy in tail, but by reason of the fact that subject to the tenancy in tail the property was limited over. Then he goes on to point out that when the vendor executed the disentailing deed he was not a person having the powers of a tenant for life who was seeking to get rid of those powers or to assign his interest or anything of that sort. The effect of the disentailing deed "was merely to enlarge the estate of the tenant in tail to a tenancy in fee simple." Then he went on to say (*ibid.* at p. 15):

C "What has the applicant done? He has done what the Act [the Fines and Recoveries Act] says he may do. He has disposed of the lands as if he were a tenant in fee simple and has thereby constituted himself a tenant in fee simple. Is that disentailing deed for the purposes of s. 50 an assignment of his estate or interest or tenant in tail under the settlement? It seems to me that it clearly is not. He has never disposed of his estate or interest at all. In my opinion, the applicant, although he was once a tenant in tail, has ceased, by reason of the conveyance which he has executed, to be a tenant in tail and to have the powers of a tenant for life."

E But if *Re Mundy and Roper's Contract* (3) went as far as counsel for Lord Carnarvon asks me to say that it went it would follow that WARRINGTON, J., was wrong in saying that the applicant in the case before him had not the powers of a tenant for life. For he certainly was a person who was entitled in fee simple subject only to certain annuities which were presently payable.

F The last case to which I shall have to refer is *Re Monckton's Settlement, Monckton v. Calder* (2), which came before NEVILLE, J. There, according to the headnote:

G "In 1894 lands were by deed settled to the use of A. for life, remainder to the use of B. (the eldest son of A.) in fee simple if he should survive A., with powers for A. to create portions terms for his younger children and for B. to jointure any wife and to create portions terms for his younger children. In 1896 B. married, and in exercise of his power by deed charged a jointure for his wife and created a portions term for his younger children. In 1916 A. died, having in exercise of his power created portions terms for his younger children, and B. became tenant in fee simple in possession subject to the several portions terms and the jointure."

H So far as regards the portions which had been created by the father A. those portions took precedence of B.'s interest, but so far as regards the jointure that he had appointed to his wife and the portions terms he had created for the benefit of his children they only took effect on the death of B. So that the position after the death of A. was this: The land was charged with portions for A.'s children immediately raisable; subject thereto the land was vested in B. in fee subject to this, that on B.'s death a jointure rentcharge became payable to his wife and portions were to become raisable for his younger children. NEVILLE, J., came to the conclusion that in those circumstances B. was tenant for life of the settlement, which he found and was bound to find, having regard to *Re Mundy and Roper's Contract* (3), was subsisting. He held that B. was tenant for life of that settlement and could exercise all the powers of a tenant for life. He pointed out in his judgment that on the death of the father the land stood limited in favour of certain portioners with terms for securing the portions and upon the death of B. limited in favour of a jointure and portions with terms to secure them with a further limitation to B. Then he said ([1917] 1 Ch. at p. 229):

"Having regard to the decision of the Court of Appeal in *Re Mundy and Roper's Contract* (3), it is, I think, plain that, having regard to the limitations created by the plaintiff in favour of the jointress and portioners, the estates are limited to or in trust for persons by way of succession."

He very carefully guards himself. He does not say that by reason of the portions created by A. the estates were limited to or in trust for persons by way of succession. He is referring, as *Re Mundy and Roper's Contract* (3) referred, to a case where jointure and portions come into being at a future date; when they come into being then an interest in the land arises by succession. Then he refers to the judgment in *Re Mundy and Roper's Contract* (3), and says ([1917] 1 Ch. at p. 229):

"It was argued that here there was no tenant for life, the limitation in the settlement being to the plaintiff in fee. If the limitations had been on the death of the father to the son for life and then to any jointress and portioners appointed under the power given to the plaintiff by the settlement with remainder to the plaintiff in fee, the case would have been precisely within the decision in *Re Marshall's Settlement*, *Marshall v. Marshall* (1). But it is said, and said truly, in that case the settlor was given a life tenancy in terms, and that the decision turns upon that. It seems to me that there are two answers to that argument—first that the powers given by the Act do not depend upon the intention of the settlor, so that whether he calls a limitation a limitation for life or whether upon death a fresh limitation is introduced can be of no importance; and, secondly, that s. 2 (5) is explicit upon the point, for it defines a tenant for life not as one so called, but as the person who is for the time being under a settlement entitled to the possession of settled land for his life. It is clear here, I think, upon the authorities that, although he is entitled under the words of the settlement to the settled land in fee, other estates are or may be let in at his death, thereby reducing his immediate estate to an estate for life."

In that way he was enabled to arrive at the conclusion, not only that it was settled land, but that there was a tenant for life of that settled land.

Those are the only authorities that have been cited to me as bearing on the point with which I have to deal, and, in my opinion, they do not in any way support the proposition that, where land is vested in a person in fee simple subject to a jointure rentcharge or portions vested in possession, the land stands limited to or in trust for any persons in succession within the meaning of those words in s. 2 (1) of the Settled Land Act, 1882. I therefore arrive at the conclusion that at the time when the Act of 1925 came into force, that is to say, under the old law, this land was not settled land, but that it was merely land vested in somebody in fee simple subject to an existing family charge. I must now turn to the Act of 1925 for the purpose of ascertaining in whom the legal estate in the Highclere estate ought to be vested. For it admittedly became settled land when that Act came into force by reason of the provisions of s. 1 (1) (v). Now who is the tenant for life? Section 19 says he is "The person of full age who is for the time being beneficially entitled under a settlement to possession of settled land for his life." Having regard to the words of s. 1 (1), the settlement must here mean the instrument whereby the land stands charged for the time being. But in this case the only instrument by virtue of which the property is charged is the settlement made on June 25, 1895; it does not, at any rate, include the agreement to sell to the company, which did not in any way charge or operate to charge the property, with the family charge. There is nothing, therefore, in s. 1 (1) to suggest that in a case like this the settlement includes the conveyance or agreement to convey to the corporation. But neither Lord Carnarvon nor the company appears to me to be a person who under s. 19 (1) is beneficially entitled under the settlement to possession of the settled land for life. The company, for the

A reason I have given, are not entitled under the settlement at all, and Lord Carnarvon does not appear to me to be that person, because he is not entitled, as I understand the words, for life; he is entitled for a great deal more than his life. I think the words "for life" in this section mean for life and not for a greater interest. Section 19 (1) appears to me to have no application to the matter. I turn to s. 20, and in sub-s. (1) I find:

B "Each of the following persons being of full age shall, when this estate or interest is in possession, have the powers of a tenant for life under this Act (namely) . . . (ix) A person beneficially entitled to land for an estate in fee simple or for a term of years absolute subject to any estates, interests, charges or powers of charging, subsisting or capable of being exercised under a settlement."

C The charge arose under the settlement of June 25, 1895, and the person who is beneficially entitled to the land for an estate in fee simple subject to the charge created by the settlement, is, in my opinion, the company.

I, therefore, come to the conclusion that this property is settled land by virtue and by virtue only of s. 1 (1) (v) of the Settled Land Act, 1925, and that by virtue of s. 20 (1) (ix), the company has the powers of a tenant for life and is therefore the tenant for life for the purposes of the vesting deed.

Orders accordingly.

Solicitors: *Frere, Cholmeley & Co.*

[*Reported by J. S. SCRIMGEOUR, Esq., Barrister-at-Law.*]

JAGGER v. JAGGER

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hill, J.), December 21, 1925, January 18, 20, February 18, 1926]

[COURT OF APPEAL (Lord Hanworth, M.R., Scrutton and Sargant, L.JJ.), March 22, 1926]

[Reported [1926] P. 93; 95 L.J.P. 83; 135 L.T. 1; 42 T.L.R. 413; 70 Sol. Jo. 503]

Divorce—Maintenance of wife—Security—Assignment by husband of property before order—Power of court to set aside—Injunction to restrain dealings by husband with his property.

H On Nov. 24, 1924, the wife obtained a decree absolute for the dissolution of her marriage. On December 1 she filed a petition for permanent maintenance. On July 1, 1925, an interim order for maintenance was made. On July 23 the husband, who had no capital, executed an assignment to trustees of substantial sums due or accruing to him under certain contracts, this assignment being expressed to be in consideration of an intended marriage which in fact took place later. On November 18 the registrar made an order for the annual payment to the wife of £550, the husband to secure for her a further £150 a year. The husband having contended that nothing should be directed to be secured as he had no property on which a payment could be secured, the wife contended that so far as necessary to effect security the court should set aside the assignment made by the husband on July 23, 1925.

I Held: the court had no power, either inherent or conferred on it by statute, to set aside the assignment, for at the date when the husband made it no final order had been made against him and he was free to do what he liked with his property.

Per HILL, J.: On the making of the interim order on July 1, 1925, I think an injunction might have been granted, but none was applied for, and on July 23, when the property was assigned, the power of the court to act by injunction was gone.

Notes. Applied: *Scott v. Scott*, [1950] 2 All E.R. 1154. Considered: *Wright v. Wright*, [1954] 1 All E.R. 707. Referred to: *Fanshawe v. Fanshawe*, [1927] P. 238; *Gilbert v. Gilbert and Boucher*, [1928] P. 1.

As to permanent maintenance, see 12 HALSBURY'S LAWS (3rd Edn.) 430 et seq.; and as to restraining dealing with property by injunction, see *ibid.*, 477, 478. For cases see 27 DIGEST (Repl.) 611 et seq., 683, 684.

Cases referred to:

- (1) *Brown v. Brown* (1828), 2 Hag. Ecc. 5; 162 E.R. 766; 27 Digest (Repl.) 489, 4272.
- (2) *Newton v. Newton* (1885), 11 P.D. 11; 55 L.J.P. 13; 34 W.R. 123; 27 Digest (Repl.) 684, 6533.
- (3) *Bellamy v. Sabine* (1857), 1 De G. & J. 566; 26 L.J.Ch. 797; 30 L.T.O.S. 68; 3 Jur.N.S. 943; 44 E.R. 842, L.C. & L.J.J.; 40 Digest (Repl.) 179, 1426.
- (4) *Loraine v. Loraine and Murphy*, [1912] P. 222; 82 L.J.P. 29; 107 L.T. 363; 28 T.L.R. 534; 56 Sol. Jo. 687, C.A.; 27 Digest (Repl.) 638, 6003.
- (5) *Constantinidi v. Constantinidi and Lance*, [1904] P. 306; 73 L.J.P. 91; 91 L.T. 273; 20 T.L.R. 573; 48 Sol. Jo. 571, C.A.; 27 Digest (Repl.) 661, 6251.
- (6) *Noakes v. Noakes and Hill* (1877), 4 P.D. 60; 47 L.J.P. 20; 39 L.T. 47; 26 W.R. 284; 27 Digest (Repl.) 641, 6038.
- (7) *Twentyman v. Twentyman*, [1903] P. 82; 72 L.J.P. 36; 88 L.T. 571; 51 W.R. 575; 47 Sol. Jo. 354; 27 Digest (Repl.) 621, 5801.
- (8) *Burmester v. Burmester*, [1913] P. 76; 82 L.J.P. 54; 108 L.T. 272; 29 T.L.R. 323; 57 Sol. Jo. 392; 27 Digest (Repl.) 626, 5872.
- (9) *Hanbury v. Hanbury*, [1895] A.C. 417; 72 L.T. 480; 11 R. 302, H.L.; 27 Digest (Repl.) 619, 5783.
- (10) *Newton v. Newton*, [1896] P. 36; 65 L.J.P. 15; 12 T.L.R. 65; 27 Digest (Repl.) 626, 5871.
- (11) *Sidney v. Sidney* (1867), 17 L.T. 9; 27 Digest (Repl.) 626, 5869.
- (12) *Blenkinsopp v. Blenkinsopp* (1849), 12 Beav. 568; affirmed (1852), 1 De G.M. & G. 495; 21 L.J.Ch. 401; 18 L.T.O.S. 324; 16 Jur. 787; 42 E.R. 644, L.J.J.; 25 Digest 201, 396.
- (13) *Bulmer v. Hunter* (1869), L.R. 8 Eq. 46; 38 L.J.Ch. 543; 20 L.T. 942; 25 Digest 170, 151.
- (14) *Barned's Banking Co., Ex parte Thornton* (1866), 2 Ch. App. 171; 36 L.J.Ch. 190; 15 L.T. 523; 15 W.R. 292.

Motion by wife to vary order for maintenance.

A wife obtained a decree absolute for the dissolution of her marriage on Nov. 24, 1924, and on Dec. 1, 1924, she filed a petition for permanent maintenance. There was one child of the marriage. The husband was a sculptor and had derived considerable sums of money from his professional work in connection with war memorials. On April 1, 1925, he filed an answer to the petition for permanent maintenance, and on July 1, 1925, an interim order was made against him to pay £600 a year for the maintenance of the wife and child. On July 23, 1925, the husband executed an assignment to trustees of the bulk of the money then in, or shortly to come into, his possession in respect of his war memorial contracts. The assignment was expressed to be in consideration of his intended marriage to a second wife. Of this money £1,500 was to be held by the trustees on the terms of another indenture of the same date (which directed that the £1,500 should be held in trust to satisfy any claims upon the settlor in respect of his first wife's maintenance during the ensuing three years), but the remainder, and

A by far the larger part, of the fund was assigned on trusts to satisfy certain claims, and, as to the balance, to pay half the income thereof to the second wife for life, for her separate use without power of anticipation during any coverture, with further dispositions as to the other half of the income. The intended marriage took place. On Nov. 23, 1925, the interim order for £600 a year was replaced by a final order for payment of £550 a year to the first wife, plus £150 a year to **B** be secured to her, together with a payment of £100 a year for the child. The wife then gave notice of motion to vary the final order so that the sum to be secured should be £250, instead of £150, and she prayed for a declaration that the assignment of July 23, 1925, was null and void in so far as might be necessary to enable the larger sum to be secured. The husband gave notice of motion to vary the registrar's order so that no portion of the £700 a year for the wife should be **C** secured.

W. O. Willis, K.C., and H. B. D. Grazebrook with him, for the wife, referred to *Brown v. Brown* (1), *Newton v. Newton* (2), *Bellamy v. Sabine* (3), *Loraine v. Loraine* and *Murphy* (4), *Constantinidi v. Constantinidi* and *Lance* (5), *Noakes v. Noakes* and *Hill* (6), *Twentyman v. Twentyman* (7), *Burmester v. Burmester* (8).

D D. Cotes-Preedy, K.C., and P. B. Morle, for the husband, also cited *Hanbury v. Hanbury* (9).

Cur. adv. vult.

Feb. 18. **HILL, J.**, read the following judgment.—On Nov. 24, 1924, the wife obtained a decree absolute for the dissolution of her marriage. There is one child of the marriage. On Dec. 1, 1924, the wife filed a petition for permanent maintenance, and on April 1, 1925, the husband filed an answer. On July 1, 1925, an interim order for permanent maintenance was made at the rate of £600 a year for the wife and child, and an order for discovery was also made. There was a summons for further time on July 14, 1925, and on July 22, 1925, the husband filed an affidavit of documents. On July 23, 1925, the husband executed an assignment to trustees of the bulk of his property. He had, apparently, no capital, except a small quantity of furniture. He was a sculptor, and had carried **E** out, or was carrying out, two contracts for the erection of war memorials, a contract with the Royal Artillery Commemoration Fund, dated Mar. 17, 1922, as modified by a contract dated June 4, 1923, and the other for erection of a war memorial in Egypt. There were large sums, amounting to several thousand pounds, due or accruing to him under these contracts. Such moneys, when **G** received, would represent income of the year or years in which they were received. He was about to marry again. He assigned to the trustees the benefit of these contracts and the furniture. The assignment was expressed to be in consideration of the intended marriage, and the marriage was in fact celebrated. On Nov. 18, 1925, the registrar made an order for the annual payment of £550 for the wife and £100 for the child, and ordered the husband to secure a further £150 a year **H** for the wife. Neither the wife nor the husband challenges this total of £700 for the wife. Each attacks the order for security. The wife says £250 should be secured. The husband says nothing should be directed to be secured, for he has no property whereby anything can be secured. The wife asks that so far as necessary for effecting security the court should set aside the assignment by the husband made on July 23, 1925. Unless that can be done, and unless part of the **I** moneys received, or to be received, under the contracts are to be treated as belonging to the husband, he has no property whereby security can be given, and it is idle to order security.

I am unable to find any power in the court to vary or set aside an assignment made in the circumstances of this case, even though its effect be entirely to prevent a wife making a good claim for security. I was not referred to any statute which gives the court that power, nor to any case which shows that such a power is inherent to the court. The cases cited mainly turned on the question whether an injunction can be granted to restrain the husband parting with property in

such a way as to defeat a wife's claim to alimony pendente lite or permanent maintenance; and the effect of those cases is that an injunction can be granted after an order for alimony or maintenance, and cannot be granted before order made. That I take to be the effect of *Newton v. Newton* (2), *Newton v. Newton* (10), *Twentyman v. Twentyman* (7), and *Burmester v. Burmester* (8); and, among other cases, *Sidney v. Sidney* (11). If and so far as *Noakes v. Noakes and Hill* (6) is to the contrary, SIR JAMES HANNEN, in *Newton v. Newton* (2) himself treated it as no authority. I fail to see how these cases are any authority for saying that where a husband has parted with his property the transaction can be set aside. Upon the making of the interim order on July 1, 1925, I think an injunction might have been granted, but none was applied for, and on July 23, 1925, the property was assigned and the power of the court to act by injunction was gone.

Counsel for the wife referred me to the general principle that property the subject of a *lis pendens* cannot be dealt with while the *lis* is *pendens*. He cited *Bellamy v. Sabine* (3), *Lorraine v. Lorraine and Murphy* (4), and *Constantinidi v. Constantinidi and Lance* (5). But in a petition for maintenance there is no dispute as to the rights to the property of the husband. In *Lorraine v. Lorraine and Murphy* (4), and in *Constantinidi v. Constantinidi and Lance* (5) the *lis pendens* related to the property settled. This principle seems to me not to touch the matter now in question. I was referred also to *Brown v. Brown* (1). All it decides is that if a husband with the object of avoiding an order for alimony pendente lite divests himself of all his property, an order may be made as if the property were still his. And I can well suppose that if the husband, against whom an order for payment has been made based upon his income in 1922-3-4, should in some later years apply to reduce the amount, on the ground that he received no income in 1925-6, he will not be allowed to say that, if, in 1925, he voluntarily assigned his prospective income for 1925 and 1926. It may well be that he will be treated as having received that income. But this does not help me to say that this assignment can be set aside.

I have further considered whether I can treat the assignment as within the statute of Elizabeth (13 Eliz. 1, c. 5) [dealing with fraudulent conveyances: repealed by Law of Property Act, 1925, and replaced by *ibid.*, s. 172: see 20 HALSBURY'S STATUTES (2nd Edn.) 427], and in this connection I have considered the cases of *Blenkinsopp v. Blenkinsopp* (12) and *Bulmer v. Hunter* (13). I have considered these cases with the more care because in *Blenkinsopp v. Blenkinsopp* (12) the assignment appears to have been made before any order for alimony (though the decision is not so treated in *Barned's Banking Co., Ex parte Thornton* (14) (2 Ch. App. at p. 176). But in *Blenkinsopp v. Blenkinsopp* (12) the assignment was voluntary. In the present case it was in consideration of the second marriage. And in *Bulmer v. Hunter* (13), though there was a second marriage and the assignment was expressed to be in consideration of it, yet it was found that both the marriage, which was between parties who had been living together as husband and wife for a long period, and the assignment, were with the object of defeating creditors. In that case it is said that

"a marriage got up with the object of defrauding a man's creditors, where the intended wife is a party to the fraud, will not be supported": *Bulmer v. Hunter* (13) (L.R. 8 Eq. at p. 61).

There "the wife was implicated in the matter, and the court will not allow such an attempt at fraud to prevail." There is no pretence for saying in the present case that the second marriage was other than genuine or that it had any ulterior motive.

I cannot set the assignment aside. Unless that assignment is set aside, it is not suggested that the husband has any property whereby payment can be secured. I, therefore, think that, upon the point in issue before me, the wife fails and the husband succeeds. I vary the order by ordering an annual payment of £700 for the wife, and £100 for the child, and by omitting the order for the security of

A £150. I should add, in the husband's favour, that the assignment does not show an intention to defeat the wife altogether, for £1,500 is set aside for fulfilment of his obligations to the wife during the ensuing three years. I wish it to be clearly understood that my decision in this case does not apply where the assignment is voluntary, i.e., voluntary on the face of it, or expressed to be for a consideration which is found to be a sham.

B The wife appealed.

W. O. Willis, K.C., and H. B. D. Grazebrook for the wife.

D. Cotes Preedy, K.C., and P. B. Morle for the husband.

Mar. 22. LORD HANWORTH, M.R., stated the facts and continued: It has been contended on behalf of the wife that the husband had by his voluntary act
C put it out of his power to give security for the maintenance of his (first) wife, by disposing of all his property and that it was a fraud on her. It was further contended that he had so acted at a time when the matter was before the court as to prevent his being able to comply with any order that the court might make and that such conduct on his part was contumacious. HILL, J., has given a carefully considered judgment in which he has dealt with the authorities, and I do
D not desire to do more than to say that I agree with his judgment. It must be remembered that a litigant is not entitled as a right to have his rights safeguarded before an order has been actually made on the principle of quia timet, and there is no disciplinary or statutory power in the court to prevent a respondent to a petition from doing what he likes with his property before an order for maintenance has been made. SIR JAMES HANNEN dealt with the matter in *Newton v. Newton* (2). In that case it was held that the court would not, in order to protect
E a wife's right to alimony, restrain a husband from removing his property out of the jurisdiction of the court before an order for alimony had been made. SIR JAMES HANNEN, after referring to *Sidney v. Sidney* (11) and *Noakes v. Noakes and Hill* (6), and pointing out that in the former case there was, as there was not in the case before him, a subsisting order for the payment of the annuity, said:

F "No other authority having been cited, and as I have myself been unable to find any other authority in support of the proposition advanced on the part of the petitioner, I come to the conclusion that as it has been decided that the Judicature Act does not give any enlarged powers to the court in this respect, it is not competent for a court, merely quia timet, to restrain a respondent
G from dealing with his property."

He, accordingly, dissolved the injunction that had been granted in that case. Those cases have recently been considered in *Burmester v. Burmester* (8), and it was there held that the court upon a petition for permanent maintenance, and before any specific sum had been made payable by a subsisting order, had no power to grant an injunction, at the instance of a wife, restraining the husband
H from dealing with property which might be ultimately affected under a petition for permanent maintenance, and that the same principle applied to an application for permanent alimony. In that case SIR SAMUEL EVANS dealt with *Newton v. Newton* (2), and held himself bound by it. In the present case no application was made by the wife for an injunction at the time she applied for the interim order for maintenance. It is clear, therefore, on the authority of *Newton v. Newton* (2) and *Burmester v. Burmester* (8), that no order can be made in respect of the husband in dealing with his property four months before the order made by the registrar for permanent maintenance. It is of importance to observe that the present case comes before us on appeal from the Probate and Divorce Division, and I do not overlook the possibility of a very different position if the matter came before the court in bankruptcy, by reason of the failure of the husband to pay any of the instalments due to the petitioner. For these reasons I think that the order of HILL, J., was right, and that this appeal must be dismissed with costs.

SCRUTTON, L.J.—I agree. I am not aware of any statutory or other power in the court to restrain a person from dealing with his property at a time when no order against him has been made.

SARGANT, L.J.—I also agree.

Appeal dismissed.

Solicitors: *Bartlett & Gregory; Boyce, Evans & Co.*

[*Reported by* HERBERT ROLFE, Esq., and G. P. LANGWORTHY, Esq.,
Barristers-at-Law.]

Re AUTOMATIC BOTTLE MAKERS, LTD. OSBORNE v. THE COMPANY

[COURT OF APPEAL (Lord Hanworth, M.R., Warrington and Sargant, L.JJ.),
January 13, 14, 27, 1926]

[Reported [1926] Ch. 412; 95 L.J.Ch. 185; 134 L.T. 517;
70 Sol. Jo. 402]

Company—Debenture—Floating charge—Series of debentures secured by floating charge—Special charging power reserved—Subsequent floating charge thereunder—Priority.

A company issued a series of debentures for £50,000 and executed a trust deed dated Jan. 15, 1925, by cl. 6 of which the company charged in favour of the trustees for the debenture holders its undertaking and assets for the time being with the payment of the debentures. Clause 6 further provided that the charge should be a floating security, "provided always that the company is not to be at liberty, save as hereinafter provided, . . . to create any . . . charge on such assets ranking *pari passu* with, or in priority to, the charge hereby created." Clause 7 provided that the company should "be at liberty to create such mortgages, charges or other incumbrances as the company shall think proper (*inter alia*) (c) by the deposit of any dock warrants, &c., or upon any raw materials . . . and stock for the purpose of raising money in the ordinary course of business of the company." A debenture dated Aug. 11, 1925, was issued to secure a sum of £12,000 advanced to the company in the ordinary course of the company's business by the P. Trust Co., it being stated to be issued in pursuance of cl. 7 of the trust deed and to be a first charge on the dock warrants, &c., of the company to rank in priority to the floating charge created by the trust deed, and to be a floating security.

Held: the August debenture was valid, and was effective to give its holders priority, in respect of the assets thereby charged, over the trustees of the January deed, because a general floating charge was not necessarily incompatible with the subsequent creation, under a reserved special charging power, of a floating charge over specified assets to rank in priority to or *pari passu* with the general charge, and because the power under cl. 7 "to create such charges as the company shall think proper" enabled it to create a floating charge over the assets there specified.

Re Benjamin Cope & Sons, Ltd., Marshall v. The Co. (1), [1914] 1 Ch. 800, explained, approved and distinguished.

Notes. As to the effect of a floating charge, see 6 HALSBURY'S LAWS (3rd Edn.) 473; as to priorities of debenture holders, see *ibid.* 481; and for cases see 10 DIGEST (Repl.) 774-781 and 790-793 respectively.

A Cases referred to :

- (1) *Re Benjamin Cope & Sons, Ltd., Marshall v. The Co.*, [1914] 1 Ch. 800; 88 L.J.Ch. 699; 110 L.T. 905; 58 Sol. Jo. 432; 21 Mans. 254; 10 Digest (Repl.) 791, 5138.
- (2) *Illingworth v. Houldsworth*, [1904] A.C. 355; 73 L.J.Ch. 739; 91 L.T. 602; 53 W.R. 113; 20 T.L.R. 633; 12 Mans. 141, H.L.; 10 Digest (Repl.) 770, 5008.
- (3) *Smith v. English and Scottish Mercantile Investment Trust, Ltd.* (1896), 40 Sol. Jo. 717; 10 Digest (Repl.) 791, 5137.

B

Appeal from a decision given on Dec. 5, 1925, by the Vice-Chancellor of the County Palatine of Lancaster.

C

The defendant company was incorporated on Jan. 17, 1923, for the purpose of acquiring and taking over a certain business of glass bottle manufacturers carried on at Trafford Park, Manchester, and to carry on the business so acquired and generally to carry on business as glass manufacturers, bottle makers, and makers of and dealers in all kinds of glass ware, glass vessels, and articles and other similar businesses specified in the memorandum of association. In January, 1925,

D

the company resolved on the issue of a series of debentures for an aggregate sum of £50,000 charged by way of floating security on the undertaking and assets of the company, and executed a trust deed dated Jan. 15, 1925, for the purpose of securing those debentures. The company thereby created a specific mortgage in favour of the trustees on certain freehold hereditaments, and, in addition, a general charge on its undertaking and assets. Clauses 6 and 7 refer to this general charge and are in the following terms. Clause 6

E

“charged in favour of the trustees, its undertaking, and its other assets for the time being, both present and future, with the payment of the debentures and the interest thereon and premiums and all other moneys intended to be thereby secured.”

It was further provided that such charge should be a floating security.

F

Clause 6 also contained the following proviso :

“Provided always that the company is not to be at liberty, save as hereinafter provided, or except in accordance with the provisions of these presents, to create any mortgage or charge on such assets ranking *pari passu* with, or in priority to the charge hereby created.”

G

The terms of cl. 7, so far as relevant, were as follows :

“The company shall be at liberty to create such mortgages, charges, or incumbrances as the company shall think proper upon such property, and for such amounts and purposes as are next hereinafter mentioned: . . . (c) By the deposit of any dock warrants, bills of lading or other similar commercial documents, or upon any raw materials or finished or partly finished products and stock for the purpose of raising moneys in the ordinary course of the business of the company.”

H

It is on the construction of these clauses that the question turns.

Purporting to act on the liberty conferred by cl. 7 (c), the company executed the debenture of Aug. 11, 1925, in favour of trustees for their bankers, Williams Deacons Bank, Ltd., for the sum of £12,000 and interest. By that document the

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company charged with the said sum of £12,000 and interest all its dock warrants, bills of lading or other similar commercial documents, raw materials, finished and partly finished products, and stock, both present and future, and by the conditions forming part of the debenture it was provided, amongst other things, that it was issued in pursuance of the powers in that behalf given to the company by cl. 7 (c) already cited. It was to be a first charge on the dock warrants, bills of lading, or other similar commercial documents, raw materials, finished or partly finished products, and stock of the company, both present and future, and it was to rank in priority in all respects to the floating charge created by the trust deed, and to

the debentures for the time being thereby constituted and secured; it was to be a floating security not hindering any sale or other dealing by the company in the ordinary course of business with the property and assets comprised in the charge. A

Of the sum of £12,000 purported to be created by this debenture two sums of £5,000 had already been advanced on July 7, 1925, and July 23, 1925, by a company, called the Parent Trust and Finance Co., Ltd., in contemplation of the loan from the bank and on an undertaking by the company to repay the sum out of the proceeds of the loan. These sums have been duly repaid accordingly. The loan from the bank was guaranteed by the Parent Trust and Finance Co., Ltd. They have paid to the bank all moneys due to them, and the debenture has been transferred to the Parent Trust and Finance Co., Ltd., or to trustees for them, and they are now entitled to the benefit of the security thereby created. B

The security created by the trust deed having become enforceable the present action was begun on Aug. 17, 1925, by the trustees for the realisation of their security, and on Aug. 19 a receiver was appointed in the usual form, the order being originally made ex parte as a temporary order, and afterwards as a permanent order on Aug. 25, 1925. Judgment in the action was obtained on Aug. 26, 1925. A creditor's petition for winding-up was presented on the same day and the company has since been ordered to be wound-up. C

On Oct. 15 the applicants, the present appellants, served on the plaintiffs in the action and the Official Receiver a notice of motion asking for a declaration that the applicants, the present holders of the debenture of Aug. 11, are entitled to a charge on the raw materials, finished and partly finished products, and stock of the defendant company in priority to the charge of the plaintiffs and for consequential relief. The motion was heard on Dec. 5, 1925, by the Vice-Chancellor, who dismissed the motion. D

The applicants, the holders of the second debenture, now appealed. E

Alexander Grant, K.C., and *J. Bennett* for the applicants.

Cyril Atkinson, K.C., and *J. M. Easton* for the respondents, the trustees of the first series of debentures.

The arguments will be found sufficiently outlined in the three judgments. F

Cur. adv. vult.

Jan. 27. The following judgments were read.

LORD HANWORTH, M.R., stated the facts and continued: The question to be determined in this appeal thus is whether the company had the power to issue such a debenture in view of the restrictions imposed upon it by cls. 6 and 7 of the trust deed. It is a question of the right construction of the proviso to cl. 6 and the terms of cl. 7, and in particular its sub-cl. (c). G

Both debentures are floating securities; and it is agreed that to issue another debenture similar in character to that prior in date is in effect to undermine and to destroy the benefit of the charge created by the earlier security, and that if successive debentures were issued of a like nature, all the property charged under the first debenture might be, piece by piece, removed. In support of this argument reliance is placed on a decision given by SARGANT, J., in *Re Cope & Sons, Ltd.*, *Marshall v. The Co.* (1), where he decided that a company, making its bargain with the first debenture holders, cannot give a charge over the same assets which puts later chargees on the same or a prior footing to those who have already got their charge. There is, no doubt, force in this argument, but we have to consider the effect of the exception made in terms to cl. 6 of the trust deed. H

No doubt it was realised that in the course of carrying on its business, which the floating charge of Jan. 15, 1925, was intended to enable it to do, the company might find it necessary to raise money in particular transactions. Hence the exception to cl. 6 and the provisions made in cl. 7. Those contained in sub-cl. (a) and (b) refer to particular acquisitions which might in ordinary course require the company to raise money for their completion. Similarly in sub-cl. (c) the deposit I

- A of dock warrants, bills of lading, and other commercial documents is contemplated as an operation common in the ordinary course of a mercantile transaction. There follow the words "upon any raw materials, finished or partly finished products, &c.," which may involve a lock-up of present assets, and the company may need to charge them if its business is not to be brought to a deadlock. The purpose of making a charge a floating security is to enable it to carry on its business in its ordinary way (see *Illingworth v. Houldsworth* (2)); and the powers of a trading company include the power to mortgage by deposit, nor does a mortgage to debenture holders prevent a valid charge being given on a specific asset. In the present case it appears clear from the terms of cls. 6 and 7, and especially the opening lines of cl. 7, that the company was to be free to create charges of any nature that it thought proper upon the classes of assets mentioned in sub-cl. 7 (c) for the purpose of raising moneys in the ordinary course of business. The Vice-Chancellor's judgment appears to hold this power to be limited to raising money upon and in close relation to the assets charged and by a specific, as opposed to a floating charge upon them. This interpretation appears to hamper the company's activities and to render it impossible to raise money, which may be as vital to its existence and continuance as the particular sale or purchase transaction in respect of which he thinks that a specific charge may be given—such as for the payment of wages or rent, the purchase of coal, or the payment for the electric current required to keep the furnaces and power in operation. A glance at the cash summary, July 7 to 31, 1925—being exhibit "C" to an affidavit before us—will show the cogency of these matters. The need of the company—if it is to carry on its work which results "in finished or partly finished products and stock"—is as great under the latter head as under the earlier. I cannot see any need to restrict the interpretation of sub-cl. (c) as suggested. The covering words in cl. 7 give the company "liberty to make such mortgages, charges, or incumbrances as the company shall think proper." I cannot read these wide words as restricting their discretion to specific charges only as opposed to floating charges. The whole purpose of the exceptions in cl. 6 and cl. 7 is to give latitude to the company to carry on its business, while the decision given restricts that latitude, and, by restricting the exception to specific charges on specific goods, lays down a narrow course for the company to follow which would deprive it surely and increasingly of any means to raise finance for its source of power and primary needs.

The argument for the respondents appears to be based on a reading of the decision of SARGANT, J., already referred to, which it does not bear. There was not in that case an exception in respect of particular securities, but the charge was on the same securities as those already subject to the earlier debenture. The Vice-Chancellor's decision does not, in my opinion, give sufficient effect to the terms of cl. 7, which appears to have been carefully drawn to meet the necessities of the company within limits allowed by law.

- H The appeal will be allowed with costs here and below, and a declaration made in the terms of the notice of motion as to (a), (b), and (c) therein.

WARRINGTON, L.J.—In January, 1925, the defendant company issued a series of debentures for an aggregate sum of £50,000, charged by way of floating security on the undertaking and assets of the company. In August, 1925, the company created a single debenture for £12,000, charged by way of floating security upon a specific part of its assets, and gave to this debenture priority over the original series of debentures. The question in this appeal is whether the provision as to priority was effective. The question turns on the true construction of the trust deed, and in particular on cls. 6 and 7 thereof, by the latter of which express power was conferred on the company of creating such charges as are therein mentioned to rank in priority to the debentures for £50,000. The learned judge has decided against the contention of the holders of the debenture for £12,000—hence this appeal.

The facts are as follows: [His Lordship then stated the facts, and continued:]

Before the learned judge the appellants' claim was resisted on two main grounds. A
First, that the security in question was not within the class of securities authorised
by cl. 7 of the trust deed according to its true construction, and, secondly, that
even if it were, the charge was not created for the purpose of raising money in the
ordinary course of the business of the company. The first contention obviously
raises merely a question of law depending on the true construction of the deed. B
The second is, in the main, a question of fact, though the precise meaning of the
words "in the ordinary course of the business of the company" may be a question
of law. This point has been decided by the Vice-Chancellor in favour of the
applicants after consideration of the evidence and hearing the examination and
cross-examination in open court of some of the witnesses. I will assume that "in
the ordinary course of the business of the company" should be construed in a
commercial sense, viz., in the ordinary course of carrying on the manufacturing C
and commercial transactions the object of its incorporation, but construing the
words in this narrow sense, I am clearly of opinion that the finding of the Vice-
Chancellor was right. It is made quite clear, especially by the document at p. 59
of the bundle of papers furnished to us, being exhibit C to an affidavit of Mr. G.
Du Cros of Nov. 5, 1925, that the money was required for, and was expended in,
the discharge of current business liabilities of the company. The learned judge has D
found, and this is a pure question of fact, that the transaction was a bona fide one,
and there is no reason for interfering with his finding. This point of attack there-
fore fails.

I now turn to the construction of the deed. It is, of course, well settled that
by creating a charge on its assets generally by way of floating security the company
are not, in the absence of any stipulation to the contrary, prohibited from creating E
specific charges on specific portions of their assets in the ordinary course of business,
as otherwise they would be prevented from effectually carrying on that business,
the carrying on of which was contemplated by the parties to the security. Clauses 6
and 7 of the trust deed have the effect of excluding this rule of law so far as
mortgages or charges are concerned except as provided by cl. 7, and thus to allow,
and allow only, in priority to, or *pari passu* with, the debenture, charges created F
in accordance with such provisions. I now turn to the material words of the clause.
It gives liberty to the company to create such mortgages, charges, or incumbrances
as the company shall think proper upon such property and for such amounts and
purposes as are next thereafter mentioned, but not for any greater amounts or
for any other purpose; and then provided, by sub-cl. 7 (c), that the permitted
charge may be effected by deposit of commercial documents or upon any raw G
materials or partly finished products or stock for the purpose of raising money
in the ordinary course of the business of the company. In my opinion the true
effect of this provision is that the form and nature of the charge is by the force of
the expression "such charges as the company shall think proper" left to be deter-
mined by the company, the subject-matter of the charge and the purpose for which
the money is raised being determined by the provisions of the clause. In the H
present case the subject-matter of the charge is raw materials, finished or partly
finished products, and stock, and its purpose that of raising money in the ordinary
course of the business of the company. It seems to me, therefore, that it is clearly
within the clause unless some good reason is given for excluding it. The only
reason suggested, other than the one I have disposed of, is that it is a floating
security. With all respect to the learned Vice-Chancellor, I cannot see the force I
of this objection. The authority given to the company, except as to subject-matter,
amount, and purpose, is unlimited, and I can find no good reason, in the absence
of express words to that effect, to limit it in the way suggested. It is true that the
commercial documents cannot be made the subject of a floating security because
they have to be actually deposited, but I cannot see why, by construction, the
same disability should extend to the other subject-matters which are in themselves
exempt from it.

It has, indeed, been contended that the true meaning of the clause is to authorise

- A** only such securities as, but for the general prohibition contained in cl. 6, would have been allowed under the general rules relating to floating securities, and it is further contended that no floating security, although on a portion only of the assets, would be allowed. The answer is, in my opinion, first, that there is no reason to be found in the expressions used for any such limitation of the company's authority, and to act on the assumption that the parties so intended would be to act on a mere guess. The parties had excluded the general rule so far as charges are concerned and were making a special bargain. To interpret this we must simply ascertain the meaning of the words used, and as to this I have already expressed my opinion.

- But in my judgment there is no authority for the proposition that no floating charge, though on a part only of the assets, would be allowed under the general law, and I am not prepared so to hold without authority. The only authority on which the respondents rely is *Re Benjamin Cope & Sons, Ltd., Marshall v. The Co.* (1), but in that case the subsequent charge was a charge of the same nature and over the same property as the original charge; that is to say, a floating security on the whole undertaking and assets of the company, and what the learned judge determined was that such a charge, comprising, as it did, the identical property covered by the original charge, was not authorised by a provision in the trust deed authorising the company, in the course of its business and for the purpose of carrying on the same, to deal with its property as it might think fit, and in particular to sell and mortgage the same or any part thereof. I think the learned judge makes it quite clear that it was the fact that the charge in question covered the whole of the property included in the original charge, which, in his opinion, prevented it from ranking *pari passu* with the latter; see particularly the passage ([1914] 1 Ch. at p. 807) beginning

- "and, generally speaking, it would, in my view, be as incompatible with the company's bargain with the first debenture holders to put their debentures behind or on the same footing as subsequent debentures giving a charge of the same character as if the debentures had constituted a specific charge and it were then attempted to create a subsequent specific charge ranking *pari passu* with them or in priority to them."

- He is comparing one pair of charges with another pair and saying they were on the same footing in respect of the point in question. There would be no point in this comparison unless the property comprised in each of the first pair were identical with each other, as it certainly is in the case of the second pair.

- G** On the whole I am of opinion that the appeal should be allowed and an order made substantially in accordance with the notice of appeal, omitting the alternative provision (d).

- SARGANT, L.J.**—The first objection to the applicant's security, and that which has been accepted by the learned Vice-Chancellor, is that on the true construction of the trust deed of Jan. 15, 1925, cl. 7 does not authorise a mortgage or charge by way of floating security on the company's dock warrants, bills of lading or other commercial documents, raw materials, finished and partly finished products, and stock present and future. To determine this question it is essential in the first place to examine and interpret the terms of the trust deed itself. It is only after this has been done that it is permissible to refer to or consider the authority of any reported case.

I On taking this step, it is obvious that cl. 7 of the trust deed is an independent, substantive clause not merely operating by way of exception to the proviso to cl. 6, but applying to the whole of that clause, and that the purpose and effect of cl. 7 are to reserve to the company a power with regard to certain classes of its property to create incumbrances in priority to the general floating charge given by cl. 6 on the whole of the undertaking and property of the company. Any such prior charges can only be given on the particular classes of property mentioned in sub-cl. (a), (b), and (c) of cl. 6, and are not to be for any greater amounts or for any other

purposes than those respectively specified in those sub-clauses. But, within these limits, the mortgages, charges, or incumbrances may be such as the company shall think proper. It is not immaterial at this point to make two observations. In the first place the classes of property that may be charged are portions only of the property of the company, and do not include the general undertaking or goodwill of the company, or such valuable classes of property as the machinery or tools used in the company's business, or the book-debts for the time being owing to the company. And in the next place the object of cl. 7 obviously is to enable the company to give a good title to third parties, namely, intending mortgagees or chargees; and the terms of the power should not be read in an unduly restricted spirit, or otherwise than in accordance with the ordinary commercial meaning of the words used.

If, then, the matter is regarded on these lines, is there any valid objection to the form or effect of the debenture of Aug. 11, 1925? The assets comprised in it are precisely those mentioned in sub-cl. (c) of cl. 7 of the trust deed as assets which may be charged by way of floating security. I can see no *prima facie* reason to doubt that the words of cl. 7, giving the company power to create such mortgages, charges, or incumbrances as they should think proper, enabled them to choose the form of a floating charge, should that be the form that they should find suitable to satisfy an intending mortgagee. Indeed, in the case of such essentially fluctuating property as raw materials or finished or partly finished products and stock, it is difficult to see how any effective charge could be given in any other form without paralysing the business of the company. It is to be noted that the same result would obtain if under sub-cl. (b) it were desired to give a charge on any undertaking thereafter acquired by the company, for such a charge must almost necessarily be of a floating character. No doubt, a particular dock warrant or bill of lading, as representing specific goods, is often deposited with or left in the hands of bankers or discounters as a security for moneys paid or advanced in regard to those specific goods; and it was sought to use this as an indication that the raw materials and other assets mentioned in the latter part of sub-cl. (c) could only be dealt with by way of a similar specific charge. But, in my judgment, this argument is unsound as ignoring the discretion as to the form of charge expressly given by the initial words of cl. 7, and also as failing to recognise that, under sub-cl. (b), also two classes of security can be given, namely, first, specific charges on the securities or shares of undertakings acquired by the company, and, secondly, a floating charge on the undertakings themselves. Further, the argument, when closely examined, appears to involve the limitation of each charge to the amounts required to finance the particular transaction with regard to the goods comprised in the charge, and was indeed carried to this extent in the argument of counsel for the respondents. But I cannot think that this is so, or that under the terms of sub-cl. (c) the company could not make a general charge to bankers or discount houses on the dock warrants or bills of lading for the time being in their hands to secure the general balance from time to time due from the company. The contrary view is too rigid and inelastic for the ordinary purposes of commerce. For smooth working, it seems to me essential that the power to charge should enable a general charge on the property represented by the documents from time to time in the hands of the company's bankers. In my view, this is even more clearly the case with regard to the materials and stock from time to time in the possession of the company. For, otherwise, it would be necessary to take stock at very short intervals, and to give a fresh substituted charge after each stocktaking.

Great stress has, however, been laid for the respondents on a decision of my own as a judge of first instance in *Re Benjamin Cope & Sons, Ltd., Marshall v. The Co.* (1), and it has been urged that this case decides that a general floating charge is necessarily incompatible with the subsequent creation under a special charging power of a floating charge to rank in priority to or *pari passu* with the earlier floating charge. I have examined that decision with great care, and have no reason to think it was wrong, particularly in view of the fact that it appears to

- A** be in accord with an earlier decision of VAUGHAN WILLIAMS, J., in *Smith v. English and Scottish Mercantile Investment Trust, Ltd.* (3), and not to have been questioned since. But the facts in that case were very different. There the original charge was on the whole undertaking and property for the time being of the company, and the reservation of a power to mortgage was in quite general terms; and it was held that such a power could not have been intended to authorise a
- B** competing charge upon the entirety of the property comprised in the earlier charge. Here the reservation of the power to mortgage is precise and specific in its terms, and extends only to certain particular classes of the property of the company.

- The second objection raised by the respondents to the applicants' mortgage was that it was not effected for the purpose of raising money in the ordinary course of the company's business. This objection was overruled by the learned Vice-
- C** Chancellor who had the advantage of seeing the witnesses on what was, to a great extent, a question of fact, and was satisfied as to the general bona fides of the transaction. The circumstance most pressed on us was the close proximity of the date of the applicants' mortgage to the date of the appointment of the respondents' receiver. But it is clear that the applicants' mortgage was given in pursuance of an arrangement made several weeks earlier, when the applicants made their first
- D** advance of £5,000. Though no doubt the company were in pressing need of money, this was precisely the reason why they resorted to their power of further mortgaging. Such a power is obviously superfluous in prosperous times, and to deny a resort to it in times of stress would deprive the power of most of its value. Nothing in the cross-examination that was called to our attention was sufficient, in my judgment, to displace the statement of Mr. George Du Cros, the chairman of the
- E** company, in his affidavit, viz.,

"I wish to make it quite clear that at this time I believed the company to be entirely solvent and I believed that the advance in question would enable the company to carry on comfortably and to meet its obligations as they fell due and I believed that the company had very good prospects indeed."

- F** In my judgment the appeal should be allowed with costs here and below.

Solicitors: *Guedalla, Jacobson & Spyer*, for *Taylor, Kirkman & Mainprice*, Manchester; *Hedley, Norris & Co.*, for *Vaudrey, Osborne & Mellor*, Manchester.

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

Re BUNN. DURBER v. BUNN

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Merrivale, P.), February 11, 12, 1926]

[Reported 134 L.T. 669]

Will—Revocation—Dependent relative revocation—Will destroyed in belief that valid later will made—Later will invalid for want of due execution.

Where a testator destroys his will in the belief that he has validly executed another will, but the second will fails for want of due execution, the doctrine of dependent relative revocation applies, and, therefore, the first will is not revoked and evidence may be given of its contents, even though the intention of the testator is thereby defeated.

Notes. Direct evidence of the physical destruction of the first will is not essential: *In the Estate of Botting, Botting v. Botting*, [1951] 2 All E.R. 997.

Referred to: *In the Estate of Botting, Botting v. Botting*, [1951] 2 All E.R. 997.

As to dependent relative revocation of wills, see 34 HALSBURY'S LAWS 89; and for cases see 44 DIGEST 361-365.

Cases referred to:

- (1) *Cooper v. Bockett* (1843), 3 Curt. 648; 2 Notes of Cases, 391; 7 Jur. 681; 163 E.R. 855; on appeal (1846), 4 Moo.P.C.C. 419; 4 Notes of Cases, 685; 10 Jur. 931; 13 E.R. 365, P.C.; 44 Digest 282, 1148.
- (2) *Blake v. Knight* (1843), 3 Curt. 547; 2 Notes of Cases, 337; 1 L.T.O.S. 208; 7 Jur. 633; 163 E.R. 821; 44 Digest 280, 1122.

Probate Action in which the plaintiff was the residuary legatee under the alleged last will, dated Aug. 7, 1923, of A. B. who died on June 20, 1925, and the defendant was the lawful widow and relict of the deceased. By her defence she pleaded undue execution of the alleged will and counter-claimed for letters of administration.

By the terms of the alleged will the whole estate, which was under £500, and largely realty, was given to trustees who were directed, after paying various expenses, to pay two-thirds of the residue to the plaintiff, or, if she were dead, to her children, whether legitimate or illegitimate, equally at age twenty-one, and the remaining one-third to a grandson of the deceased at age twenty-one, or if dead before that age, on the trusts as to the two-thirds. The plaintiff joined issue on the defence and disclosed an earlier will made in or about the year 1906 whereby she was made sole executrix and universal legatee and devisee. She pleaded that this will had been revoked by the will propounded in the action, but, alternatively, that if for any reason the will of 1923 was not entitled to probate, then that the will of 1906 was valid and subsisting, although it had been destroyed by the testator on the execution of the later will. In the substance of the case it was pleaded that the destruction of the 1906 will only operated to revoke the same in the event of the will propounded being valid and effectual. Evidence was given by a solicitor as to the preparation of the later will on the deceased's instructions, as to the deceased's testamentary capacity and as to the directions in writing given to the deceased to ensure that the execution of the will should be properly carried out. On the attesting witnesses being called, however, they failed to establish by their evidence either that the deceased had signed the will in their presence, or that they saw his signature, or that the document was acknowledged to them by the deceased as his will. Evidence was given on behalf of the plaintiff that the testator had been seen by him to burn the 1906 will at a date after the alleged execution of the 1923 will, throwing it on the fire and at the same time stating that it was "no good now." Another witness stated that he had seen and read the 1906 will many times, that, in substance, its contents were: "I leave my

A property to K.D." (the plaintiff), and that it was attested by a local solicitor and by the solicitor's clerk.

T. J. O'Connor for the defendant.

Noel Middleton, for the plaintiff, referred to *Cooper v. Bockett* (1) and *Blake v. Knight* (2).

B **LORD MERRIVALE, P.**—The testator's wife is the defendant in this case. The plaintiff propounds an alleged will of Aug. 7, 1923, and the defendant puts the plaintiff to proof of due execution. The plaintiff then alleges a will of 1906 in her favour and says that it was destroyed by the deceased on the supposition that the alleged will of 1923 was a valid and subsisting will, and that the destruction of the 1906 will only operated to revoke it if the 1923 will was valid and subsisting—in other words, that this is a case of dependent relative revocation. The deceased made his home with the plaintiff for many years and was estranged from his wife. It is established that the 1906 will was in the terms stated, that is, that it was in the plaintiff's favour; it was prepared by a solicitor and the attesting witnesses were that solicitor and his clerk. I am satisfied that it remained in being until after the alleged execution of the 1923 will. The circumstances illustrate the extreme folly, even in the case of a person of small means, of dispensing with skilled witnesses when a will is executed. The deceased left only about £500. In 1923 a change of circumstances had occurred in his family and he wished to benefit a grandson. He therefore went to a solicitor and produced to him the will of 1906; which attracted the solicitor's attention and impressed itself upon his mind because it was in a simple form given in PRIDEAUX's book of conveyancing forms. It is said that I ought to reject this evidence, but I entirely accept it. The solicitor drafted the 1923 will and gave the deceased explicit instructions as to the manner in which it should be executed and attested. The attesting witnesses, who did not appear to be qualified either by nature or training for the witness-box, failed to establish that the deceased signed the will in their presence, or that they saw his signature, or that the document was acknowledged to them by the deceased as his will. Counsel for the plaintiff argued that when a document is produced in correct form the court is at liberty to presume that the testator's signature was on it at the time when the attesting witnesses signed. That is not my view of the law. If those witnesses were lying, or if they had said they knew nothing, I could have made the presumption. But I am satisfied that they could not see the testator's signature, so I am not entitled to presume. They were attesting something about which they knew nothing. I regret that the intention of the testator is defeated, but the Wills Act prevails. The signature of the testator must be made or acknowledged in the presence of the attesting witnesses. I do not know judicially whether the signature was there or not. The solicitor who gave evidence at first felt confident of establishing the case for the 1923 will, and he had only a shadowy knowledge of the destruction of the 1906 will. Then he remembered a witness whom he had seen, but who was not then in court, who had made a declaration as to the destruction of the 1906 will. This morning three witnesses go into the box; two say that they saw the 1906 will burned and the third had a communication from the testator about it. The testator told them that he was destroying the old will because it was no longer of any use. The Wills Act does not prevent the continuance in being of the old will under those circumstances. I am satisfied that the old will remained in the possession of the testator for some time, and that when he thought he had a valid new will he destroyed the old one. I pronounce for the will of 1906 as contained in para. 6 of the defence and counterclaim, until an authentic copy thereof be found. The defendant will be allowed her costs out of the estate on any issue or issues on which she has succeeded. The plaintiff will take her costs out of the estate.

Solicitors: *Thorowgood, Tabor & Hardcastle*, for *Cooper & Co.*, Newcastle, Staffs.; *Ogill & Llewellyn*.

[Reported by HERBERT ROLFE, Esq., Barrister-at-Law.]

Re HEWITT. HEWITT v. HEWITT

[CHANCERY DIVISION (P.O. Lawrence, J.), April 15, 1926]

[Reported [1926] Ch. 740; 95 L.J.Ch. 300; 135 L.T. 319;
70 Sol. Jo. 607]

Will—Condition—Condition subsequent—Words of futurity—Reference to date of will—Income for life or “until she shall take the veil”—Veil taken after date of will before death of testator.

By his will, dated April 29, 1912, the testator directed his trustees to hold his residuary real and personal estate on trust to pay three-fiftieths of the income thereof to his niece during her life or “until she shall take the veil.” On Sept. 16, 1913, the niece made her profession in a Dominican convent, thereby taking the veil. The testator died on March 9, 1920. He was aware when he made his will that his niece contemplated taking the veil in a manner involving a vow of poverty.

Held: words of futurity used in a will were referable to the date of the will and not to the date of the testator's death unless a contrary intention was shown by the context in which the words were used; in the present case no such contrary intention was shown; and the words, therefore, referred to the niece taking the veil at any time after the date of the will and she was not entitled to the share of income.

Re Chapman (1) [1904] 1 Ch. 431; affirmed [1905] A.C. 106, distinguished.

Notes. Cf. *Re Feuteur, Cockerton v. Feuteur*, [1950] 2 All E.R. 1073, in which *Re Chapman* was applied.

As to the time to which a will refers, see 34 HALSBURY'S LAWS (2nd Edn.) 222, 223; and for cases see 44 DIGEST 534, 535.

Case referred to:

- (1) *Re Chapman, Perkins v. Chapman*, [1904] 1 Ch. 431; 73 L.J.Ch. 291; 90 L.T. 339; 52 W.R. 467, C.A.; affirmed sub nom. *Chapman v. Perkins*, [1905] A.C. 106; 74 L.J.Ch. 331; 92 L.T. 372; 53 W.R. 485, H.L.; 44 Digest 535, 3515.

Adjourned Summons.

The testator by his will, dated April 29, 1912, devised his Mangersbury estate to his trustees upon trust for his wife for life and subject thereto to the use of his first and other sons in tail male; he then devised and bequeathed the residue of his real and personal estate to his trustees upon trust to sell his real estate and certain securities therein stated and out of the proceeds to pay his funeral and testamentary expenses and the legacies thereby bequeathed and to invest the proceeds, and upon further trust to retain the residue of his personal estate upon the investments in which the same were invested at the time of his death, and directed his trustees to stand possessed of the residuary trust fund upon trust to pay three-fiftieths of the income thereof to his niece, Ethel Hewitt, during her life or “until she shall take the veil,” and to pay the rest of the income in certain proportions to his nephews and nieces, and wife and sister during their respective lives. And the testator directed that the income set free by the death or deaths from time to time of any of the persons to whom the income of his residuary trust fund had been bequeathed should form part of that fund, and declared that the trustees should stand possessed of the said fund upon trusts corresponding with or similar to the limitations thereinbefore contained in respect of his Mangersbury estate so far as the rules of law and equity would permit and as if the same were capital moneys arising from the sale of that estate under the Settled Land Acts. On Aug. 14, 1905, Ethel Hewitt was received into the Roman Catholic communion, and on Oct. 3, 1905, she went into a convent at Bruges. On Jan. 18, 1912, she entered the Dominican Convent at Stone, and entered upon her novitiate,

- A having previously informed the testator of her intentions. On April 29, 1912, the testator made his will. On Sept. 16, 1913, Ethel Hewitt made her profession, or, in other words, she took the veil. On Mar. 9, 1920, the testator died. This summons was issued by the testator's widow (who since his death had married again) as a trustee of the will and the tenant for life of the Mangersbury estate for the determination of the question, amongst others, whether in the circumstances Ethel
- B Hewitt was entitled during her life to the share of the income of the residuary trust fund bequeathed to her by the will.

C. E. E. Jenkins, K.C., and Alfred Adams for the plaintiff.

E. P. Hewitt, K.C., and R. G. Nicholson Combe for Ethel Hewitt.

- George P. Slade; Owen Thompson, K.C., and F. D. Morton; C. J. W. Farwell, K.C., and C. R. R. Romer, for defendants interested to contend that Ethel Hewitt*
- C was not entitled to the three-fiftieths of the income of the residuary trust fund, were not called upon to argue.

- P. O. LAWRENCE, J.—The testator at the date when he made his will was aware that his niece Ethel Hewitt contemplated becoming a professed nun, and that such a step would involve her taking a vow of poverty with the consequence
- D that she would thereby be deprived of any personal enjoyment of the bounty which the testator might bestow upon her by his will. With these matters in mind the testator made his will on April 29, 1912, and thereby directed his trustees to hold three-fiftieths of the proceeds of sale and conversion of his residuary real and personal estate on trust for his niece Ethel Hewitt during her life, or until she took the veil. On Sept. 16, 1913, Miss Ethel Hewitt made her profession in the
- E Dominican convent, and thereby took a step which the testator describes as taking the veil. The testator died on Mar. 9, 1920, and the question now arises whether Miss Ethel Hewitt is entitled for the rest of her life or until she should again take the veil, to the income of the three-fiftieths share of the testator's residuary estate.

- The solution of that question depends on whether the words of futurity which the testator has used speak from the date of the making of his will or from the
- F date of his death. The primary meaning of words of futurity are undoubtedly referable to the date of the making of the will, but, as has been said in many of the cases, the context in which they are used may show that the testator intended the words of futurity to speak as from the date of his death. In the present case, and in the circumstances which I have mentioned, I have come to the conclusion that the testator intended the words of futurity to bear their primary meaning—
- G that is to say, from the date when he made the will. It appears to me to be evident on the face of this will, considering the facts of which the testator was aware, that he intended that if Miss Ethel Hewitt did become a professed nun and thereby deprived herself of the right of the personal enjoyment of the income of the share which he had given her, that share should no longer be payable to her. The form of the bequest is not that of giving her a life interest with a proviso for forfeiture in the event of a certain step being taken by her, but it is framed in
- H the form of a limitation until she took such a step. It was said that that is a distinction without a difference, but I think it has some bearing on the question which I have to decide.

- Counsel for Miss Ethel Hewitt have relied on *Re Chapman* (1). In that case there was a gift to a person for life, with a proviso for forfeiture in the event of
- I that beneficiary marrying in contravention of a prohibition contained in the will. The majority of the Court of Appeal came to the conclusion that, although the words of futurity there used *prima facie* should be read as speaking from the date of the will, and not from the death, yet having regard to the peculiar language in which the gift was couched, the essential words in that case spoke from the date of the death, and not from the date of the will. The words in that case were special and very strong. They were that in any such case the share of the trust estate and the income should thenceforth cease and determine, and there were also words in that case relating to the marriage without the consent of the

trustees. Those were the words on which the court came to the conclusion that the words of futurity there used could only have been intended to have spoken from the death of the testator and not from the date of the making of the will.

In the present case it has been contended that a similar presumption ought to be made because the proceeds of the residuary estate, to the enjoyment of a share of which Miss Ethel Hewitt would become entitled, could only have come into being after the death of the testator. That is true in this sense, that no will becomes operative until after the death of the testator, and, therefore, all the directions for realisation of his estate are necessarily referable to what is to happen after his death; but that to my mind does not in the least conflict with the admitted proposition that words of futurity in the gift contained in the will are, ordinarily speaking, referable to the date of the instrument in which they are contained. In the present case, as I have already said, I think the object of the testator was to let Miss Ethel Hewitt have the income of the three-fiftieths until the event which he mentioned should happen, and that there is nothing in the will to show that he intended her to have that income, in any event, at the date of his death, and that it was only to cease after his death should she take the step therein mentioned. Junior counsel for Miss Ethel Hewitt has argued that she might take the veil again after the death. I express no opinion on that because, frankly speaking, I know nothing about the ceremony, which is described by the testator as to the taking of the veil. There is no evidence in this case whether that step could be repeated at any future date. The ground for my decision is that these words in this case refer to her taking the veil at any time after the date of the will, and that event having occurred in the lifetime of the testator, it seems to me that she never was a beneficiary under the will because the event upon which her interest would cease had taken place before the will became operative.

For these reasons I have come to the conclusion that Miss Ethel Hewitt is not entitled to the income of the three-fiftieth share in question.

Solicitors: *Bell, Brodrick & Gray*, for *Jones & Carr*, East Retford; *Prideaux & Sons*; *Rawle, Johnstone & Co.*, for *E. W. Hewitt*, Hull.

[Reported by GEOFFREY P. LANGWORTHY, Esq., Barrister-at-Law.]

Re LLANOVER SETTLED ESTATES

[CHANCERY DIVISION (Astbury, J.), April 21, 22, 1926]

[Reported [1926] Ch. 626; 95 L.J.Ch. 419; 135 L.T. 363]

B *Settled Land—Tenant for life—Resulting trust—Person entitled to income during limited period under resulting trust—Effect of orders of court and compromises made before 1926—Settled Land Act, 1925 (15 Geo. 5, c. 18), s. 20 (1) (viii), s. 23 (1), s. 117 (1) (xii), s. 118.*

C By her will, a testatrix, who died in 1896, devised real property to trustees on various trusts, but failed to dispose of the whole of the income for a period which would determine on the birth of a daughter to F., or on the death of F. without leaving a daughter. The surplus income, therefore, passed under the resulting trust to Mrs. H., the heir-at-law of the testatrix. In 1907 it was declared by the court (so far as relevant) that Mrs. H. had not the powers of a tenant for life in respect of the settled estates. Mrs. H. appealed, but the appeal was compromised (with the approval of the court) on the basis that Mrs. H. personally should have certain rights of management during her life. In 1912 Mrs. H. died, and the surplus income became payable to her legal personal representatives. In 1922 a further compromise (confirmed and approved by the court) was made by all the parties interested, which provided that during the lifetime of T., the trustees should pay to the legal personal representatives of Mrs. H. out of the income of the settled estates a clear annual sum in satisfaction of all the claims of the estate of Mrs. H. during the period during which the surplus income was undisposed of by the testatrix. On the coming into force of the Settled Land Act, 1925, the question arose who was the person having the powers of a tenant for life and entitled to a vesting deed in his favour.

F **Held:** apart from the agreements of compromise, the legal personal representatives of Mrs. H. had the powers of a tenant for life under the Act, because they took the income under a trust for payment thereof within s. 20 (1) (viii) of the Act read with the definition of "trust" in s. 117 (1) (xii); but, in view of s. 118 and the orders of court and agreements, Mrs. H. had ceased to have any of the powers of a tenant for life except to a limited extent during her life, and, therefore, the trustees of the settlement (i.e., the will of the testatrix) had the powers of a tenant for life under s. 23 (1) of the Act, and the vesting deed must be executed in their favour.

G *Re Baroness Llanover (1), [1907] 1 Ch. 635, distinguished.*

Notes. Referred to: *Re Alston-Roberts-West's Settled Estates*, [1928] W.N. 41. As to who is the tenant for life, see 29 HALSBURY'S LAWS (2nd Edn.) 673 et seq.; and for cases see 40 DIGEST (Repl.) 794 et seq.

H Cases referred to:

(1) *Re Baroness Llanover, Herbert v. Ram*, [1907] 1 Ch. 635; 76 L.J.Ch. 427; 97 L.T. 286; 40 Digest (Repl.) 803, 2825.

(2) *Re Baroness Llanover's Will, Herbert v. Freshfield*, [1903] 2 Ch. 16; 72 L.J.Ch. 406; 88 L.T. 648; 51 W.R. 418; 19 T.L.R. 338; 47 Sol. Jo. 385, C.A.; 40 Digest (Repl.) 794, 2756.

I (3) *Re Baroness Llanover, Herbert v. Freshfield (No. 2)*, [1903] 2 Ch. 330; 72 L.J.Ch. 729; 88 L.T. 856; 51 W.R. 615; 19 T.L.R. 524; 37 Digest 136, 641.

(4) *Re Jones* (1884), 26 Ch.D. 736; 53 L.J.Ch. 807; 50 L.T. 466; 32 W.R. 735, C.A.; 40 Digest (Repl.) 797, 2776.

Adjourned Summons.

Augusta Lady Llanover by her will, dated Aug. 16, 1889, after appointing executors and trustees thereof, and directing that the estates devised to her by the will of her late husband should be primarily liable to and charged with the payment

of all incumbrances on the same, whether created by her late husband or not, and of all annuities which she might give by any codicil, by cl. 3 gave and bequeathed all the freehold, copyhold and leasehold hereditaments devised to her by her late husband, and also her freehold house in Great Stanhope Street and her Ynysyngharad property, and all other (if any) the freehold, copyhold, and leasehold hereditaments to which she might be entitled at her death, or over which she might then have a general power of disposition, unto and to the use of her trustees (subject as regards the hereditaments so devised to her as aforesaid to the several charges and incumbrances thereinbefore mentioned) on trust to enter into possession or receipt of the rents and profits of, or to manage, the same with certain powers which are not material to the present case, and with full power to sell or exchange the said hereditaments (except certain mansion houses therein mentioned), and she declared that the moneys to arise from any sale should be applied in the manner directed by cl. 10 of her will concerning the proceeds of her residuary property. By cl. 4 she directed that her trustees should by and out of the rents and profits of the said hereditaments pay and discharge the expenses incurred in or about the management, and any annual sum charged on the said hereditaments (including the annuities (if any) given by any codicil) and the interest of any principal sum or sums of money which might be charged on the said premises, and subject thereto should pay certain annuities thereby given and certain premiums on life policies to be effected by her trustees. By cl. 5 she directed that, subject as aforesaid, her trustees should apply such annual sum or sums of money as should be necessary for keeping up her two mansion houses at Llanover, and the residence called "Abercarn Uchat," and the mansion house in Great Stanhope Street, in a fit state for residence (including in such keeping-up the wages of all servants and other persons employed by the trustees), and should permit her daughter, Mrs. Augusta Herbert, to reside in the said two mansion houses at Llanover and the said residence and mansion, and during such residence should out of the said rents and profits pay to her daughter an allowance of £80 a week, and subject thereto her trustees should, during the life of her daughter, but not for a period of more than twenty years after her death, apply the ultimate surplus (if any) of the rents and profits in the manner by cl. 10 of the will directed concerning the proceeds of her residuary property; and after the death of her daughter (after making provisions for a granddaughter now dead) the testatrix directed that her trustees should permit her grandson Ivor (now Lord Treowen) as long as he should be the husband of his then wife or her widower (without having married again) or the husband of any Protestant Trinitarian Christian whom he might marry after her death, to reside in the said mansion houses with the like allowance during his residence, and apply the surplus (if any) of the rents and profits, after all other payments thereout, but not for more than twenty years after her death in the manner by cl. 10 of her will directed concerning her residuary property. Subject thereto, the testatrix directed that her trustees should permit her great-granddaughter Florens (now Mrs. Roch) to reside at her mansion house with the like allowance during her residence, and should apply the surplus (if any) of the rents and profits of the premises, after all other payments thereout, but not for more than twenty years after her death, in the manner by cl. 10 of her will directed concerning the proceeds of her residuary property, and that subject to and after the determination or failure of the several directions thereinbefore contained, her trustees should stand possessed of the said freehold premises (subject to the annuities, charges, and incumbrances for the time being affecting the same under will or any codicil thereto), and all surplus rents thereof, in trust for every daughter of Mrs. Roch by a Protestant Trinitarian Christian husband, successively, according to seniority in tail male, and in default or failure of such issue for every daughter of her great-grandson, Elydr, by a Protestant Trinitarian Christian wife, successively according to seniority in tail male; and the testatrix directed that, after the determination or failure of the directions and trusts thereinbefore contained and declared, her trustees should continue such of the annuities thereinbefore be-

A queathed as might not have ceased and, subject as aforesaid, should settle the said freehold premises subject to the charges and incumbrances for the time being affecting the same, to successive uses for lives and in tail for ultimate remaindermen, but without any ultimate limitation of the fee to the testatrix's heirs or otherwise. The copyholds and leasehold were to be settled on corresponding trusts. Under the ultimate limitations Miss Crichton Stuart was now tenant in tail in remainder. By cl. 10 the testatrix gave the residue of her property not disposed of by any codicil thereto to her trustees on trust to realise the same and apply the proceeds in the discharge of the incumbrances on the estates thereinbefore devised, or in the purchase of other estates near the devised Llanover estate to be held on like trusts and subject to the like powers and directions. The testatrix died on Jan. 7, 1896. There were a large number of charges on the settled estates which, with the sum of £40,000 required for estate duty on the testatrix's death, were consolidated by the trustees into a mortgage for £100,000. This mortgage was paid off out of the surplus rent prior to the expiration, in 1916, of the period of twenty years from the testatrix's death limited by the will. The testatrix's great-granddaughter, Mrs. Florens Roch, was still living, but had no daughter. The testatrix's great-grandson Elydr was dead without issue. Mrs. Herbert was the only child of the testatrix and her heiress-at-law.

By an order of the Appeal Court in *Re Baroness Llanover's Will, Herbert v. Freshfield* (2) it was declared that the testatrix's daughter, Mrs. Augusta Herbert, came within the definition of a tenant for life in s. 2 (5) of the Settled Land Act, 1882, in respect of the mansion houses mentioned in the will. By an order of FARWELL, J., on May 27, 1903, in *Re Baroness Llanover's Will, Herbert v. Freshfield* (No. 2) (3), it was decided that, under the Accumulations Act, 1892, the part of cl. 10 of the testatrix's will which directed that the surplus rents should be accumulated for the purchase of lands was invalid. In consequence of that decision, after the payment off of the incumbrances, the balance of the surplus rents, remained undisposed of until a daughter should be born to Mrs. Roch, or Mrs. Roch should die without leaving a daughter, and until one of those two events happened the balance of the surplus rents became payable to Mrs. Herbert, as heiress-at-law of the testatrix, and to her legal personal representatives after her death. In *Re Baroness Llanover, Herbert v. Ram* (1) SWINFEN EADY, J., held that, having regard to the nature and extent of the interest of Mrs. Herbert as heiress-at-law, she had not, at the then present time, the powers of a tenant for life in respect of the settled estates (other than the mansion houses) under s. 58 (1) (vi) or (vii) of the Settled Land Act, 1882. Mrs. Herbert appealed from this decision, and before the hearing of the appeal a compromise was entered into between all the parties sui juris who were interested in the settled estates. By an agreement dated April 28, 1908, and executed by all such parties, it was agreed that Mrs. Herbert should be entitled to exercise during her life, if she should so long be entitled in possession to the said surplus rents and profits, the powers of management given by cl. 3 of the will of the testatrix to the trustees in respect of the whole Llanover estate (which was about one-fourth of the whole settled estates), but that such right should be strictly limited to Mrs. Herbert personally, and should not extend beyond her own life. The agreement contained other provisions relating to the settled estates, and it was provided that it should be in settlement of all questions, whether relating to corpus or income or accumulations of income as between Mrs. Herbert and the trustees down to a certain date. On April 29, 1908, the Court of Appeal approved the agreement as being for the benefit of the infant defendants to the application, and of all unborn persons who might become interested in the settled estates, dismissed the appeal, and affirmed SWINFEN EADY, J.'s order with the necessary variations to carry out the agreement. On June 29, 1908, an order by consent was made for the administration of the trusts of the will of Lady Llanover. Mrs. Herbert died in 1912, having by her will appointed executors and trustees, who were in receipt of the surplus rents and profits until the compromise of 1922 hereafter mentioned. After the death of Mrs. Herbert,

the testator's grandson, Ivor Herbert (now Lord Treowen), went into residence in the mansion houses. Mrs. Roch, who had no daughter, at the date of the summons was between forty and fifty years of age. On July 24, 1922, a further agreement of compromise was entered into by all the parties then interested, and on Oct. 12, 1922, ASTBURY, J., approved and confirmed the agreement with certain agreed alterations. The agreement as so confirmed provided that, during the lifetime of Lord Treowen, the trustees should pay to the legal personal representatives of Mrs. Herbert, out of the income of the settled estates, such an annual sum as after the deduction of income tax, but not of supertax, should provide the clear annual sum of £5,000 per annum, such payments to commence from Jan. 17, 1921, and that such annual sum should be in satisfaction of all claims of the estate of Mrs. Herbert during the period in question, and that the residue of the said income, after payment of the expenses of management, should be invested and accumulated.

On the Settled Land Act, 1925, coming into force it became necessary that the trustees should execute a vesting deed in respect of the settled estates. Questions arose whether or not, on the true construction of that Act, the legal personal representatives of Mrs. Herbert had now become, notwithstanding the decision of SWINFEN EADY, J., on the language of the Settled Land Act, 1882, persons having the powers of a tenant for life, and whether the vesting deed ought to be executed in favour of them or of the trustees themselves as statutory owners. The trustees issued this summons for the determination of this question to which the legal personal representatives of Mrs. Herbert and Miss Crichton Stuart, as tenant in tail in remainder, were defendants.

Clauson, K.C., and *J. V. Nesbitt* for the trustees.

Topham, K.C., and *Howard Wright* for the legal personal representatives of Mrs. Herbert.

J. N. Gray for Miss Crichton Stuart.

ASTBURY, J., stated the facts and continued: By a decision of SWINFEN EADY, J., in the matter of this estate in *Re Baroness Llanover, Herbert v. Ram* (1) it was held that Mrs. Herbert had not at that time the powers of a tenant for life over the freehold, copyhold, and leasehold estates settled by the will, the result of which decision was that the management of these estates remained in the trustees of Lady Llanover's will. The learned judge, in arriving at his decision, had his attention called to s. 2 (2) of the Settled Land Act, 1882, which provides:

"An estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is, for the purposes of this Act, an estate or interest coming to the settlor or heir under or by virtue of the settlement."

The reasons for that subsection are, I think, rightly stated in WOLSTENHOLME'S SETTLED LAND ACTS (10th edn.) p. 367. The learned judge's attention was then directed to s. 58 (1) (vi) and (ix) of the Settled Land Act, 1882. Subsection (1) (vi) provides:

"A tenant for his own or any other life, or for years determinable upon a life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts is a person having the power of a tenant for life."

Subsection (1) (ix) provides:

"A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event,"

is similarly situated. In the portion of the judgment which is relevant to this question, SWINFEN EADY, J., said ([1907] 1 Ch. at p. 650):

A "The question next arises, is the plaintiff [Mrs. Herbert] within cl. (ix) [sub-cl. (ix) of s. 58] as a person entitled to the income of land during her own or any other life? In this clause there is no repetition of the words that occur in cl. (vi) '... whose estate is liable to cease during that life ... or to be defeated by an executory limitation ... over.' The plaintiff [Mrs. Herbert] may be 'a person entitled to the income of land' as the surplus income, if any, would be payable to her, but she is not entitled 'during her own or any other life,' as her interest is liable to determine at any moment on the birth of a daughter to Florens or Elydr. Nor is this surplus income payable to her 'under a trust or direction for payment thereof to her,' as was the case in *Re Jones* (4). Her interest really arises because the will does not contain any 'trust or direction for payment thereof,' and, although s. 2 (2) provides that an estate or interest in remainder or reversion not disposed of by a settlement, and descending to the testator's heir, is for the purposes of the Act, an estate or interest coming to the settlor under or by virtue of the settlement, and comprised in the subject of the settlement, there is no provision in the Act that an heir taking on an intestacy the undisposed of surplus of rents and profits shall be deemed to take 'under trust or direction for payment thereof to him,' which the will does not really contain. For these reasons the plaintiff does not, in my judgment, fall within cl. (ix)."

The learned judge had already decided that she did not fall within sub-s. (1) (vi) of s. 58. The judgment continues (*ibid.*):

E "The result is that the plaintiff [Mrs. Herbert] has not at the present time the powers of a tenant for life under the Settled Land Acts."

Those of course were the Settled Land Acts then in force.

F Certain agreements of compromise in the matter of this settled estate have been entered into and orders made in respect of them. I shall have to deal with them separately, but the first matter which has to be determined is whether under the new Act of 1925 Mrs. Herbert or her representatives have obtained the powers of a tenant for life, notwithstanding the judgment which I have read, which was based on the previous Settled Land Acts. The reason for this is that by the present Act, in para. 2 of Sched. 2, it is provided:

G "As soon as practicable after the commencement of this Act the trustees for the purposes of this Act of every settlement of land [the applicants] subsisting at the commencement of this Act (whether or not the settled land is already vested in them) may and, on the request of the tenant for life or statutory owner, shall at the cost of the trust estate execute a principal vesting deed (containing the proper statements and particulars) declaring that the legal estate in the settled land shall vest or is vested in the person or persons therein named (being the tenant for life or statutory owner, and including themselves if they are the statutory owners)."

H It is necessary in the management of this estate, having regard to the provisions of this new statute, that such a vesting deed shall be executed, and it has to be executed as stated in this schedule to the tenant for life or statutory owner. "Tenant for life" includes, under the definition of s. 117 (1) (xxvii), "a person (not being a statutory owner) who has the powers of a tenant for life under this Act."

I I will now attempt to consider whether, apart from the agreements of compromise and orders of court which have been made in this case, there are in this new Act provisions which would result in the personal representatives of Mrs. Herbert now having the powers of a tenant for life, notwithstanding the decision of SWINFEN EADY, J., under the previous statutes. Section 1 (4) of the present Act provides, very much as in the case of the old statute, that

"An estate or interest not disposed of by a ... settlement, and remaining in or reverting to the settlor or any person deriving title under him, is for the

purposes of this Act an estate or interest comprised in the subject of the settlement, and coming to the settlor or such person under the settlement." **A**

By reason of that subsection, as also under the previous Act, the interest in the surplus rents during what has been described as "the gap," was an interest which passed to Mrs. Herbert under or by virtue of the settlement, notwithstanding the fact that apart from the Act it passed to her because it was not included in and dealt with by the settlement, but as undisposed of. Section 20 (1) of the new Act provides: **B**

"Each of the following persons, being of full age, shall, when his estate or interest is in possession, have the powers of a tenant for life under this Act."

Subsection (1) (vi) of s. 20 of the new Act is very similar to sub-s. 1 (vi) of the old s. 58, and I do not think that I need stop to read it. Subsection 1 (viii) of the new Act replaces sub-s. (1) (ix) of s. 58 of the old Act. It is in much wider terms, and is as follows: **C**

"A person entitled to the income of land under a trust or direction for payment thereof to him, during his own or any other life, whether or not subject to expenses of management or to a trust for the accumulation of income for any purpose, or until sale of the land, or until forfeiture, cesser, or determination by any means of his interest therein, unless the land is subject to an immediate binding trust for sale." **D**

By s. 117 (1) (xii) "trust" includes an implied or constructive trust. SWINFEN EADY, J., held that under the old Act Mrs. Herbert was not entitled to this surplus income under any trust or direction for payment to her, and I have read the judgment on that point. It appears from the judgment that he came to that conclusion for two reasons. First, that there was no trust or direction in the settlement for payment of the surplus profits to Mrs. Herbert at all, but that she got them by reason of their being unprovided for therein; and, secondly, he held that she was not entitled to them for her own or any other life, because they were liable to cease during those lives in certain events. The present s. 20 (1) (viii) is to be read as including a constructive or implied trust for payment, and a person thereunder can hold for his own or any other life, notwithstanding the fact that there may be a cesser of interest during either of the two lives. **E**

Counsel, who have argued this case on behalf of the trustees of the will, contend that Mrs. Herbert did not take the surplus rents under an express trust, which is obvious and not disputed, nor under an implied or constructive trust, if those words are properly construed. They contend that an implied trust means a trust declared by a party, not directly but by implication. That no doubt is a strict and accurate statement, but not exhaustive. They submitted that a constructive trust is a trust which the court elicits by a construction put on certain acts of the parties, as, for instance, where a trustee renews a lease belonging to the trust in his own name. That, again, is perfectly accurate, but not, I think, exhaustive. For the purpose of these definitions counsel referred to LEWIN ON TRUSTS (12th edn.), p. 124, where the learned author states these definitions, but he also says this, which appears to me to be accurate: **F**

"The terms implied trusts, trusts by operation of law, and constructive trusts, appear from the books to be almost synonymous expressions, but for the purposes of the present work the following distinctions as considered the most accurate, will be observed." **G**

Then he gives the definition of the terms "implied" and "constructive" trusts, in accordance with what counsel have contended. He then proceeds: **H**

"Trusts by operation of law are such as are not declared by a party at all, either directly or indirectly, but result from the effect of a rule of equity, and are either resulting trusts or constructive trusts." **I**

SIR ARTHUR UNDERHILL, in the 8th edn. of his work on TRUSTS AND TRUSTEES, says on p. 9:

- A** "Trusts are created either intentionally by the act of the settlor (in which case they are called express trusts), or by implication of a court of equity, where the legal title to property is in one person, and the equitable right to the beneficial enjoyment of it in another, in which case they are called constructive trusts."
- B** I think that that again is substantially accurate. It is quite true, as contended by counsel for the trustees, that a resulting trust in ordinary circumstances is really not a trust at all in one sense. Property settled or devised on trusts which do not exhaust it leave, with regard to the unexhausted part, a resulting trust to the settlor or deviser; but where, as in the present case, property is devised as a whole to trustees, and the trusts declared do not exhaust the income during some particular period, although there is a resulting trust for the settlor or her heir-at-law, there is a trust construed by the court in the trustees of the income which they so hold, and which they cannot apply in accordance with any expressed trust in the settlement, and which, in the present case, they hold in trust to pay to the person entitled thereto by reason of this so-called resulting trust. That, I think, is within the general meaning of an implied or constructive trust. None of that could be considered by SWINFEN EADY, J. He held, as he was bound to hold, that there was no trust or direction for payment of this ungiven surplus income. Under the present Act, however, which unquestionably was passed in many respects to extend the powers and provisions of the old Act, a person is a person entitled to exercise the powers of a tenant for life, if he is entitled to the income of land under an implied or constructive trust, as well as under an express trust, and, in my opinion, if nothing else had happened to prevent the operation of the settlement, the representatives of Mrs. Herbert would, on the passing of the Act of 1925, have been persons entitled to the surplus income under an implied or constructive trust for payment thereof to them. The property was held by trustees; they were under a trust to pay the income to somebody, and, under the constructions which courts of equity have put on these cases, it was their duty to pay it to the person entitled, who, in this particular case, was Mrs. Herbert or her estate. I am, therefore, of opinion that, if there were nothing else to affect this question, the representatives of Mrs. Herbert would now be persons having the powers of a tenant for life by reason of the extended provisions of the new Act, notwithstanding that they had no such powers, as decided by SWINFEN EADY, J., under the narrower provisions of the previous statute. I should add that the reason why SWINFEN EADY, J., held that Mrs. Herbert was not entitled for her own or any other life is also put an end to by the provisions contained in present sub-s. (1) (viii) of s. 20. That the present Act was intended to have some effect of this character is shown by referring to s. 118 and to Sched. 4. Section 118 of the present Act provides:
- G**

H "For the purpose of removing certain doubts as to the construction and operation of the Settled Land Act, 1882 to 1890, and validating past transactions, the provisions contained in Sched. 4 to this Act shall have effect."

In Sched. 4, cl. 15, it is provided:

- I** "Paragraph (ix) of sub-s. (1) of s. 58 of the Settled Land Act, 1882, shall be deemed always to have had effect as if in that paragraph (a) 'trust' included an implied or constructive trust; (b) 'forfeiture' included cesser or determination by any means."

With regard to what I have said as to the construction of the words "implied or constructive trusts," I should point out that this wider construction to which I have referred, as distinct from the narrower construction contended for by counsel for the trustees, has for years before the passing of this new Act appeared in textbooks and has been treated as an existing and true construction of those terms.

The result, therefore, is that, if nothing further had occurred, except the death of Mrs. Herbert and the passing of the new Act, the vesting deed would, I fear, have

had to be executed in favour of the personal representatives of Mrs. Herbert, notwithstanding the fact that the trustees have for many years had the whole management and conduct of this estate, and the personal representatives of Mrs. Herbert would have had little or no interest in it, except the receipt of these surplus rents. But it is contended by the trustees that events have happened which prevent the construction which I have felt bound to put on the statute being applied in this case. [His Lordship then considered the effect of the agreements of compromise of April 28, 1908, and July 24, 1922, and of the Orders of April 29, 1908, and Oct. 12, 1922, and continued:] The net result of all this is, that at the present time Mrs. Herbert's personal representatives are entitled to a fixed annuity out of this estate, and are to have no further rights, interests, or powers in or over it. In other words, Mrs. Herbert obtained a limited part of what she claimed in her appeal to the Court of Appeal, and by way of compromise gave up her appeal and the rest of her claim accordingly. Under s. 118 of the present Act it is provided:

"Subject as aforesaid, this Act does not affect the validity of anything done or any order made or direction given by the court before the commencement of this Act."

I think that the effect of that, with the documents and orders which I have read, is that Mrs. Herbert ceased, except for the limited period, and in respect of the limited property referred to in the first agreement of compromise, to have any of the powers of a tenant for life in respect of this estate. That limited power which was given to her ceased on her death, and from that time her personal representatives have had no powers of a tenant for life at all in respect of this estate. That has been sanctioned more than once by orders of the court, and those same orders confirmed the trustees in their right to exercise the powers in question. The net result is this: Under s. 23 of the Act of 1925 it is provided:

"Where under a settlement there is no tenant for life nor, independently of this section, a person having the powers of a tenant for life then . . . the trustees of the settlement shall have the powers of a tenant for life under this Act."

Section 117 (1) (xxvi) provides:

"'Statutory owner' means the trustees of the settlement or other persons who, during a minority, or at any other time when there is no tenant for life have the powers of a tenant for life under this Act."

Under Sched. 2, which I read at the commencement of my judgment, the vesting deed has to be made in favour of the tenant for life or statutory owner, including the trustees themselves, if they are the statutory owners. "Tenant for life" there means tenant for life or person having the powers of a tenant for life. In my judgment, in the circumstances which I have detailed there is no tenant for life or person or persons having the powers of a tenant for life in respect of these surplus profits, and the trustees are in fact the present statutory owners, and the vesting deed must, in my opinion, be executed in their favour.

Order accordingly.

Solicitors: Freshfields, Leese & Munns; Hunters; Farrer & Co.

[Reported by E. K. CORRIE, Esq., Barrister-at-Law.]

A

Re GRIFFITHS. JONES v. JENKINS

[CHANCERY DIVISION (Romer, J.), April 29, 30, May 13, 1926]

[Reported [1926] Ch. 1007; 95 L.J.Ch. 429; 136 L.T. 57;
70 Sol. Jo. 735; [1926] B. & C.R. 56]

B

Bankruptcy—Forfeiture clause—Income for life—Gift over if life tenant “shall by any deed or document anticipate charge assign or dispose of the income . . . or any part thereof”—Tenant for life adjudicated bankrupt on own petition.

C

A tenant for life of a sum of money under a will, which provided that, if he should “by any deed or document anticipate charge assign or otherwise dispose of” the income, the fund was “upon the execution of such charge or assignment” to be divided among his children, was adjudicated a bankrupt on his own petition.

D

Held: the forfeiture clause had not taken effect because the bankruptcy petition, the only relevant document executed by the bankrupt, did not in any way anticipate, charge, assign, or dispose of any property of the petitioner.

Re Cotgrave, Mynors v. Cotgrave (1), [1903] 2 Ch. 705, doubted and distinguished. *Re Riggs, Ex parte Lovell* (2), [1901] 2 K.B. 16, followed.

Notes. As to interests determinable on bankruptcy, and as to the construction, on bankruptcy, of forfeiture clauses, see 2 HALSBURY'S LAWS (3rd Edn.) 413, 414, 351; and for cases see 5 DIGEST 659-669.

E

Cases referred to:

(1) *Re Cotgrave, Mynors v. Cotgrave*, [1903] 2 Ch. 705; 72 L.J.Ch. 777; 89 L.T. 433; 52 W.R. 411; 10 Mans. 377; 5 Digest 667, 5922.

(2) *Re Riggs, Ex parte Lovell*, [1901] 2 K.B. 16; 70 L.J.K.B. 541; 84 L.T. 428; 49 W.R. 624; 45 Sol. Jo. 408; 8 Mans. 233; 5 Digest 667, 5920.

F

(3) *Shee v. Hale* (1807), 13 Ves. 404; 33 E.R. 346; 5 Digest 659, 5872.

(4) *Brandon v. Aston* (1843), 2 Y. & C.Ch. Cas. 24; 7 Jur. 10; 63 E.R. 11; 5 Digest 661, 5884.

(5) *Re Amherst's Trusts* (1872), L.R. 13 Eq. 464; 41 L.J.Ch. 222; 25 L.T. 870; 20 W.R. 290; 5 Digest 664, 5899.

G

(6) *Re Moon, Ex parte Dawes* (1886), 17 Q.B.D. 275; 55 L.T. 114; 34 W.R. 753; 2 T.L.R. 506, C.A.; 5 Digest 665, 5908.

(7) *Graham v. Lee* (1857), 23 Beav. 388; 26 L.J.Ch. 395; 29 L.T.O.S. 46; 3 Jur.N.S. 550; 5 W.R. 328; 53 E.R. 152.

Adjourned Summons.

H

By his will, dated Jan. 26, 1924, John Griffiths, the testator, gave the sum of £1,000 to his trustees in trust to pay the income to Thomas Idris Jenkins during his life and after his death to divide the capital equally amongst such of his children as should then be living. It was provided by the will that

I

“if the said Thomas Idris Jenkins shall by any deed or document anticipate charge assign or otherwise dispose of the income of the said sum of £1,000 or any part thereof such deed or document shall have no valid effect as I hereby declare that the said sum of £1,000 shall upon the execution of any such charge or assignment be divided among the children of the said Thomas Idris Jenkins then living in equal shares.”

The testator died on May 11, 1924. On Nov. 20, 1917, Thomas Idris Jenkins was adjudicated a bankrupt on his own petition. The summons was issued by the trustees of the will for the determination of the question whether on the true construction of the will Thomas Idris Jenkins had forfeited his life interest in the above-mentioned sum of £1,000 or the investments representing that sum, and

whether the same had become divisible amongst his children, and whether the income was payable to his trustee in bankruptcy. A

H. W. Clements for the plaintiffs, the trustees of the will.

M. Beebee for the children of the bankrupt, the persons entitled on a forfeiture.

Dighton Pollock for the trustee in bankruptcy.

Cur. adv. vult. B

May 13. **ROMER, J.**, read a judgment in which he stated the facts and continued: It is alleged by the trustee in the bankruptcy of Thomas Idris Jenkins that he is entitled to receive the income of the fund representing the £1,000 during the life of Thomas Idris Jenkins. It is alleged on the other hand on the part of his children that by reason of his having been adjudicated a bankrupt on his own petition Thomas Idris Jenkins incurred a forfeiture of his life interest under the directions in that behalf contained in the will. It is admitted by the trustee in bankruptcy that notwithstanding the words of futurity contained in the will a forfeiture would have been occasioned by any assignment of the income made in the testator's lifetime. The trustee, however, contends that even if the presentation of the petition and the adjudication had taken place after the testator's death no forfeiture would have been thereby occasioned and this is the point I have to determine. C

The contention in favour of a forfeiture having taken place is based on a decision of **KEKEWICH, J.**, *Re Cotgrave, Mynors v. Cotgrave* (1), in which that learned judge arrived at the conclusion that where a legatee was adjudicated a bankrupt on his own petition, the petition and adjudication consequent thereon constituted an alienation of his legacy by the legatee. Before considering that case, it will be convenient to refer to one or two earlier decisions. In *Shee v. Hale* (3) a testator directed payment to his son of a yearly sum during his life or until such time as his son should actually sign any instrument whereby or in which he should contract or agree to sell assign or otherwise part with the same or any part thereof . . . or whereby or in which he should authorise or empower or intend to authorise or empower any person or persons whomsoever to receive such annuity or any part thereof except only as to the then next quarterly payment after such authority or power should be given. After the death of the testator the son took the benefit of the Insolvent Debtors Relief Act, 1801. It was held by **SIR WILLIAM GRANT** that the son had done an act to authorise or empower others to receive the annuity. Inasmuch as according to the strict terms of the will the annuity would only cease if the son signed an instrument whereby or in which he should authorise or empower others to receive the annuity, I must suppose that **SIR WILLIAM GRANT** treated the schedule of property signed by the legatee in accordance with the Act as being such an instrument. Under that Act, however, a debtor who, having presented the necessary petition and given the necessary notices, could satisfy the justices that the schedule was accurate was entitled as of right to have it adjudged that he was entitled to the benefit of the Act. Thereupon he obtained his discharge from prison, and his property became vested in the clerk of the peace for the benefit of the creditors. When, therefore, the son, having complied with the necessary preliminaries, signed the schedule of his property, he signed a document which, having regard to the Act of Parliament, necessarily resulted in his property becoming vested in the clerk of the peace. The vesting was, no doubt, in one sense done by the Act of Parliament. But it rested with the debtor alone to decide whether such vesting should or should not take place. It was, therefore, in substance the debtor, and the debtor alone, who empowered the clerk of the peace to receive the annuity. D

The next case to which I wish to refer is *Brandon v. Aston* (4). In that case a testator bequeathed an annuity to one Nathan, declaring that it should cease if Nathan should attempt to sell mortgage incumber or anticipate the payment of the annuity. After the testator's death, Nathan, who was confined in Whitecross Street prison, filed his petition for discharge to the court for the relief of insolvent E

A debtors under s. 35 of the Judgments Act, 1838. The result of his so doing was that under s. 37 the court became bound to make an order under which the whole of his property, with certain immaterial exceptions, became vested in the provisional assignee. In his petition the debtor was required to state his willingness that all his real and personal estate should be so vested. It was held by KNIGHT BRUCE, V.-C., that Nathan had forfeited his annuity. The Vice-Chancellor said :

B "Now it is possible that there may be a case of insolvency which would not fall within the terms of this will. The present case, however, is one, if I may use the expression, of voluntary insolvency. It is the case of an application by a person for delivery from imprisonment upon certain conditions: it is his own act. He presents a petition to the court for the relief of insolvent debtors, stating his imprisonment, and that he is willing that all his real and personal estate and effects may be vested according to the provisions of the Act of Parliament. By so doing, he has, in effect, executed a Parliamentary power; that is, he has voluntarily elected to do that act which, being done, brings the provisions of the Act of Parliament into operation. In effect, therefore, the vesting order is procured by himself; for every substantial purpose it is his own act. I apprehend I should be deciding against the letter and spirit of this enactment if I were to hold that there has not been a clear attempt to incur and anticipate payment of the annuity."

There again the anticipation of the annuity was the act of the debtor alone. The statute gave him a power to anticipate in a particular way, and that power he executed by filing his petition.

E Similar decisions in reference to the same statute are to be found in the books. But in *Re Amherst's Trusts* (5) the question came up for decision, whether a tenant for life of a fund, who presented a petition for liquidation of his affairs by arrangement under the Bankruptcy Act, 1869, had thereby "parted from" the income of the fund. It was held by BACON, V.-C., that he had. By one of the rules under the Act of 1869, however, the court had power at any time after presentation of the petition to appoint a receiver to take immediate possession of the property of the debtor, and the decision of the Vice-Chancellor was, as I understand it, based on that consideration. He said :

"I must hold that the presentation of this petition by this debtor whereby he put into the power of the court immediately to appoint a receiver of all his property was a 'parting from' his life interest in the fund."

G Although in that case the petition was followed by a resolution of the creditors in favour of a liquidation by arrangement and the appointment of a trustee in whom the property of the debtor thereupon vested by virtue of the provisions of the Act, the Vice-Chancellor did not hold that by presenting the petition the debtor had assigned his life interest. So far as the assignment was concerned it was not the act of the debtor, though it might well be said to have been the act of the creditors, following the reasoning of KNIGHT BRUCE, V.-C., in *Brandon v. Aston* (4). But inasmuch as the debtor by presenting his petition had put it in the power of the court to take possession of his property, he had parted with his exclusive power over the income of the fund, and in that sense might, I suppose, be said to have "parted from" his income.

I I must now turn to *Re Cotgrave* (1). In that case a testator gave a fund to trustees on trust for a grandson for life, and declared that in the event of the grandson alienating or incumbering or agreeing to alienate or incur the income he should thenceforth absolutely forfeit his interest. After the death of the testator the grandson filed his petition in bankruptcy, and on this petition he was adjudicated a bankrupt. It was held by KEKEWICH, J., that the forfeiture clause had taken effect. The learned judge referred to *Re Amherst's Trusts* (5) and said that it was a direct authority that under the Bankruptcy Act, 1869, the presentation of a petition in bankruptcy by the tenant for life was sufficient to cause a forfeiture under a clause of the kind with which he was dealing. He added that

the words of the two clauses were not precisely the same, but in point of substance were not distinguishable. However, as I have already pointed out, the actual decision of BACON, V.-C., was that the debtor had "parted from" his income by presenting a petition for liquidation of his affairs by arrangement and not that the presentation of the petition was an alienation of the income. It had, moreover, been pointed out by CAVE, J., in *Ex parte Dawes* (6) that a presentation by a debtor of a petition in bankruptcy under the Act of 1883 did not by itself amount to an assignment of any part of the debtor's property. WRIGHT, J., had stated the same thing in *Ex parte Lovell* (2), where, after referring to the cases under the Insolvents Relief Acts, and to *Re Amherst's Trusts* (5), he said:

"All those cases except *Re Amherst's Trusts* (5) were determined upon statutes under which the debtor's petition ipso facto effected an assignment of the debtor's property for the benefit of creditors; but under the Act of 1883, even upon a debtor's petition asking for adjudication, the adjudication does not follow automatically. The court has a discretion in the matter, and, unless the court in its discretion adjudicates, the creditors may prefer to accept a composition. Therefore CAVE, J., in *Ex parte Dawes* (6), held that the debtor's petition under the Act of 1883 did not of itself amount to an assignment. In that case the creditors had accepted a composition, so that there was no adjudication and no vesting of the debtor's property in a trustee; but the case seems to be an authority that the mere filing of a petition by a debtor is not of itself an assignment. And if so, then there is in any view no assignment until adjudication."

Both *Ex parte Lovell* (2) and *Ex parte Dawes* (6) were referred to by KEKEWICH, J., and he read the passage from WRIGHT, J.'s judgment that I have just quoted. He then proceeded as follows ([1903] 2 Ch. at p. 710):

"Therefore he distinguished *Re Amherst's Trusts* (5), and thought that it was inapplicable to a case under the Act of 1883—that is to say, he thought the presentation of a petition was not in itself equivalent to an assignment. The learned judge's distinction does not apply to this case, because here the petition, though not followed automatically by adjudication, was in fact so followed, and though adjudication was not the necessary consequence, it was a consequence, and also the very consequence which was contemplated by the bankrupt. Though not automatically, it followed in the natural course of events, and because of his bankruptcy, which was his own act. It seems to me, therefore, that the principle of *Re Amherst's Trusts* (5) applies, and that here the petition was an 'alienation' causing a forfeiture under this will."

I have felt some difficulty in following this reasoning of the learned judge. The adjudication was the act of the court, which had a discretion in the matter, and, though the presentation of the petition by the debtor was an act by him setting the court in motion, I cannot for myself understand how the adjudication and the consequent divesting of his property can be said to be an alienation by him. If the adjudication had been made on the petition of a creditor, could it truthfully be said that the creditor had alienated the debtor's property? Indeed if the alienation is to be regarded as the act of a person who is instrumental in bringing about an adjudication by the court, it will be difficult to know where to stop. Supposing that a debtor files a declaration of his inability to pay his debts, and so commits an act of bankruptcy on which a creditor founds a petition on which an adjudication is made, is the consequent divesting of his property to be regarded as the act of the bankrupt? If it is not to be so regarded, it must be because an act of bankruptcy does not necessarily lead to an adjudication. But no more does the presentation of a petition, as pointed out by WRIGHT, J. There is in fact direct authority whether the commission by a debtor of an act of bankruptcy on which a petition is founded and an adjudication is made constitutes an assignment by him of his property. In *Graham v. Lee* (7) one Henry Smith was to forfeit a legacy if he should assign, mortgage, or in any manner anticipate the same or

A attempt so to do. He got into pecuniary difficulties, and contemplated raising money on the legacy in order to satisfy his creditors, but was advised by his solicitor that he could not do so without forfeiting the legacy, and the matter fell through. Being still pressed by his creditors, Henry Smith and his partner made a declaration under the Bankrupt Act that they were not able to meet their engagements with their creditors, and on the same day on the petition of certain creditors B they were declared bankrupts. It was contended that Henry Smith had forfeited his legacy. SIR JOHN ROMILLY, however, decided that this was not so. He said:

"A condition of forfeiture must be strictly construed, and here nothing is said as to bankruptcy being a ground of forfeiture. It is then said that this declaration of insolvency, which was the foundation of the bankruptcy, was voluntary, but the same may be said of every act of bankruptcy."

C Henry Smith's declaration was undoubtedly made in the expectation that an adjudication in bankruptcy would shortly ensue.

The petition of the grandson in *Re Cotgrave* (1) was made in the same expectation. In both cases the debtor's expectation was in fact realised, though in both cases it might have been disappointed. Why in these circumstances the grandson D is to be regarded as having alienated his legacy and Henry Smith acquitted of alienation it is difficult to understand. For myself I should, in both cases, have thought that the alienation was the act of the law and not the act of the debtor at all. If, however, the words of the forfeiture clause in the present case had been indistinguishable from those of the clause in *Re Cotgrave* (1), I might, notwithstanding my own doubts, have found it my duty to have followed the decision of E KEKEWICH, J., given over twenty years ago and, so far as I know, never since questioned. But the clause in the present case differs in one important respect from that with which KEKEWICH, J., was dealing. No forfeiture is occasioned in the present case unless Thomas Idris Jenkins has dealt with the income of the trust fund by some deed or document, which, as I read the clause, must be some deed or document that purports to anticipate charge assign or otherwise dispose F of such income. For the testator directs that the deed or document shall have no valid effect, which means, of course, no valid effect so far as the income is concerned, and that the forfeiture is to take effect on the execution of such charge or assignment. This, in my opinion, means on the execution of the deed or document creating the charge or assignment. Now the petition in bankruptcy does not purport in any way to anticipate charge assign or dispose of any property G of the petitioner at all, and most certainly no forfeiture was occasioned on its execution. The most that could be extracted from *Re Cotgrave* (1) would be that the forfeiture was caused when the adjudication was made, but took effect as from the presentation of the petition. In the result I come to the conclusion that the forfeiture clause has not taken effect, and I must so declare.

H Solicitors: Gibbs, White & King, for W. H. Pethybridge, Cardiff; Solicitor to the Board of Trade.

[Reported by J. S. SCRIMGEOUR, Esq., Barrister-at-Law.]

Re QUINTIN DICK. LORD CLONCURRY v. FENTON

[CHANCERY DIVISION (Romer, J.), June 2, 3, July 1, 1926]

[Reported [1926] Ch. 992; 96 L.J.Ch. 9; 136 L.T. 23; 42 T.L.R. 681; 70 Sol. Jo. 876]

Will—Name and arms clause—“Refuse or neglect”—Failure to comply with condition—Person entitled ignorant of provisions of will.

By his will a testator, who died in 1858, directed that real and personal estate should be held to the use of various persons in strict settlement. The will contained a name and arms clause, under which any person who should become entitled to the estate and who should “refuse or neglect” to take the surname and arms of D. within three months after becoming so entitled under the will should forfeit all his interest in the estate.

On the death of a tenant for life in 1923 W.H.B. became entitled to the estate under the will, but remained ignorant of his claim and of the existence and terms of the will for nearly two years, and so he did not take the surname and arms of D. within the three months.

Held: the expression “refuse or neglect” connoted the exercise of the mind and so could not cover a failure or omission due to ignorance of the provisions of the document and not resulting from any operation of the mind, and, therefore, W.H.B.’s interest had not been forfeited.

Re Edwards (1), [1910] 1 Ch. 541, and *Partridge v. Partridge* (2), [1894] 1 Ch. 351, applied.

Astley v. Earl of Essex (3), L.R. 18 Eq. 290, distinguished.

Notes. Applied: *Re Hughes, Rea v. Black*, [1948] 2 All E.R. 269.

As to the meaning of “neglect or refuse” in a will, see 34 HALSBURY’S LAWS (2nd Edn.) 117, note (c), 118, note (e); and for cases see 35 DIGEST 705, 706. As to change of name and arms by persons taking under a will, see 23 *ibid.* 557–560.

Cases referred to:

- (1) *Re Edwards, Lloyd v. Boyes*, [1910] 1 Ch. 541; 79 L.J.Ch. 281; 102 L.T. 308; 26 T.L.R. 308; 54 Sol. Jo. 325; 35 Digest 708, 76.
- (2) *Partridge v. Partridge*, [1894] 1 Ch. 351; 63 L.J.Ch. 122; 70 L.T. 261; 44 Digest 478, 2960.
- (3) *Astley v. Earl of Essex* (1874), L.R. 18 Eq. 290; 43 L.J.Ch. 817; 30 L.T. 485; 22 W.R. 620; 35 Digest 706, 63.
- (4) *Corbet’s Case, Corbet v. Corbet* (1600), 1 Co. Rep. 83b; Moore, K.B. 633; 2 And. 134; 76 E.R. 187; 38 Digest 702, 469.
- (5) *Mildmay’s Case* (1605), 6 Co. Rep. 40a; 77 E.R. 311; sub nom. *Mildmay v. Mildmay*, Moore, K.B. 632; 38 Digest 717, 645.
- (6) *Porter v. Frye* (1674), 1 Freem.K.B. 31; 89 E.R. 26; sub nom. *Williams v. Fry*, 2 Keb. 814; 3 Keb. 19; 2 Lev. 21; T.Raym. 236; sub nom. *Williams d. Porter v. Fry*, 1 Mod. Rep. 86; sub nom. *Lady Anne Fry’s Case*, 1 Vent. 199; 44 Digest 475, 2936.
- (7) *Doe d. Kenrick v. Lord Beauclerk* (1809), 11 East, 657; 103 E.R. 1160; 44 Digest 476, 2944.
- (8) *Doe d. Duke of Norfolk v. Hawke* (1802), 2 East, 481; 102 E.R. 453; 44 Digest 1236, 10679.
- (9) *Hawkes v. Baldwin* (1838), 9 Sim. 355; 7 L.J.Ch. 297; 2 Jur. 698; 59 E.R. 394; 44 Digest 475, 2939.
- (10) *Re Hodges’ Legacy* (1873), L.R. 16 Eq. 92; 42 L.J.Ch. 452; 28 L.T. 624; 21 W.R. 558; 44 Digest 475, 2940.
- (11) *King v. Burrell* (1840), 12 Ad. & El. 460; 4 Per. & Dav. 207; 4 Jur. 1109; 113 E.R. 886; sub nom. *R. v. Burrell*, 9 L.J.Q.B. 337; 4 J.P. 556; 20 Digest 193, 1693.

- A (12) *Bird v. Johnson* (1854), 23 L.T.O.S. 320; 18 Jur. 976; 2 W.R. 692; 5 Digest 655, 5848.
- (13) *Seymour v. Vernon* (1864), 33 L.J.Ch. 690; 10 L.T. 397; 10 Jur.N.S. 487; 12 W.R. 729; 44 Digest 440, 2664.
- (14) *Re Connington's Will* (1860), 2 L.T. 535; sub nom. *Re Conington's Will*, 24 J.P. 419; 6 Jur.N.S. 992; 8 W.R. 444; 8 Digest (Repl.) 436, 1260.
- B (15) *Re Catt's Trusts* (1864), 2 Hem. & M. 46; 4 New Rep. 88; 33 L.J.Ch. 495; 10 L.T. 409; 10 Jur.N.S. 536; 12 W.R. 739; 71 E.R. 377; 44 Digest 461, 2810.
- (16) *Re London and Paris Banking Corpn.* (1875), L.R. 19 Eq. 444; 23 W.R. 643; 10 Digest (Repl.) 854, 5628.
- (17) *R. v. Ryland* (1867), L.R. 1 C.C.R. 99; 37 L.J.M.C. 10; 17 L.T. 219; 31 J.P. 790; 16 W.R. 280; 10 Cox, C.C. 569, C.C.R.; 15 Digest (Repl.) 1033, 10,159.
- C (18) *Musgrave v. Brooke* (1884), 26 Ch.D. 792; sub nom. *Re Brooke, Musgrave v. Brooke*, 54 L.J.Ch. 102; 33 W.R. 211; 35 Digest 706, 65.
- (19) *Re Richmond Gas Co. and Richmond (Surrey) Corpn.*, [1893] 1 Q.B. 56; 62 L.J.Q.B. 172; 67 L.T. 554; 56 J.P. 776; 41 W.R. 41; 9 T.L.R. 5; 36 Sol. Jo. 866; 5 R. 29, D.C.; 25 Digest 478, 48.
- D (20) *Re Whitmore, Walters v. Harrison*, [1902] 2 Ch. 66; 71 L.J.Ch. 673; 87 L.T. 210, C.A.; 44 Digest 560, 3764.
- (21) *Re Roberts, Percival v. Roberts*, [1903] 2 Ch. 200; 72 L.J.Ch. 597; 88 L.T. 505; 44 Digest 788, 6452.
- (22) *Re Bostock's Settlement, Norrish v. Bostock*, [1921] 2 Ch. 469; 91 L.J.Ch. 17; 126 L.T. 145; 66 Sol. Jo. (W.R.) 7, C.A.; 20 Digest 239, 63.
- E

Originating Summons raising the question whether the defendant William Henry Barrett had forfeited his interest under the will, made in 1844, of Quintin Dick, by "refusing or neglecting" to take and use the name and arms of Dick "within three months after" becoming entitled to his interest.

- F The defendant, William Henry Barrett, who resided at Port Dover, Ontario, Canada, had remained in ignorance of his claim to the estate and of the existence of the testator's will for nearly two years after the death of Capt. Quintin Dick, the last tenant for life, and the question raised by the trustees was whether the defendant William Henry Barrett had forfeited his estate through having neglected or refused, within three months of his succession, to take the testator's name and arms. The defendant was born in the lifetime of the testator. He had a son, the defendant Theobald Butler Barrett, who was married and had three children, the eldest of whom was the defendant Henry Bemister Barrett, who was born in 1922.
- G The facts are sufficiently stated in the judgment.

Manning, K.C., and *J. V. Nesbitt* for the trustees.

- H *Gavin Simonds, K.C.*, and *McMullan* for the legal personal representative of Capt. Quintin Dick, appointed to represent remaindermen entitled under limitations subsequent to the defendant William Henry Barrett's estate tail.

Sir Thomas Hughes, K.C., and *Andrewes-Uthwatt* for the defendant William Henry Barrett.

C. J. Farwell, K.C., and *A. H. Droop* for the defendant Theobald Butler Barrett.

Gover, K.C., and *Beebee* for the defendant Henry Bemister Barrett.

- I The following cases were referred to: *Corbet's Case* (4), *Mildmay's Case* (5), *Lady Anne Fry's Case* (6), *Doe d. Kenrick v. Lord Beauclerk* (7), *Doe d. Duke of Norfolk v. Hawke* (8), *Hawkes v. Baldwin* (9), *Re Hodges' Legacy* (10), *Astley v. Earl of Essex* (3), *King v. Burrell* (11), *Bird v. Johnson* (12), *Seymour v. Vernon* (13), *Re Connington's Will* (14), *Re Catt's Trusts* (15), *Re London and Paris Banking Corpn.* (16), *R. v. Ryland* (17), *Musgrave v. Brooke* (18), *Re Richmond Gas Co. and Richmond Corpn.* (19), *Partridge v. Partridge* (2), *Re Whitmore* (20), *Re Roberts* (21), *Re Edwards* (1), and *Re Bostock's Settlement* (22).

Cur. adv. vult.

July 1. **ROMER, J.**, read the following judgment.—The particular question that I am now called on to determine is one of many that have arisen in the course of ascertaining who are now entitled to the real and personal estate of a testator called Quintin Dick, who died as long ago as the year 1858.

By his will the testator directed that the freehold lands that should be purchased by his trustees with his residuary estate as therein mentioned should be held to the use of his sister during her life and after her death to the use of various persons and their male issue in strict settlement. The will contains a name and arms clause in the words following :

"I do hereby order and direct and declare it to be my will and meaning that every person who shall be entitled to the possession and enjoyment of the said hereditaments or of my residuary estate under the limitations thereof as aforesaid after the decease of my sister shall and do within three months after he shall become entitled to the same as aforesaid take upon him and use in all writings and on all occasions whatsoever the surname of Dick only and use the arms of Dick only and I do hereby direct that in case any person or persons so entitled as aforesaid shall refuse or neglect to take my said surname and arms and to use or take the proper means for so doing within the said period of three months then the limitations in this my will contained to him or them so refusing or neglecting as aforesaid shall cease determine and be utterly void and the same hereditaments and residuary estate shall in such case immediately go and devolve to the person or persons next beneficially entitled in remainder under the limitations aforesaid in the same manner as if the person or persons whose estate shall so cease and determine was or were actually dead."

The question that I have to determine is whether a person of the name of Barrett, who is alleged to have become entitled in the year 1923 to the possession of the settled property as tenant in tail male, in complete ignorance not only of the fact that he had so become entitled but even of the very existence of the will and its contents, and who remained in such ignorance for a year or two thereafter, can be said to have "refused or neglected" to take the name and arms of Dick within the meaning of the clause. It is not disputed by him that ignorance of a condition cannot prevent its operation. But he does contend that inasmuch as the question of whether he should or should not take such name and arms was never presented to his mind, he cannot be said to have either refused or neglected to do so, and that the forfeiture clause therefore never came into operation at all. It is contended on the other hand that the word "neglect" meant no more than "fail" or "omit."

If the testator intended a forfeiture to take place in the event of a beneficiary failing to take the name and arms within the period of three months from his becoming entitled to the possession of the settled property I cannot understand why he did not say so. The word "fail" would without any doubt include every omission, whether the question of taking the name and arms presented itself to the mind of the beneficiary or not. It would, therefore, cover the case of a refusal, and the specific reference to a refusal would have been quite unnecessary. The testator must be taken to have had some reason for using the word "refuse" and to have used it deliberately, and the fact that he did use it suggests very strongly to my mind that he was directing his attention to the case of a beneficiary to whose mind the question had presented itself. If such a beneficiary in terms expressed his intention of not taking the name and arms, that would amount to a refusal. If, however, without expressing that intention, he merely omitted to comply with the condition, it might be doubtful whether in strictness he has refused or not. As to this, see *Doe d. Kenrick v. Lord Beauclerk* (7), in which it was said that a refusal imports that the thing refused was proposed to the refusing party, and *Doe d. Duke of Norfolk v. Hawke* (8), in which LAWRENCE, J., said that a refusal need not be expressed. The testator might, therefore, very naturally add the word

- A "neglect" to cover the case of a refusal that was not express, but I cannot think that it would be natural or in accordance with the ordinary use of language to add the word "neglect" in order to cover every case of failure. Although, therefore, as will presently appear, the word "neglect," when used by itself, may in certain contexts mean no more than the word "fail," I should not, in the absence of authority to the contrary, come to the conclusion that it has that wide meaning
- B in the clause with which I have to deal; but my attention has been directed to certain authorities which I must now consider. Some of them certainly seem to establish the proposition that the word "neglect" may cover every form of omission. In others, however, the word has been treated as covering only omissions that are negligent. Among the former class are included *Re Hodges' Legacy* (10) and *Hawkes v. Baldwin* (9). But in the first of these cases WICKENS, V.-C., did not
- C in terms deal with the meaning of the word "neglect," though he undoubtedly was of the opinion that the word, even in a condition, included an omission due to ignorance. It would appear, however, that he treated the condition as being a condition precedent and not as a condition subsequent, failure to comply with which caused a forfeiture.

- In *Hawkes v. Baldwin* (9) the testator, after giving certain legacies, declared
- D that in case the said legatees or any or either of them

- "shall be dead at the time of my decease or shall not then be heard of to be then living or shall not respectively claim their respective legacies within twelve calendar months next after my decease then the legacies hereinbefore given to such of my respective legatees as shall be dead at the time of my decease or as shall neglect to claim the same within the time aforesaid shall
- E sink into and form a part of my residuary personal estate."

- It was held in the case of one of the legatees who, in consequence of her ignorance that the testator was dead, and accordingly of the contents of his will, did not claim her legacy within twelve calendar months from the testator's death, that she was not entitled to it. But it was quite clear that in that case the words
- F "neglect to claim" were used as being equivalent to "shall not claim."

- Astley v. Earl of Essex* (3) was also cited as being an authority within the same class, but in that case the testator had directed that in case any person entitled to the possession of his real estate under the limitations of his will should neglect or fail to take and use a certain name and arms then the estate and interest of the person so failing should cease and determine and the testator's estates should
- G immediately thereupon go over to the person next in remainder. It was held that a person who became entitled in possession in 1868 but knew nothing of his rights under the will until 1870 and had not complied with the name and arms clause had forfeited his estate. He had, however, undoubtedly "failed" to take the name and arms and it was not necessary to decide that he had "neglected" to comply with the condition.

- In the latter class of cases are *Richmond Gas. Co. and Richmond Corpn.* (19), *Re London and Paris Banking Corpn.* (16) and *Re Connington's Will* (14). The first two of these cases, however, were not dealing with conditions imposed by a will or settlement and are not of much assistance in the present case. In *Re Connington's Will* (14), however, the testator had devised lands to the use of the poor vicar of L. for ever upon condition that the vicar for the time being should read or cause to be read in the parish church morning prayer upon every Wednesday, Friday, and Holy-day throughout every year for ever and the testator provided
- I as follows:

"It is my will that every vicar of L. which shall not hereafter fully and punctually observe and keep the condition aforesaid shall neither have nor receive any manner of benefit or advantage by this my will during the residue of the term of his life natural. . . . If any of the vicars or curates of L. aforesaid hereafter shall neglect in the least to read divine service when and where as before required then it shall and may be lawful for the trustee to pay

the profits of the land to the master of the free school of W. for and during the life of such negligent vicar of L." A

It was held by WOOD, V.-C., that the testator was looking to the case of wilful neglect. He was, however, of course, assisted in arriving at that conclusion by the reference to the negligent vicar. Having regard to these authorities it may well be that, if in the present case the gift over were directed to take effect if the person becoming entitled to the estate should neglect to take the name and arms within the named period the word "neglect" ought properly to be construed as including the mere omission or failure. In none of the cases, however, did the court have to consider the words "refuse or neglect," and those are the words with which I have to deal. B

Counsel for the personal representative of the late tenant for life very properly referred me to certain statements to be found in DAVIDSON'S PRECEDENTS and in VAIZEY ON SETTLEMENTS. The court in such cases as the present always attaches great weight to any established practice of conveyancers. In DAVIDSON'S PRECEDENTS (3rd Edn.), vol. 3, Part I, at p. 358, there is the following passage in relation to the form of a name and arms clause: C

"The proviso of cesser and gift over of the estate . . . are made operative on refusal or neglect to take the name and arms within the year," D

and then, in a note on p. 363, there is the following statement: "The words 'refuse or neglect' no doubt cover every omission." If by the words "every omission" in the note it was intended to include an omission due to ignorance of the existence of the will, the statement would constitute a serious difficulty in the way of Mr. Barrett, but the note goes on as follows: E

"Whether the word 'refuse' alone would do so may be doubtful. See 2 East. 487; contra, 11 East 667."

No one could suppose that a person who knew nothing about the will could be said to have "refused" to comply with the condition. That cannot be said to be doubtful, but it may well be doubtful, as already pointed out, whether a person to whose mind there was present the question of whether he should or should not comply with the condition, but who never expressly refused to do so, could be said to have "refused." I think, therefore, that I am justified in coming to the conclusion that the note was intended to be confined to those cases in which a person had knowledge of the will and to whose mind, therefore, the question whether he should or should not comply with the condition must have presented itself. In VAIZEY ON SETTLEMENTS, vol. 2, p. 1277, there is this passage in reference to a name and arms clause: "'Refuse or neglect' no doubt covers every omission." F G

The only authority given for the statement, however, is the note in DAVIDSON to which I have just referred, and the learned author must be taken to have used the word "omission" in the same sense as that in which it appears to have been used in the authority that he cites. H

So far, then, I can find nothing in the authorities or in the practice of conveyancers to suggest that the view I have taken of the meaning of the words "refuse or neglect" is not a correct one. On the contrary, there are two authorities, to which I must now refer, which appear to me conclusively to support my own view. In *Partridge v. Partridge* (2) a testatrix, after devising real estate, including a mansion house, in strict settlement, added a proviso to the effect that every person who by virtue of the limitations thereinbefore contained should become entitled to the possession or to the receipt of the rents of the estate should within three months next after the death of the tenant for life reside in and occupy the mansion house for nine months at the least in every year, and she directed that in case any person who should become entitled in possession or receipt of the rents and profits should refuse or neglect to reside in and occupy the mansion house then the limitations thereinbefore contained of the estate to the use of him or her so refusing or neglecting should cease and the estate should go over to the person next I

A in remainder under the limitations of the will. The person who became entitled in possession after the death of the first tenant for life was an infant who did not in fact reside in or occupy the mansion house, and the question was whether he could be said to have refused or neglected to do so. It was held by NORTH, J., that he had not refused or neglected; and in the course of his judgment NORTH, J., expressed himself as follows:

B "The only event mentioned is, if the person who becomes entitled to the estate 'refuses or neglects' to reside in the house; and an infant cannot 'refuse or neglect' to reside in a particular place if the persons to whom his legal custody and care are committed do not choose that he shall do so. The words are not if he 'omit' to reside, or if he 'does not reside,' but if he 'refuse or neglect' to reside; and, in my opinion, an infant, who cannot control or fix the place where he is to reside, cannot within the terms of this clause be said to 'refuse or neglect' to reside at the place mentioned."

And then later he said:

D "As I have already pointed out, there is merely a proviso to defeat a vested estate, and it is made to depend, not upon the taker of the estate not doing the thing mentioned, but upon his refusing or neglecting to do it."

E It is clear from these passages that NORTH, J., did not consider that the words "refuse or neglect" cover every form of omission but that they merely apply to a case where the person has present to his mind the question of whether he will or will not comply with the condition. Inasmuch as an infant is not in a position to exercise his mind on such a question, the clause did not apply to him. If the word F "neglect" were to be treated as equivalent to "failure" or "omission" the decision would have been different seeing that an infant can fail or omit as well as anybody else. The other case is *Re Edwards* (1). That was similar to *Partridge v. Partridge* (2), except that WARRINGTON, J., had to deal with a name and arms clause and not a clause as to residence. He held, following *Partridge v. Partridge* (2), that the words "refuse or neglect" involved an exercise of the will, and that, inasmuch as in law an infant had no power, except in certain special cases, to exercise a discretion in reference to a legal matter, the testator, in using those words, must be taken not to include an infant. After referring to *Partridge v. Partridge* (2), and holding that the decision in that case applied to a name and arms clause as well as to a clause as to residence, WARRINGTON, J., said:

G "Supposing this infant had—which is quite possible—become entitled to the estates as tenant in tail in possession a few days after his birth, could it by any possibility be said that an infant of that age had 'refused or neglected' to do the act in question? The expression 'refuse or neglect' involves the idea of some exercise of discretion, some exercise of will, on his part."

H If the word "neglect" connotes the exercise of the will, it cannot include a failure or omission which is due to ignorance of the provisions of the document, and which therefore does not result from any operation of the mind.

I For these reasons I come to the conclusion that Mr. Barrett did not refuse or neglect to take the name and arms within the period mentioned, and I must so declare. In these circumstances it is not necessary for me to express any opinion on the interesting and difficult point whether the whole condition is not repugnant and void under the doctrine of *Corbet's Case* (4).

Solicitors: *Arnold & Henry White; Rooper and Whately.*

[Reported by J. S. SCRIMGEOUR, Esq., Barrister-at-Law.]

PALMER v. CAREY

[PRIVY COUNCIL (Viscount Cave, L.C., Lord Parmour, Lord Wrenbury, Lord Blanesburgh and Lord Darling), March 5, 8, April 19, 1926]

[Reported [1926] A.C. 703; 95 L.J.P.C. 146; 135 L.T. 237;
[1926] B. & C.R. 51]

Chose in Action—Assignment—Equitable assignment—Fund—Agreement between lender and borrower to apply in particular way—No assignment unless obligation in favour of lender to pay debt out of fund—Agreement by borrower to buy goods with money lent, sell the goods, and pay the proceeds of sale forthwith into lender's bank account—Bankruptcy of borrower—Title to goods and to proceeds of sale thereof.

Privy Council—Australia—New South Wales—Equitable assignment.

Although an agreement for valuable consideration that a fund shall be applied in a particular way may found an injunction to restrain its application in another way, such an agreement between debtor and creditor will not amount to an equitable assignment of the fund unless an obligation has been imposed in favour of the creditor to pay the debt out of the fund.

A debtor borrowed money under an agreement which provided that he should use the money to buy goods and should "sell such goods as soon as possible after the purchase thereof, and pay the proceeds of such sale forthwith" into the bank account of the lender. On the bankruptcy of the borrower,

Held: the agreement did not amount to an equitable assignment to the lender of any interest in the goods or the proceeds of sale thereof.

Notes. Cf. *Re Gillott's Settlement*, [1933] All E.R.Rep. 334, in which MAUGHAM, J., at pp. 340F–341D, explained and distinguished this case. It there appears that at the date of the bankruptcy of the borrower in this case, there was no money standing to the credit of the lender in the Commonwealth Bank, and so their Lordships were not deciding any question as to any such money.

Distinguished: *Re Gillott's Settlement*, *Chattock v. Reid*, [1933] All E.R.Rep. 334. Referred to: *Re Warren*, *Wheeler v. Mills*, [1938] 2 All E.R. 331.

As to equitable assignments, see 4 HALSBURY'S LAWS (3rd Edn.) 492–513; and for cases see 8 DIGEST (Repl.) 573–584.

Case referred to:

(1) *Rodick v. Gandell* (1852), 1 De G.M. & G. 763; 42 E.R. 749, L.C.; 8 Digest (Repl.) 574, 237.

Appeal by special leave from a judgment of the High Court of Australia (ISAACS and STARKE, JJ.; SIR ADRIAN KNOX, C.J., dissenting), dated June 10, 1924, reversing a judgment of the Chief Judge in Bankruptcy in the State of New South Wales (STREET, C.J.), dated Dec. 19, 1923, in favour of the appellant.

The matters in dispute in this case arose from the bankruptcy of one Alfred Edwin Johnstone, the borrower, who became bankrupt on June 21, 1921, the appellant being appointed assignee in bankruptcy of his estate, and the question for decision was whether, under the terms of a written agreement entered into between the respondent, the lender, and the borrower, dated April 30, 1917, the lender was entitled to a security charge or lien on certain goods the property of the borrower. The facts are stated in the judgment. The Chief Judge in Bankruptcy held that the agreement was not an equitable assignment. This decision was reversed by the High Court. The assignee in bankruptcy appealed.

Clauson, K.C., and *Geoffrey Lawrence, K.C.*, for the assignee in bankruptcy.
Sir John Simon, K.C., and *Wilfrid Barton* for the lender.

A April 19. The judgment of their Lordships was delivered by
LORD WRENBURY.—The appellant is assignee in bankruptcy of the estate of the borrower, one Alfred Edwin Johnstone, a trader. He was so appointed on June 21, 1921. The question on the appeal is whether an agreement dated April 30, 1917, made between the borrower of the one part and the respondent lender of the other part is an equitable assignment. If it is not, no other question
B arises. If it is, then inasmuch as the agreement was not registered under the Bills of Sale Acts, a further question arises under those Acts. The trial judge held that the agreement was not an equitable assignment. The High Court of Australia, by a majority (the Chief Justice dissenting), held that it was. The assignee in bankruptcy appeals.

The facts are that in April, 1917, the bankrupt wanted to obtain money for the
C purchase of goods to be sold in his business of an indenter and importer which he carried on in Sydney. The lender agreed to advance him money for this purpose, and the terms on which the advances were to be made were expressed in the agreement of April 30, 1917. The effect of that agreement is as follows: The borrower was from time to time to purchase goods for his business and the lender was to advance the purchase money for them. The borrower was (art. 3) to sell
D the goods as soon as possible and to pay the proceeds of sale into the lender's credit at the lender's bank. The borrower (art. 4) was to be diligent in carrying on the business and (art. 5) to keep proper books of account and give the lender access to them. A monthly account (art. 6) was to be furnished to the lender, and he, after deducting the amount he had advanced and one-third of the gross profits, was to pay the borrower the remaining two-thirds of the gross profits and (art. 7) the
E agreement was not to constitute a partnership. The amount to be advanced was originally fixed at £1,000. By verbal arrangement this was increased to £1,500 and the lender's share of gross profits was increased to one-half. The £1,500 was advanced. Further sums were advanced, partly by the lender's father and partly by the Commonwealth Bank, by way of overdraft on the lender's account. These amounts ultimately ran up to £18,990 16s. 3d. By letters dated May 31, 1921,
F and June 7, 1921, the lender, with knowledge that the borrower was financially embarrassed, entered into an agreement in writing with the borrower by which, in consideration of the release of this sum £18,990 16s. 3d., the borrower assigned to the lender all the stock of his business. On June 21, 1921, the bankrupt's estate was sequestrated and the appellant was appointed assignee in bankruptcy. The assignment of the goods in 1921 has been declared void and the only question to
G be determined is whether the lender has, under the agreement of April 30, 1917, any charge on or equitable interest in the stock-in-trade or the moneys in the hands of the lender.

The article in the agreement of April 30, 1917, on which reliance was placed by the lender and which the trial judge held did not create an equitable assignment was art. 3. That article, when stated in full, is as follows:

H “(3) To sell such goods or stock as soon as possible after the purchase thereof, and to pay the proceeds of such sale forthwith into the credit of the lender at the head office of the Commonwealth Bank in Sydney.”

The law as to equitable assignment, as stated by LORD TRURO in *Rodick v. Gandell* (1), is this:

I “The extent of the principle, to be deduced from them (the cases cited) is, that an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund, in other words, will operate as an equitable assignment of the debts or fund to which the order refers.”

An agreement for valuable consideration that a fund shall be applied in a particular way may be found an injunction to restrain its application in another way; but if

there be nothing more, such a stipulation will not amount to an equitable assignment. It is necessary to find, further, that an obligation has been imposed in favour of the creditor to pay the debt out of the fund. This is but an instance of a familiar doctrine of equity that a contract for valuable consideration to transfer or charge a subject-matter passes a beneficial interest by way of property in that subject-matter if the contract is one of which a court of equity will decree specific performance. Their Lordships have to look at the agreement of April 30, 1917, with these principles in mind. Under art. 1 of that agreement the money when borrowed is the borrower's money, and the lender becomes a creditor. The goods when purchased are the borrower's goods. They have been bought with his money. There is nothing in the agreement to make them the lender's goods. The goods are to be sold. The proceeds of sale when the goods are sold belong to the borrower. They arise from the sale of goods belonging to him. Under art. 3, however, the proceeds are to be paid to the lender's credit at his bank. This gives the lender a most efficient hold to prevent the misapplication of the proceeds, but there is nothing in that article to give him a property by way of security or otherwise in the moneys of the borrower before or after he, the lender, has them in his charge. Article 6 was not relied on as giving an equitable charge, and it is difficult to see how it could be relied on for that purpose. It is an article determining the distribution between the parties in manner there defined of a fund which is in the hands of one of them.

Their Lordships, therefore, fail to find in the agreement any provision creating, contractually or otherwise, any right of property in either the goods or the proceeds of sale of the goods. The Chief Justice says :

"The words of the agreement on which the lender relies are apt to express a contract by the bankrupt to apply the money in the purchase of goods, to sell those goods, and to pay the proceeds of the sale into the lender's bank account, but I can see nothing in them to indicate that the intention was to assign any interest in goods purchased by the bankrupt or to create either a charge over or a trust of such goods in favour of the lender."

Their Lordships agree with this. In their judgment the trial judge and the Chief Justice are right, and this appeal must be allowed, and the order of the trial judge of Dec. 19, 1923, restored with costs before the High Court of Australia and before this Board. The second question, viz., as to the Bills of Sale Act, therefore, does not arise. Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitors : *Blake & Redden; Rodgers, Gilbert & Rodgers.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

A

THE CITY OF BARODA

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P.), January 28, 1926]

B

[Reported 134 L.T. 576; 70 Sol. Jo. 1044; 17 Asp.M.L.C. 27;
24 Lloyd L.R. 72]

*Discovery—Privilege—Production of document—Legal professional privilege—
Reports of ship's officers regarding theft of cargo.*

C

The plaintiffs claimed for short delivery of certain parcels of bristles, in respect of which they were holders of bills of lading, loaded at Shanghai in the defendants' steamship. The defendants denied liability, alleging that the loss was due to pilferage by an organised band of thieves. The defendants called for reports from the first, second, third, and fourth officers of the steamer in order to investigate the question of the management of the vessel and the conduct of their officers in the prevention of theft, which reports were in due course obtained through the defendants' agents in China. The defendants claimed that these reports were privileged from discovery.

D

Held: the reports did not come into existence for the purpose of being communicated to the defendants' solicitors and were not obtained for those solicitors, but were merely communications between principal and agent, as such giving information about a transaction which subsequently became the subject of the litigation, and so they were not privileged from discovery.

E

The Hopper No. 13 (1), [1925] P. 52; 16 Asp.M.L.C. 473, and *Birmingham and Midland Motor Omnibus Co., Ltd. v. London and North-Western Rail. Co.* (2), [1913] 3 K.B. 850, distinguished. *Anderson v. Bank of British Columbia* (3), 2 Ch.D. 644, applied.

F

Semble: an affidavit claiming privilege from discovery should state the grounds on which privilege is claimed, but not the arguments for the existence of those grounds.

Notes. The distinction between privileged and unprivileged reports by servants or agents has since been exemplified in *Seabrook v. British Transport Commission*, [1959] 2 All E.R. 15, and *Longthorn v. British Transport Commission*, [1959] 2 All E.R. 32.

G

Referred to: *Ankin v. London and North-Eastern Rail. Co.*, [1930] 1 K.B. 527. As to legal professional privilege from discovery, see 12 HALSBURY'S LAWS (3rd Edn.) 39-49; and for cases see 18 DIGEST (Repl.) 90-120. As to the form of affidavits of documents, see *ibid.* 28; and for cases see DIGEST (Repl.) 48-51.

Cases referred to:

H

(1) *The Hopper No. 13*, [1925] P. 52; 94 L.J.P. 45; 192 L.T. 736; 41 T.L.R. 189; 16 Asp.M.L.C. 473, D.C.; 18 Digest (Repl.) 109, 935.

(2) *Birmingham and Midland Motor Omnibus Co., Ltd. v. London and North-Western Rail. Co.*, [1913] 3 K.B. 850; 83 L.J.K.B. 474; 109 L.T. 64; 57 Sol. Jo. 752, C.A.; 18 Digest (Repl.) 53, 409.

(3) *Anderson v. Bank of British Columbia* (1876), 2 Ch.D. 644; 45 L.J.Ch. 449; 35 L.T. 76; 24 W.R. 624, 724; 3 Char. Pr. Cas. 212, C.A.; 18 Digest (Repl.) 102, 863.

I

(4) *Southwark and Vauxhall Water Co. v. Quick* (1878), 3 Q.B.D. 315; 47 L.J.Q.B. 258; 26 W.R. 341, C.A.; 18 Digest (Repl.) 91, 752.

(5) *Theodor Korner* (1878), 3 P.D. 162; 47 L.J.P. 85; 38 L.T. 818; 27 W.R. 307; 4 Asp.M.L.C. 17; 18 Digest (Repl.) 109, 929.

(6) *Bustros v. White* (1876), 1 Q.B.D. 423; 45 L.J.Q.B. 642; 34 L.T. 835; 24 W.R. 721; 3 Ch. Pr. Cas. 229, C.A.; 18 Digest (Repl.) 63, 501.

Appeal from the Assistant Admiralty Registrar's decision that certain documents disclosed in the defendants' affidavit were privileged from discovery.

The plaintiffs were the holders of bills of lading for certain parcels of bristles loaded upon the defendant's steamship *City of Baroda* at Shanghai in respect of which they claimed damages for short delivery. The defendants, owners of the *City of Baroda*, pleaded by their defence that the loss was due to pilfering by organised gangs of thieves in China.

Before telling the plaintiffs of the loss the defendants had called for a report on the matter from the captain of the *City of Baroda*, which report was duly made, dated April 20. On the following day the defendants, before the plaintiffs made a claim, instructed their agents to obtain reports from the ship's officers, and reports, dated April 24, were duly obtained from the first, second, third, and fourth officers of the *City of Baroda*. These reports were disclosed by the defendants in their affidavit of documents, and privilege was claimed upon the grounds that the defendants' London agents, having ascertained that the goods were stolen, and knowing that they were worth £1,000, anticipated that litigation would arise; that the defendants always consulted solicitors in such a case, that it was usual for them to procure materials upon which professional advice could be obtained, and that therefore the reports were prepared in view of anticipated proceedings for the purpose and with the intention of being laid before solicitors. The Assistant-Registrar held that the report of the captain dated April 20, being made before the request for a report from the defendants, was not privileged, but that privilege attached to the reports made on April 24. The plaintiffs appealed.

Clement Davies, for the plaintiffs, referred to *The Hopper No. 13* (1).

Sir R. Aske, for the defendants, referred to *Birmingham and Midland Omnibus Co., Ltd. v. London and North-Western Rail. Co.* (2) and *The Southwark and Vauxhall Water Co. v. Quick* (4).

Reference was also made to: *The Theodor Korner* (5), *Bustros v. White* (6), and *Anderson v. Bank of British Columbia* (3).

Cur. adv. vult.

Jan. 28. **LORD MERRIVALE, P.**—Matters of difficulty necessarily arise in respect of the extent of and the limitations upon the right of discovery in cases like the present where, in the course of commercial transactions and the carriage of goods by sea, a loss has been suffered, and, when the loss has been discovered, questions almost inevitably arise as to the quarter in which the burden of the loss will fall. The cases which have to be dealt with very commonly present complicated facts. The principles which have to be applied to the facts are not at all complicated. It is by keeping in view the principles which have to be applied that something like a working rule can be ascertained and maintained. The question is whether, within the working rules with regard to discovery, the defendants in this case ought to produce a series of reports with regard to the subject-matter of the claim which, in the course of the history of the loss, they have obtained from servants of theirs. The obligation which rests on the litigant is, perhaps, as well illustrated as in any other way by referring to the terms of the defendants' own affidavit of documents in para. 1. What the defendants were required by the practice to do, and what they proceed to do, is to disclose on oath what documents are in their possession or power relating to the matters in question in the suit.

Their *prima facie* obligation is to disclose those documents with such particularity that an order for production and inspection can be made. But the *prima facie* obligation which exists is limited by a principle of law, which does not need to be expounded to-day, which is summed up in the judgment of *COTTON, L.J.*, in *Southwark and Vauxhall Water Co. v. Quick* (4) in these words (3 Q.B.D. at p. 322):

"That, I think, is the true principle, that if a document comes into existence for the purpose of being communicated to the solicitor with the object of obtaining his advice, or of enabling him either to prosecute or defend an action, then it is privileged."

- A That is the broad principle on which exemption from a *prima facie* right is allowed in the case of communications with solicitors. The matter has often been expounded at great length.

The principle laid down in that statement by COTTON, L.J., was somewhat elaborated and applied in *Birmingham and Midland Motor Omnibus Co., Ltd. v. London and North-Western Rail. Co.* (2). Questions arose there, on a particular state of facts, whether the documents obtained for use by the solicitor of the litigant for the purpose of helping the litigant in his professional capacity were or were not subject to be produced. BUCKLEY, L.J., expounded the rule in the *Southwark Water Co. Case* (4) by this statement:

- C "It is not necessary, I think, that the affidavit should state that the information was obtained solely or merely or primarily for the solicitor, if it was obtained for the solicitor, in the sense of being procured as materials upon which professional advice should be taken in proceedings pending, or threatened, or anticipated. If it was obtained for the solicitor, as above stated, it is none the less protected because the party who has obtained it intended if he could to settle the matter without resort to a solicitor at all."

- D These are plain statements which govern the decision of this case. What was done in *The Hopper No. 13* (1), out of which, I think, this controversy has more immediately arisen, was done with the intent of applying the principle as to discovery laid down in the earlier cases and exemplified in *Birmingham and Midland Motor Omnibus Co., Ltd. v. London and North-Western Rail. Co.* (2); it did not in any way modify, and certainly was not intended to modify, any of the principles applicable to this matter. The foundation of privilege from discovery is a sufficient affidavit, or the proof by consent of sufficient facts if there is any consent that the facts shall be established otherwise than by affidavit. It was a peculiarity of *The Hopper No. 13* (1) that the material which was before the court had been produced in the course of an interlocutory proceeding, and that the privilege which was claimed was not claimed in the fullest and most direct way in the affidavit which
- F had been used; and that by consent of the parties the facts were ascertained not with a view of creating a precedent for inquiry in court as to questions of privilege, but to avoid delay and expense in formulating the controversy which had arisen, and which was well understood, by means of a further affidavit.

- G In a general way, it is the affidavit of the party claiming privilege which must be referred to, and the party claiming privilege has this great advantage, that, if his affidavit is in explicit terms which bring him within the grounds of privilege, he may not be cross-examined on it, and, unless aliunde facts appear before the court which displace the affidavit, he will be protected by the terms of the affidavit.

- The affidavit here is of an unusual character. Counsel for the defendants conceded that it proceeds rather on the lines of an argument founded on *The Hopper No. 13* (1), than on those grounds of sober and restrained statements of fact whereby privilege from discovery is obtained. The deponent relates circumstances under which the loss had become known to his firm, and he says that certain memoranda were considered, then he assumes a fact and says "in view of the fact that the defendants could not see their way to accept responsibility for the loss"—there being no evidence of any such fact; and, so far as I know, it not being the fact—
- I "it was anticipated that proceedings would arise." I make a benevolent guess as to where it was anticipated. Then the deponent enters on generalities. He says the defendant company always consults solicitors in such a case, and for such purpose it is usual to procure materials on which professional advice could be taken with reference to anticipated litigation. It sounds rather like an extract from a popular lecture on business methods where there is possible litigation. At the close the argument is thus summed up: "The documents referred to were therefore prepared for the defendants by Captain Hufton in view of anticipated proceedings for the purpose, and with the intention of the same being laid before their solicitors

confidentially and in their professional capacity as materials upon which professional advice should be taken." A

I am not going to comment further on the terms of that affidavit; but the affidavit which will inevitably protect the party from discovery will not be an argument, and it will contain the grounds of the alleged privilege so framed that the party who has stated them on his oath will expose himself to the proper penalties if those grounds are untruly stated—if the claim is not honestly made. I have no doubt B that the claim here is honestly made, but it is made with the intention of ascertaining whether protection can be got in this case. The affidavit being of that character, with an argumentative conclusion of what might be the necessary contents of an affidavit of fact, I have been referred by counsel to the correspondence—the correspondence between the plaintiffs and the defendants—and a previous C correspondence between the defendants and their agents and other persons.

If I could come to the conclusion that the affidavit here was a mere routine mode of stating the conclusions on which privilege is properly founded, and if the correspondence provided support for a conclusion to that effect, I might see my way to sustain the decision of the learned deputy registrar. However, I have read the correspondence which has been produced. The documents in question, naturally D enough, have properly not been produced, but the correspondence which has been produced seems to me to show that the documents in question are not within the privilege when it is properly understood. There are no documents which came into existence for the purpose of being communicated to the solicitor with the object of obtaining his advice or enabling him either to prosecute or defend an action, and the documents do not come within the description of documents obtained for the E solicitor.

The true position was that a serious question had arisen as to the conduct of those in charge of one of the defendant company's vessels, and the management properly found it necessary to insist on immediate reports which would explain a very grave occurrence on board the defendants' vessel. Whether they might or might not refer the matter ultimately to solicitors was entirely an open question; but the immediate question was that of the management of the vessel and the F conduct of their officers in the prevention of theft on board their ship; the case does not fall within the principle laid down in the *Southwark Water Co. Case* (4), and illustrated by the *Birmingham Case* (2) and in *Hopper No. 13* (1); but it does come within that class of cases to which JAMES, L.J., referred in *Anderson v. Bank of British Columbia* (3), where he said that the privilege which exists for communication with solicitors and the rule governing that privilege seem to have no G application to a communication between a principal and his agent in the matter of the agency, giving information on facts and circumstances of a transaction which becomes the subject-matter of litigation.

It is not necessary to examine all the authorities which have been cited. Counsel have been so good as to supply me with all the material which appeared to bear on the case, but I am satisfied in this case, from the nature of the affidavit H and from the nature of the correspondence, that the documents in question did not come into existence for the purpose of being communicated to the defendants' solicitors and were not obtained for the solicitors. For those reasons this appeal must be allowed.

Solicitors: *Waltons & Co.; Ince, Colt, Ince & Roscoe.*

[Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.] I

IN THE ESTATE OF TODD

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P.), April 19, 21, 1926]

[Reported [1926] P. 173; 95 L.J.P. 105; 135 L.T. 381; 42 T.L.R. 545; 70 Sol. Jo. 671]

Probate—Grant—Interdependent wills affecting property in England and abroad—Necessity for English grants—Power of court to release original will after probate for foreign grant to be obtained.

If testamentary instruments are independent, one dealing with estate in the jurisdiction and the other with estate outside the jurisdiction, there is no obligation on the party propounding the instrument relating to estate within the jurisdiction to obtain probate of the instrument which relates exclusively to estate without the jurisdiction. But if two or more testamentary instruments are interdependent, relating to or affecting estate within and also without the jurisdiction, grants of probate in England of all the instruments in question are necessary. In such a case the court has power to order that a sealed and examined copy of a will which requires probate in another jurisdiction be retained in the Registry as evidence of the testamentary act and to allow the original document to be handed out after being admitted to probate in England for probate in that other jurisdiction to be obtained.

In the Goods of Dickins (1) (1842), 3 Curt. 60, applied.

Notes. As to probate of separate wills of property in England and of property abroad, see 16 HALSBURY'S LAWS (3rd Edn.) 182; and for cases see 23 DIGEST (Repl.) 140–143.

Cases referred to:

- (1) *In the Goods of Dickins* (1842), 3 Curt. 60; 1 Notes of Cases, 398; 163 E.R. 655; 44 Digest 241, 682.
- (2) *In the Goods of Schenley* (1903), 20 T.L.R. 127; 23 Digest (Repl.) 141, 1460.
- (3) *In the Goods of Astor* (1876), 1 P.D. 150; 45 L.J.P. 78; 34 L.T. 856; 40 J.P. 617; 24 W.R. 539; 23 Digest (Repl.) 141, 1455.
- (4) *In the Goods of Fraser*, [1891] P. 285; 60 L.J.P. 93; 64 L.T. 808; 23 Digest (Repl.) 141, 1463.
- (5) *In the Goods of Callaway* (1890), 15 P.D. 147; 59 L.J.P. 73; 63 L.T. 227; 38 W.R. 528; 23 Digest (Repl.) 141, 1457.
- (6) *In the Goods of Murray*, [1896] P. 65; 65 L.J.P. 49; 44 W.R. 414; 12 T.L.R. 143; 23 Digest (Repl.) 141, 1462.
- (7) *Sheldon v. Sheldon* (1844), 1 Rob. Ecc. 81; 3 Notes of Cases, 250; 8 Jur. 877; 163 E.R. 972; 44 Digest 237, 628.

H Probate Motions.

The deceased, who was a domiciled Englishman and who died on Feb. 19, 1926, left three testamentary documents; a will dated June 15, 1925, executed in England and disposing of the whole estate; a codicil thereto, also executed in England, dated Nov. 18, 1925; and a will of Jan. 13, 1926, executed in New York, and superseding all previous testamentary dispositions in so far as they related to the testator's property and property rights in the United States of America and in Cuba. By his English will the testator appointed two executors, made bequests to his wife and other persons, and declared that all duties, including estate duty, were to be borne and paid by and out of the residuary estate. By the codicil he, inter alia, made further provision for his wife, and by the American will he gave the whole of his American and Cuban estate to his wife and appointed her sole executrix.

These were cross-motions. Lady Euphemia Van Rensselaer Todd, the testator's widow, by her counsel, moved the court to exclude the American will from probate

of the English will and codicil, and for the American will to be handed out of the Registry for probate in the United States and Cuba on a duly authenticated copy thereof being left in the Registry. The executors of the English will moved, by counsel, for probate of that will, together with the codicil thereto, and of the American will. The estate consisted entirely of personalty and was of the value of approximately £155,000 in England and £138,000 elsewhere. By a memorandum of the same date as that of the American will the testator indicated his wish that that will should be "probated" in New York and in Cuba, and the will itself contained an order and direction to that effect. It appeared from an affidavit of a member of the Bar of the Supreme Court of the United States that the widow, an American by birth, in spite of her marriage to a British subject, retained her American citizenship, and could therefore act as executrix of the American will, whereas the executors of the English will, even if it were admitted to probate in New York, were by the law of the State of New York incompetent to serve as executors or administrators with the will annexed, they being non-resident aliens. There would also be further difficulties in connection with the vesting of assets and other matters. The deponent was of opinion that as the American and English wills were independent as regards their dispositions, the English will would not be admitted to probate in New York without litigation.

Norman Birkett, K.C. (H. D. Grazebrook with him), for the widow, referred to In the Goods of Schenley (2), In the Goods of Astor (3), In the Goods of Fraser (4), In the Goods of Callaway (5), and In the Goods of Murray (6).

Bayford, K.C. (Bucknill with him), for the English executors.

LORD MERRIVALE, P.—This, no doubt, is a matter of some importance between the parties. I am a little disinclined to believe that people engage in expensive litigation for the mere pleasure of exercise, and so I assume from the technical and somewhat difficult questions which have been raised and discussed that there are substantial interests involved here. The testator, Sir Joseph White Todd, being possessed of large properties in the United States and in Cuba, and of large properties in this country, in his later years made a will in accordance with the provisions of the Wills Act, he being domiciled here, whereby he disposed of everything that he possessed. He disposed of it in a way perfectly consistent with all his subsequent dispositions, in a manner consistent with the duties of man whose domestic position was that which his was. There was a codicil to the English will, and later, being in New York, and no doubt being advised with regard to the laws of the United States and of Cuba with regard to successions after death, the testator made a will, an independent will in some particulars, which disposed of his assets in the United States and in Cuba. He did not purport to annul some provisions of the earlier will—which I call the principal will—affecting those properties. One of those provisions was the disposition of property to provide for estate duties and legacy duties, and whatever duties might affect the substantial bequests which he made to members of his family other than the lady who is now his widow. That disposition appearing in the earlier will is not revoked by the later will. The later will is effectual and would be entitled here to probate, and it is sought to admit it to probate. The will is effectual on the face of it and that fact, when attention is paid to it, shows that the set of testamentary dispositions which are here in question are not independent but interdependent.

The question between the parties is whether the three testamentary dispositions which are here in question may be, or must be, admitted to probate here by the executors of what I call the principal disposition, or whether under the authorities, which are well known, it is sufficient that the executors of the principal disposition shall proceed to probate here of the English will and the English codicil and merely place on record in the Registry evidence sufficient to establish the existence of what has been called the American will. It is said on the part of the widow, who is the beneficiary under the American will, that the proper course is that the documents having direct relation to the English property, the property within the

- A jurisdiction of this court or in this country, and in Scotland, of which the first applicants here are the executors, should be admitted to probate, and that what is called the American will shall not be admitted to probate. It is said, on the other hand, that these papers being interdependent, and the beneficiaries under the original will and codicil having interests in the American property, the whole must be admitted to probate. It is partly a question of principle and partly a
- B question of what is convenient to be done. It did not need the affidavit which has been filed, and very properly filed, from a counsel who is familiar with the United States law to inform the court that difficulties do arise, where there are testamentary dispositions of property in this country and of property in some of the United States, by reason of the different requirements of proof of testamentary acts which exist in this country and in the United States. Proof in solemn form in this
- C country generally establishes the document which is admitted in solemn form to probate in every jurisdiction, but in non-contentious cases, in what has been called proof in common form, which is, of course, well known outside this jurisdiction, the mode of proof is by affidavit and there is not the same examination, and there is no cross-examination of the witnesses, as is required for proof in some of the States of the United States. Those facts make a practical difficulty in the case
- D quite apart from any question of the operation of these respective instruments. They make a practical difficulty in the discharge by the widow of the direction given her by her late husband that she shall proceed to prove the American will in the American jurisdiction.

- What I have to consider in the first instance is how this matter must be dealt with and how it may be dealt with. It is a class of topic, as has appeared in the
- E course of the discussion, which has often created difficulty. So long ago as 1844 in *Sheldon v. Sheldon* (7) it became necessary that there should be consideration in the Prerogative Court of questions such as arise here. DR. LUSHINGTON at that time was sitting for SIR HERBERT JENNER FUST as judge of the Prerogative Court, and a question resembling in principle this question, and raising the same kind of point as arises here, had to be considered. DR. LUSHINGTON explained what the
- F principles were which applied to the matter. He referred to the practice of the Ecclesiastical Courts and said (1 Rob. Ecc. at p. 86):

- "The general rule used to be that all papers entitled to probate must be admitted into the probate, and, as papers referred to were legally entitled to probate, the practice was to prove them. But difficulties arose in carrying this rule into practice in all cases. . . . Frequently the document referred to
- G was not in the custody of the parties or the expense of engrossing it was an important matter."

- A little later, referring to the changes which the Wills Act had produced, DR. LUSHINGTON pointed out that the kind of disposition which of necessity must be proved may vary, but he said this (*ibid.* at p. 88):

- H "Where there is a totally independent instrument, no one would be compelled to take probate of that which is altogether valid in itself, but . . . that never could be the case with papers incorporated by reference. The title to probate depends on the clearness and sufficiency of the words of incorporation. The necessity of taking probate will depend upon the validity or invalidity of the instrument to be incorporated."

- I Then DR. LUSHINGTON referred to the case of a valid deed which was not on the face of it testamentary, but which had testamentary effect, because the testator had directed by his will that his property should be settled on similar trusts to those of the deed. He then said: "there is a title to probate," and he went on to say that if litigation arose there would be a necessity of probate. He added:

"I have yet to learn how a court of law can give effect to such a will unless the instrument referred to formed part of the probate."

That was at a time when the jurisdiction in probate was the old jurisdiction of the

Ecclesiastical Courts and the Court of Probate was not a branch of the High Court of Justice. Since that time it has been made abundantly clear that if testamentary instruments are independent instruments, the one of them dealing with property in the jurisdiction, and the other dealing with property outside the jurisdiction, there is no obligation on the party who propounds the will relating to property within the jurisdiction to proceed to obtain probate of the will which relates exclusively to property without the jurisdiction. They are independent documents and independent acts. SIR JAMES HANNEN dealt with that matter in *In the Goods of Astor* (3), to which reference has been made, and the principle on which he acted has frequently been reaffirmed in subsequent times. The difficulty has been in determining between one document and the other how the rule applied. A B

In the present case it seems to me that the executors of the principal, or English, will are entitled, and that it is their duty, to take probate of the three interdependent instruments which are in question, and I propose to decree that they shall take probate of those three instruments. But I have then to consider whether the court is so fettered by its rules of practice that by decreeing probate here of an instrument which has some operation as a set of testamentary dispositions of a subject of His Majesty possessed of property within the jurisdiction, it is unable to leave the party who has larger interests in the United States free to obtain probate there without any difficulty from the fact that probate has been granted here. That is a question as to what is to be directed with regard to the instrument which has been called the American will. If the widow is left free to proceed in the United States and in Cuba to obtain probate in their respective tribunals of that document, it seems to me that proper regard will have been had to everybody's interests, and I am satisfied that there is power so to order. There is a case in the Prerogative Court, before SIR HERBERT JENNER FUST, in 1842 (*In the Goods of Dickens* (1)), where the court found that the documents were so interdependent that they ought to be proved together, and SIR HERBERT JENNER FUST said : C D E

"The court is prayed to decree probate without the original settlement [that was the incorporated document, or the document which had come to have testamentary operation] on the ground that it is necessary to be retained in the possession of the trustee to enable him properly to execute his trust; I think, in this case, that if a notarial copy be left in the registry, and a notarial copy form part of the probate, it will be sufficient." F

I cannot suppose that the power of the court to do what ought to be done for the purposes of justice is less vigorous than it was in 1842. What I propose to do is to direct that the three instruments in question be admitted to probate, but that the document to be retained in the registry, which shall be evidence of the testamentary act in question, namely, that which is called the American will, shall be an examined and sealed copy of that instrument, and that when the documents have all been admitted to probate with due dispatch the American will itself shall be handed out to the widow, who is directed by it to proceed under it in the United States, and who, I cannot doubt, in the course of the proceedings desires, as well as intends, to proceed. G H

Solicitors : Norton, Rose & Co.; Slaughter & May.

[Reported by HERBERT ROLFE, Esq., Barrister-at-Law.]

A

MANLEY v. SARTORI

[CHANCERY DIVISION (Romer, J.), April 23, 1926]

[Reported [1927] 1 Ch. 157; 96 L.J.Ch. 65; 136 L.T. 238]

B *Partnership—Dissolution—Death of partner—Business carried on by surviving partners—Profits after dissolution—Share to which representatives of deceased partner entitled—Management of business after dissolution by one partner—Remuneration—Partnership Act, 1890 (53 & 54 Vict., c. 39), s. 42.*

A partnership business was dissolved by the death of one of the partners. The surviving partners continued to carry on the business for some time under the management of one of them, and profits were earned. In an action for the winding-up of the partnership business,

C **Held:** (i) the legal personal representatives of the deceased partner were entitled to share in such profits as were attributable to the user of the partnership assets, and their share should be proportionate to the deceased's interest in the assets; (ii) the partner under whose management the business was carried on was entitled to an allowance in respect of his management, and an inquiry should be directed for the purpose of ascertaining the proper amount to be so allowed, and what profits, after deducting such amount, were attributable to the user of the partnership assets.

D Per **Curiam**: it was for the surviving partners to show, if they could, that the profits had been earned wholly or partly by means other than the utilisation of the partnership assets.

E **Notes.** As to distribution of profits made after dissolution, see 24 HALSBURY'S LAWS (2nd Edn.) 508–510; and for cases see 36 DIGEST (Repl.) 624–626. For the Partnership Act, 1890, s. 42, see 17 HALSBURY'S STATUTES (2nd Edn.) 603.

Cases referred to:

F (1) *Willett v. Blanford* (1842), 1 Hare, 253; 11 L.J.Ch. 182; 6 Jur. 274; 66 E.R. 1027; 36 Digest (Repl.) 625, 1877.
(2) *Simpson v. Chapman* (1853), 4 De G.M. & G. 154; 43 E.R. 466, L.J.J.; 36 Digest (Repl.) 568, 1262.

Summons in a partnership action.

G Charles Calder and his son Charles James Calder carried on in partnership the business of timber merchants for some years prior to the death of Charles Calder. Charles Calder died on Oct. 19, 1913, having by his will, in the exercise of a power given to him by the partnership articles, nominated the trustees of his will to succeed to his share in the business and the profits for a certain period after his death. By a codicil to his will he nominated Charles John Manley to succeed to a proportion of his share in the business. The will and codicil were duly proved by the executors, Charles James Calder, Charles John Manley, and August Sartori, who were appointed trustees. After the death of Charles Calder the business was carried on in partnership by Charles James Calder, Charles John Manley, and the trustees of the will of Charles Calder. Charles James Calder died on May 18, 1919, and his will was proved on Jan. 5, 1922. After the death of Charles James Calder the business was carried on by Charles John Manley and August Sartori, the surviving trustee of the will of Charles Calder, under the management of Charles John Manley. Charles John Manley was by an order of the court made on Mar. 18, 1921, ordered to commence an action for the winding-up of the partnership business. An action was accordingly commenced by Charles John Manley as plaintiff, in the course of which an order was made on April 8, 1921. By this order it was declared that the partnership had been dissolved by the death of Charles James Calder on May 18, 1919, and it was directed that an account be taken of all dealings and transactions of the business as from that date, and an inquiry was directed as to the credits, property, and effects then belonging to the partnership. The plaintiff

Manley and the surviving trustee of the will of Charles Calder continued to carry on the partnership business under the management of the plaintiff until April 26, 1922, when, with the approval of the court, the business and assets were, as from Mar. 31, 1921, transferred to a company formed for the purpose. Profits had been made in the business between the date of the dissolution by the death of Charles James Calder and Mar. 31, 1921, and this summons was taken out in the action by the executors of Charles James Calder for the purpose of ascertaining the rights of the respective parties in such profits. A

Farwell, K.C., and *Parton* for the executors of Charles James Calder.

Manning, K.C., and *Russell Gilbert* for the plaintiff, Charles John Manley.

Sir Thomas Hughes, K.C., and *Beebee* for the defendant, August Sartori, the surviving trustee of the will of Charles Calder. B

ROMER, J.—The applicants are the legal personal representatives of one Charles James Calder, who died on May 18, 1919. At the date of his death he was carrying on a timber merchant's business in partnership, the other partners being the plaintiff in the action, Mr. Manley, and the plaintiff and the first defendant, August Sartori, as the legal personal representatives of a Mr. Charles Calder, who had died in the year 1913. On the death of Mr. Charles James Calder, as has now been judicially determined, there was a dissolution of the whole partnership, that is to say, his share did not survive to the other partners, subject to their paying him the value of his share, and accordingly the whole of the assets of the partnership should then have been realised and applied in payment of the debts and liabilities of the firm, the surplus assets being applied in payment of what might be due to the respective partners. That would be in accordance with the provisions of s. 39 of the Partnership Act, 1890. That, in point of fact, was not done, but the other partners, the trustees of Charles Calder and Mr. Manley, continued to carry on the business until ultimately, in the year 1922, the whole of the assets of the business were sold as from Mar. 31, 1921. C

The question which arises is as to the rights of the parties in the profits earned between the date of Mr. Charles James Calder's death in May, 1919, and Mar. 31, 1921. Some things appear to be reasonably clear in this connection. Where, in such a case, the surviving partners, instead of realising the assets and distributing the proceeds amongst the parties in accordance with their rights and interests, choose to carry on the business and make profits by virtue of the employment of any of the partnership assets, then, subject no doubt to making a proper allowance to the surviving partners for their trouble in so carrying on the business, such profits belong to all the persons interested in the partnership assets by means of which the profits have been earned in accordance with their rights and interests in those assets; that is to say, proportionately to their interests in those assets. That has been laid down in numerous cases and is affirmed by s. 42 of the Partnership Act, 1890. There appears to have been an idea at one time that, in such a case, the partners were interested in the profits so made in the shares in which they would have been entitled to the profits if they had been earned while the partnership was a going concern. For instance, it was suggested that, supposing a partner brought no capital into the partnership but in consequence of his skill or for some other reason was entitled under the partnership articles to receive a particular share, say a one-third share, of the profits, then if, after his death, the surviving partner who brought all the capital into the concern, carried on the business and made a profit, the executors of the deceased partner were entitled to one-third of that profit. That that is not so was explained by *WIGRAM, V.-C.*, in *Willett v. Blanford* (1). He pointed out, in effect, that where the profits had been earned by reason of using the assets of the partnership, those profits were divisible between people who, in the events which had happened, were interested in the partnership assets: they were not divisible between the parties in accordance with their rights and interests in profit earned while the partnership was a going concern. That is expressed in s. 42 of the Partnership Act as follows: D

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A "Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled, at the option of himself or his representatives, to such share of the profits made since
B the dissolution as the court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of 5 per cent. per annum on the amount of his share of the partnership assets."

Of course, the reference there to the deceased partner's share of the partnership assets is due to this, that he is only entitled to his proper proportion of the profits earned by the partnership assets. For the purposes of ascertaining what it is in
C which he is entitled to share, you must ascertain what profits have been earned by the utilisation of the assets of the partnership as a whole. Once you have found that, then having ascertained what the deceased partner's interest in those assets was, you can easily ascertain his share in the profits earned by them, and in that sense it is right to say that the legal personal representatives of a deceased partner are entitled to the profits made by the utilisation of his share of the partnership
D assets. I say that, because I cannot help thinking that in the present case there has been some little misapprehension upon the matter. For instance, there are passages in the statement of facts which seem to suggest that the legal personal representatives of Charles James Calder are not entitled to any part of the profits earned since his death, because at all material times there have been liquid assets of the partnership more than sufficient to pay out to his legal personal
E representatives the capital belonging to his estate. Now the rights of the deceased partner or his legal personal representatives are rights over all the assets of the partnership. He has an unascertained interest in every single asset of the partnership, and it is not right to regard him as being merely entitled to a particular sum of cash ascertained from the balance-sheet of the partnership as drawn up at the date of his death. So that if, after the death of Charles James Calder, any profits
F were in fact earned by using any single partnership asset, the profits so far as attributable to the use of that partnership asset are profits in which the executors of Charles James Calder have a share to the extent of their share in that particular asset; that is to say, in proportion to their share in the total assets of the partnership. But, as was pointed out by WIGRAM, V.-C., in *Willett v. Blanford* (1), it does not necessarily follow that because the surviving partners have been carrying
G on the business the profits or the whole of the profits are attributable to the use of the partnership assets. WIGRAM, V.-C., said this, and these passages were expressly approved by the Court of Appeal in a later case of *Simpson v. Chapman* (2) (4 De G.M. & G. at p. 171). WIGRAM, V.-C., said (1 Hare, at p. 269):

"I have again considered the subject [that is the subject with which I am
H dealing] and read the cases to which I was referred, and I remain of the opinion I expressed at the close of the argument, that there is no rule of this court applicable alike to all cases; and that there is no rule, which is so established or general in its application, that it is to be taken to be the general rule until circumstances are shown which displace it. The facts of each case must be fully brought under the view of the court before it can be in a position to state what justice to the party seeking its protection may require, with due
I regard to the interests of other parties."

He also said this:

"I consider myself, therefore, bound by authority and reason to hold that the nature of the trade, the manner of carrying it on, the capital employed, the state of the account between the partnership and the deceased partner at the time of his death, and the conduct of parties after his death, may materially affect the rights of the parties; and that I must have more information than I now possess before I can safely decide this case."

In other words, it may well be that in a particular case profits have been earned by the surviving partner not by reason of the use of any asset of the partnership, but purely and solely by reason of the exercise of skill and diligence by the surviving partner; or it may appear that the profits have been wholly or partly earned not by reason of the use of the assets of the partnership, but by reason of the fact that the surviving partner himself provided further assets and further capital by means of which the profit has been earned. Those profits, so far as earned by sources outside the partnership assets, are not profits in which the executors of the deceased partner could be entitled to any share. A B

Applying those observations to the present case, I am met by this difficulty, that there is no evidence from which the court can answer definitely the question whether the profits, which undoubtedly have been earned by carrying on the business, have been earned, or whether any part of those profits has been earned, by using any of the assets of the partnership. I think it was the view of the learned master that in the circumstances the onus was on the applicants to show affirmatively that the profits or some part of the profits had been earned by using the partnership assets or, as the master phrases it, the deceased partner's share in the capital. But it appears to me that that is not so for these reasons: in LINDLEY ON PARTNERSHIP (9th Edn.), p. 710, I find this stated: C D

"Special inquiries on this subject [that is, the question of the right of a deceased partner to a share of profits made subsequent to his decease] are almost always necessary, and if it can be shown that, having regard to the nature of the business or other circumstances, the profits which have been made cannot be justly attributed to the use of the capital or assets of the late partner, his *prima facie* right to share such profits will be effectually rebutted." E

By that I understand the learned author to mean that where surviving partners continue to carry on the partnership business, *prima facie* they are carrying it on by reason of their possession of the assets of the partnership; and the executors of the deceased partner are *prima facie* entitled to a share of the profits proportionate to his share in the assets of the partnership. It is for the surviving partners to show, if they can, that the profits have been earned wholly or partly by means other than the utilisation of the partnership assets. F

In those circumstances, inasmuch as it appears to me that the parties in the case have not up to the present really devoted their attention to the real point which has to be ascertained, I think I must direct an inquiry, and, subject to what may be said by anybody as to the precise form of that inquiry, I think the purport of it should be to ascertain what profits have been earned by the surviving partners by the use of the assets of the partnership since May, 1919, down to Mar. 31, 1921. I wish to make it clear that amongst the assets of the partnership I include the goodwill of the partnership, notwithstanding the fact that the goodwill may not have been capable of being valued in cash. I am told that nothing appears in the partnership balance-sheet in respect of goodwill, and that when the business was sold no value was put upon the goodwill. But, notwithstanding that the goodwill may not have been capable of being ascertained in pounds, shillings, and pence, I have no doubt there was to some extent a goodwill in this business, that is to say, there was always the possibility of customers returning to the old firm. So far as use was made of that goodwill, then profits made by that use will be profits earned by the use of a partnership asset, and as such will have to be brought into this account. G H I

The order as drawn up was as follows: "This court doth declare that the legal personal representatives of the above-named Charles James Calder deceased are entitled in respect of any profits earned by the surviving partners between May 18, 1919, and Mar. 31, 1921, which are attributable to the user of any partnership assets to a share thereof proportionate to the share of the said Charles James Calder in the total assets of the firm in the said judgment mentioned on the said May 18, 1919, the date of the dissolution of the partnership. And this court doth

A order that the following inquiries be made that is to say (i) An inquiry what would be proper to be allowed to the plaintiff Charles John Manley in respect of his personal superintendence and management of the business of the said partnership between May 18, 1919, and April 26, 1922. (ii) An inquiry what profits after deducting such sum as shall be certified to be proper to be allowed to the plaintiff Charles John Manley under Inquiry No. (i) hereinbefore directed have been earned by the
 B surviving partners in respect of the partnership business between the said May 18, 1919, and Mar. 31, 1921. (iii) An inquiry whether any and if so what part of such profits was earned otherwise than by the user of the partnership assets including goodwill. And the costs of the said application are to be costs in the action including the costs of a shorthand note of this judgment and a transcript thereof for each set of parties to the said summons. And the rest of the said summons is to
 C stand over and the parties are to be at liberty to apply."

Solicitors: *Keene, Marsland, Bryden & Besant*, for *C. D. Forster & Lester*, Newcastle-on-Tyne; *E. Flux Leadbitter & Neighbour*, for *Leadbitter & Harvey*, Newcastle-on-Tyne; *Broad & Son*.

[Reported by J. S. SCRIMGEOUR, ESQ., Barrister-at-Law.]

D

Re COWLEY SETTLED ESTATES

[CHANCERY DIVISION (Astbury, J.), June 16, 17, 1926]

E

[Reported [1926] Ch. 725; 95 L.J.Ch. 477; 135 L.T. 568]

*Settled Land—Compound settlement—Additional powers in component settlements—Separate trustees of component settlements—Tenant for life of last and of compound settlement—Paramount interests under first settlement—Power of tenant for life to exercise all additional powers—Protection of
 F paramount interests—By whom capital moneys should be held—Settled Land Act, 1925 (15 Geo. 5, c. 18), s. 1 (1), s. 22 (2), s. 23 (1), s. 32 (1), s. 108, s. 109.*

The meaning of the proviso to s. 1 (1) of the Settled Land Act, 1925, that "where land is the subject of a compound settlement, references in this Act to the settlement shall be construed as meaning such compound settlement,
 G unless the context otherwise requires," is that where there is a compound settlement existing after the date of the Act, powers and provisions contained in the Act in respect of a settlement shall be deemed to apply to the compound settlement unless the context of the Act otherwise requires. Accordingly, "settlement" in s. 23, s. 108, and s. 109 includes a compound settlement, but does not do so in s. 22 (2).

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Under a settlement of 1888 certain jointures were limited and a portion was charged; the settled estates were limited to the second Earl Cowley for life, with remainder to the third earl, with remainder to his sons in tail male; certain powers additional to those given by the Settled Land Acts were conferred, especially as to the investment of capital moneys; and trustees were appointed for the purposes of the Acts. In 1912 the settled estates were disentailed, and in 1914 were re-settled. The life estate of the third earl under the 1888 settlement was restored, and subject thereto the fourth earl was given a protected life interest, but it was declared that the fourth earl should have the same powers under the Settled Land Acts, 1882 to 1890, and of all Acts extending or amending the same, as if the estates had, after the death of the third earl, been limited to him in remainder for life. Trustees were appointed for the purposes of the Settled Land Acts. Extended powers were given to the person entitled to exercise the powers of a tenant for life, and the provisions for investing capital moneys under the Settled Lands Acts were very widely

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extended, but these extensions were made subject to a proviso that no investment authorised by the 1914 settlement, but not otherwise authorised by the Settled Land Acts, should be deemed an authorised investment unless the trustees of the 1914 settlement consented thereto. The third earl died in 1919.

Held: (i) the settlement of 1888, the disentailing deed, and the settlement of 1914 constituted a compound settlement of which the trustees of the 1888 settlement were trustees by virtue of s. 32 (1) of the Act of 1925, and under that compound settlement the fourth earl had the powers of a tenant for life by virtue of s. 23 (1); by virtue of s. 108 and s. 109 (2) the fourth earl, as tenant for life, was entitled under the compound settlement to exercise the additional powers conferred by the 1888 and 1914 settlements, but that in doing so he was subject to the restrictions imposed by s. 73, s. 75, s. 101, and s. 107, and in addition could be restrained by the court from directing an investment which, though within his powers, was not suitable for the investment of the trust funds (e.g., because it prejudiced the interests of the jointresses and portioner under the 1888 settlement).

Re Hunt's Settled Estates (1), [1905] 2 Ch. 418, applied.

(ii) the capital moneys, whether subject to the trusts of the 1888 settlement or to those of the 1914 settlement or thereafter to be received by the trustees of the 1888 settlement, and the investments representing them, might be invested and applied by the direction of the fourth earl in manner sanctioned by the 1925 Act, the 1888 settlement, and the 1914 settlement, but the powers of investment conferred only by the 1914 settlement could be exercised by him only with the consent of the trustees of that settlement.

(iii) so long as the compound settlement subsisted all capital moneys held before the Act of 1925 came into force should be held by the trustees of the settlement under which they were held, but all fresh capital monies thereafter coming into existence should be paid to and held by the trustees of the compound settlement.

Notes. As to statutory powers in relation to settled land under the Settled Land Act, 1925, see 29 HALSBURY'S LAWS (2nd Edn.) 668-763; for cases see 40 DIGEST (Repl.) 790-852; and for the Act, see 23 HALSBURY'S STATUTES (2nd Edn.) 12.

Cases referred to:

- (1) *Hunt's Settled Estates*, *Bulteel v. Lawdeshayne*, [1905] 2 Ch. 419; 74 L.J.Ch. 759; 93 L.T. 333; affirmed, [1906] 2 Ch. 11; 75 L.J.Ch. 496; 94 L.T. 747, C.A.; 40 Digest (Repl.) 819, 2961.
- (2) *Re Mundy and Roper's Contract*, [1899] 1 Ch. 275; 68 L.J.Ch. 135; 79 L.T. 583; 47 W.R. 226; 43 Sol. Jo. 151, C.A.; 40 Digest (Repl.) 866, 3384.
- (3) *Re Marquis of Ailesbury and Lord Iveagh*, [1893] 2 Ch. 345; 69 L.T. 101; 9 T.L.R. 324; 37 Sol. Jo. 326; 3 R. 440; sub nom. *Re Marquis of Ailesbury and Lord Iveagh*, *Riddell v. Riddell*, 62 L.J.Ch. 713; 41 W.R. 644; 40 Digest (Repl.) 845, 3225.
- (4) *Re Cradock's Settled Estates*, ante, p. 488; [1926] Ch. 944; 95 L.J.Ch. 364; 40 Digest (Repl.) 846, 3232.

Adjourned Summons to determine the powers of the tenant for life under a compound settlement.

By a settlement dated June 9, 1888 (hereinafter called "the 1888 settlement"), made between William Henry second Earl Cowley, of the first part, his only son, Henry Arthur Mornington Wellesley (herein called the third Earl of Cowley), of the second part, and certain other parties as trustees, the Cowley Settled Estates were, in exercise of a power of appointment then vested in the second and third earls under a disentailing deed of Jan. 14, 1887, appointed and settled upon such trusts as the second and third earls should jointly appoint, and subject thereto, and to certain annual payments to the third earl during his father's lifetime, upon trust for the second earl for life in restoration of his life estate prior to the disentailing deed, and after the death of the second earl upon trust to secure a jointure for the

- A** wife of the second earl; and subject thereto the estates were limited to the third Earl Cowley for life, with remainder to his first and other sons successively in tail male, with remainders over. Power was given to the third earl to charge the estates with a jointure to any woman whom he might marry who should survive him of £2,000 per annum during the life of the widow of the second earl, and after her death of £2,500 per annum, and also power to charge the estates with a portion or
- B** portions for his younger child or children of £20,000 as therein mentioned. Powers were given to the person or persons in whom the powers of the Settled Land Act, 1882, should for the time being be vested to exercise certain powers by way of extension or enlargement of the powers under the said Act, and also a wide power of investment of capital moneys. The second earl died in 1895. The third earl married, first, on Dec. 17, 1889, Lady Violet Nevill, by whom he had issue one
- C** son, Christian Arthur Wellesley, now the fourth earl, born on Dec. 25, 1890. This marriage was dissolved in 1897, and on Dec. 14, 1905, the third earl married Millicent Lady Hartopp, by whom he had issue one child only, Henry Gerald Valerian Francis Wellesley, born on Aug. 8, 1907. By a disentailing deed dated April 2, 1912, and made between the third earl, of the first part, the fourth earl (then Viscount Dangan), of the second part, and Thomas Smith, of the third part,
- D** the Cowley Settled Estates were disentailed and conveyed to such uses as the third and fourth earls should jointly appoint, and in default of such appointment upon the trusts for which the same were held immediately before the execution of the disentailing deed. By a deed poll dated Nov. 5, 1913, the third earl charged the estates with a jointure of £1,500 per annum in favour of Millicent Lady Cowley, which was subsequently reduced to £1,200 per annum. The second marriage of
- E** the third earl was dissolved in 1914; and the third earl subsequently married Clare Florence Mary Buxton, by whom he had issue two daughters. By a re-settlement (hereinafter called "the 1914 settlement"), dated Mar. 31, 1914, and made between the third earl, of the first part, the fourth earl (then Viscount Dangan), of the second part, Henry Gilbert Ralph Nevill and Hugh de Heriz Whatton, of the third part (therein called "the Dangan trustees"), and Edward Arthur Baron Colebrooke,
- F** Lionel Gurney Buxton, and the said Henry Gilbert Ralph Nevill (therein called "the settlement trustees"), of the fourth part, the freehold portions of the Cowley Settled Estates specified in the first part of the second schedule thereto, and all other (if any) the freehold or copyhold hereditaments subject to the power of appointment in the disentailing deed, were appointed upon trust that the Dangan trustees should receive certain annuities and subject thereto upon such trusts as
- G** the third and fourth earls should by deed appoint, and in default thereof upon trust for the third earl for life in restoration of his life estate under the 1888 settlement, with remainder upon trust for the Dangan trustees during the life of the fourth earl, upon trust, after the death of the third earl, to enter into possession of and manage the said estates with the same powers as if they were in such possession during the minority of an infant tenant in tail, and to apply the net income
- H** during the life of the fourth earl for the maintenance or personal support or benefit of the fourth earl and his wife, children or remoter issue, or any persons interested in remainder, either absolutely or contingently, as the Dangan trustees should in their absolute discretion think fit, with power at their discretion to permit the fourth earl to occupy the said premises and to delegate to him the power to manage the said premises as therein mentioned, and it was
- I** declared that, notwithstanding anything thereinbefore contained, nevertheless for the purposes of all the powers under the Settled Land Acts, 1882 to 1890, and of all Acts then present or future extending or amending the same (including any extensions of any powers contained in the 1914 settlement), and for the purposes of all powers of jointuring or charging portions, the fourth earl should be in the same position in all respects as if, instead of the limitations and provisions thereinbefore contained in favour of the Dangan trustees, the premises thereby settled had been limited in remainder after the death of the third earl to the fourth earl during his life without impeachment of waste, with remainder upon trust for the

first and other sons of the fourth earl successively according to seniority in tail male, with remainders over. The settlement trustees were appointed trustees for the purposes of the Settled Land Acts, 1882 to 1890. By cls. 47 and 48 the powers of sale under the Settled Land Acts were considerably extended, and by cl. 52 the person or persons for the time being entitled to exercise over the settled lands the powers of a tenant for life were given certain extended powers. By cl. 53 it was agreed that the provisions of the Settled Land Acts should be extended so as to authorise the investment of capital moneys arising under the 1914 settlements or the said Acts in a much wider range of investments. By deed poll dated April 27, 1914, the third earl charged the settled estates with £20,000 for the portion of his younger son, Henry Gerald Valerian Francis Wellesley, if he should attain twenty-one years, and an annual sum of £800 to be paid to his said son until the £20,000 was raised, and this portion charge was subsequently made irrevocable. The fourth earl, on Feb. 24, 1912, married Mae Josephine Pickard, and has issue two sons and two daughters. The third earl died on Jan. 15, 1919, having by his will appointed to his then wife a jointure of £1,500 per annum charged on the settled estates, but so that so long as the jointure rentcharge charged on the settled estates in favour of his second wife should be subsisting, the jointure rentcharge thereby charged should be £300 per annum only.

The charges now affecting the settled estates were: (i) the £2,000 per annum jointure in favour of the widow of the second earl; (ii) the jointure of £1,200 per annum payable to the second wife of the third earl; (iii) the portion of £20,000 payable to the said Henry Gerald Valerian Francis Wellesley on attaining twenty-one; and (iv) the jointure rentcharge of £1,500 (at present £300) per annum payable to the widow of the third earl. All of these were charged under the powers of the 1888 settlement. The present trustees of the 1888 settlement were Frederick Arthur Wellesley, Thomas Smith Curtis, and George Montague Griffith Wyatt. The present settlement trustees of the 1914 settlement were Edward Arthur Baron Colebrook, Lionel Gurney Buxton, and Stanley Maidens Robinson. The present Dangan trustees were Stanley Maidens Robinson and George Montague Griffith Wyatt. On the Settled Land Act, 1925, coming into force the settlement of 1888, the disentailing deed of 1912, and the settlement of 1914, constituted a compound settlement, of which the trustees of the 1888 settlement were trustees, and under which the fourth earl had the powers of a tenant for life. Questions arose whether the fourth earl, as tenant for life, was entitled to exercise all the additional powers given by the settlements of 1888 and 1914. The jointresses and portioner under the settlement of 1888, who had paramount interests under that settlement, were afraid that the additional powers, especially those as to the investment of capital moneys under the settlement of 1914, might be exercised so as to prejudice their security; and questions also arose as to the investment of capital moneys. The trustees of the settlement of 1888, as trustees of the compound settlement, issued this summons to determine the powers of the fourth earl in respect of the additional powers, and also certain questions as to the investment of capital moneys, which are stated fully in the judgment. The respondents to the summons were the fourth earl, the Dangan trustees, the trustees of the 1914 settlement, and the jointresses and portioner.

Archer, K.C., and *H. T. Methold* for the trustees of the compound settlement, the trustees of the 1888 settlement.

Topham, K.C., and *P. M. Walters*, for the fourth earl (the tenant for life) and the Dangan trustees, referred to *Re Mundy and Roper's Contract* (2), *Re Marquis of Ailesbury and Lord Iveagh* (3), *Re Cradock's Settled Estates* (4), and *Re Hunt's Settled Estates* (1).

Errington for the jointresses and portioner.

Horace Freeman for the trustees of the 1914 settlement.

The relevant sections of the Settled Land Act, 1925, are set out in the judgment.

ASTBURY, J.—This is a summons in the matter of the Cowley Settled Estates in respect of which there is now a complicated compound settlement, which consists

A of an indenture of settlement of June 9, 1888, an indenture of disentail of April 2, 1912, and an indenture of re-settlement dated Mar. 31, 1914, and in the matter of the Settled Land Act, 1925, which is one of the statutes simplifying the present law in relation to land. Notwithstanding the simplification, this matter appears to me to be one of extreme difficulty and complication. Before I refer to the questions which the court is asked to determine I desire to state shortly the relevant contents

B of the original indenture of settlement of June 1888, and the subsequent re-settlement of March, 1914. Under the first settlement of 1888 the Cowley estates were settled and provision was made for the payment of certain jointures and other moneys. By that settlement various powers were given to the person or persons in whom the powers of the Settled Land Act related should for the time being be vested in relation to the settled estates, and it was agreed that the provisions of the

C Settled Land Act, 1882, should be extended so as to authorise the investment of capital moneys arising under the 1888 settlement as therein provided. In 1912 an indenture of disentail was executed to which the third earl, who with the second earl had been a party to the first indenture, and the fourth earl were parties. The estates which then stood limited to the fourth earl in remainder in tail were disentailed, and by the indenture of re-settlement of 1914, to which the third and

D fourth earls were parties, the estates in question were re-settled with certain more or less complicated trusts under which certain trustees during the life of the fourth earl were to enter into possession or receive the rents and profits of the settled property and apply the income, subject to the deductions therein mentioned, for the benefits of all or any and to the exclusion of other or others of the following persons: the fourth earl, his wife and children and remoter issue, and other

E persons. It was provided that the trustees should in their absolute discretion have power to permit the fourth earl to occupy the settled premises, and to delegate to him the right to enter into possession and to manage as therein provided; and it was declared that notwithstanding anything therein contained for the purposes of all powers under the Settled Land Acts, 1882 to 1890, and all Acts then present or

F future extending or amending the same, and for the purposes of powers of jointure, &c., the fourth earl should in any case be in the like position in all respects as if, instead of the limitations and provisions therein contained in favour of the trustees, the premises thereby settled had been limited in remainder immediately after the death of the third earl in trust for the fourth earl during his life, with remainder therein detailed. It was then provided that the power of sale conferred by the

G Settled Land Act should be extended to authorise the sale of any part of the settled estates or any easement, and so on, and, putting it shortly, various powers were given in excess of the statutory powers under the Settled Land Act and an extended power of investments, that is, investments beyond those authorised by the statute, was given with a proviso that no investment which would not in the absence of the settlement be authorised by the Settled Land Act should be deemed an investment thereby authorised unless the settlement trustees, that is, the trustees of the

H 1914 settlement, consented thereto, and that as to the giving or withholding of such consent the trustees should have an absolute discretion.

I It does not seem to me necessary to discuss in any detail the various changes of interest which have occurred in respect of the settled estates, because the charges now affecting them are a £2,000 jointure to the Dowager Countess Cowley, a jointure of £1,200 a year payable to the lady who was the second wife of the third earl, and a contingent portion of £20,000 payable to one Henry Wellesley if and when he attains twenty-one, the sum of £800 a year until payment of the capital money, and a further jointure of £1,500 a year in favour of the widow of the third earl, of which sum £300 at the present time alone is payable. Putting the matter very shortly for the purposes of the present summons, there are now in existence jointure and other interests created under the 1888 settlement which are paramount to the interests settled by the 1914 settlement, and under these circumstances the questions in this summons have been framed.

The first question is whether the fourth earl, as tenant for life within the meaning

of s. 117 (1) (xxviii) of the Settled Land Act, 1925, is entitled to exercise in relation to the settled estates all or any, and, if so, which, of the additional powers which are conferred by the 1888 settlement and the 1914 settlement, forming part of the compound settlement which I have referred to. It may be that some of these additional powers, especially those conferred by the 1914 settlement, might be exercised so as to prejudice the security of the paramount interests still in existence under the 1888 settlement. The second question in the summons is whether capital moneys now subject to the trusts of the 1914 settlement and the investments for the time being representing the same can be invested or applied by the direction of the fourth earl in any manner authorised by the new Settled Land Act, 1925, or by the 1888 settlement or by the 1914 settlement, and if in any manner authorised by the 1914 settlement, then whether the consent of the trustees of that settlement is necessary to such investment. The third question is whether capital money subject to the trusts of the 1888 settlement and the investments for the time being representing the same can be invested or applied by the direction of the fourth earl in any manner authorised by the new Act or by the two settlements, and, again, whether the consent of the trustees of the 1914 settlement is necessary to any investment authorised thereunder. The fourth question is whether capital moneys hereafter to be received by the trustees of the 1888 settlement as trustees of the compound settlement can be invested or applied by the direction of the fourth earl in any manner authorised by the present Act or by the two settlements, and, if in any manner authorised by the 1914 settlement, again, whether the consent of the trustees of that settlement is required. The last question is whether, so long as the above-mentioned compound settlement continues to subsist, all investments held under any document constituting the compound settlement ought to be held by the trustees of the compound settlement as distinct from the individual settlements. All that does not sound particularly simple.

The first matter, putting it shortly, is whether the fourth earl, who had the powers of a tenant for life under the provisions of the 1914 settlement, is entitled to exercise in respect of the settled estates, which are subject to these paramount interests surviving under the 1888 settlement, the powers of the 1888 settlement and the 1914 settlement. The difficulty of deciding this under the simplification process is, so far as I am concerned, very considerable. For the purposes of the present Act the fourth earl must be taken to have the powers of the tenant for life under s. 23 of the Act. That provides that

"where under a settlement there is no tenant for life nor, independently of this section, a person having by virtue of this Act the powers of a tenant for life then (a) any person of full age on whom such powers are by the settlement expressed to be conferred; and (b) in any other case the trustees of the settlement; shall have the powers of a tenant for life under this Act."

Under s. 108, which is in part a repetition of a previous section, and in part contains fresh matter, it is provided that, in case of conflict between the provisions of a settlement and the provisions of this Act, the provisions of the Act as therein stated shall prevail. Then the subsection of s. 108 proceeds:

"and, notwithstanding anything in the settlement, any power relating to the settled land thereby conferred on the trustees of the settlement or other persons exercisable for any purpose, whether or not provided for in this Act, shall, after the commencement of this Act, be exercisable by the tenant for life or statutory owner, as if it were an additional power conferred on the tenant for life within the next following section of this Act and not otherwise."

For the purposes of these sections the fourth earl must now be considered as a person in the position of a tenant for life. Section 109 (1) enacts:

"Nothing in this Act precludes a settlor from conferring on the tenant for life, or (save as provided by the last preceding section) [which I have just read] on

A the trustees by the settlement, any powers additional to or larger than those conferred by this Act,"

and sub-s. (2) says:

B "Any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this Act, operate and be exercisable in the like manner, and with all the like incidents, effects, and consequences, as if they were conferred by this Act, and, if relating to the settled land, as if they were conferred by this Act on the tenant for life."

Section 22 (2) provides:

C "Where by a re-settlement of land any estate or interest therein is expressed to be limited to any person (whether subject or not to any estate, interest, charge or power expressly created or conferred by the re-settlement) in restoration or confirmation of his estate or interest under a prior settlement, then, for the purposes of this Act and otherwise, that person is entitled to the estate or interest so restored or confirmed as of his former estate or interest, and, in addition to the powers exercisable by him in respect of his former estate or interest, he is capable of exercising all such further powers as he could have exercised by virtue of the re-settlement, if his estate or interest under the prior settlement had not been so restored or confirmed, but he had been entitled under the re-settlement only."

D It has been suggested in argument that that is a restriction on the exercise by the fourth earl in the present case of the additional powers conferred on him by the 1914 settlement, because he was not restored by that settlement to any life interest which existed under the 1888 settlement, as he had no such interest. But in s. 1 (1) of the present Act there is this proviso:

E "Provided that, where land is the subject of a compound settlement, references in this Act to the settlement shall be construed as meaning such compound settlement, unless the context otherwise requires."

F Now, whatever be the effect of this, I understand it to mean that where there is a compound settlement existing after the date of this statute, powers and provisions contained in the statute in respect of a settlement shall be deemed to apply to the compound settlement unless the context—and that must mean the context of the Act—otherwise requires. The Act does not provide that "settlement" shall include "compound settlement" where it is advisable, or where such construction will not affect any injury or risk to any other person, but it provides that that result shall follow unless the context otherwise requires, and under the various sections of this statute to which I have referred, and in which certain provisions relative to this matter now under consideration are contained, I can find no context in the Act requiring a different or any more limited construction. Section 22 (2) which I have read is an instance under this statute where the context requires H that "settlement" therein referred to shall, as therein expressly stated, refer to one only, or to less than all, of the documents constituting a compound settlement. But there is no such necessary context and no such requirement in respect of the other sections on which reliance has been placed, and in particular in respect of ss. 108 and 109.

I Counsel for the persons interested in the overriding interests under the 1888 settlement has contended, and, as I think, with very considerable force, that it is an unreasonable proposition that in the present case the settlors under the 1914 settlement should under the extended powers therein given—that is the powers given in addition to those provided for in the Act—have powers to prejudice the security of the existing interests under the 1888 settlement, and he has contended that under s. 109 the word "settlor" there ought to be construed as a person who is settling property which he has got a power and a legal right to settle, and that it cannot be applied, or ought not to be applied in the present case, to the settlors under the 1914 settlement in the sense that they can, by reason of this section,

create powers over the settled land in such a way as to defeat, prejudice, or interfere with the paramount interests under the earlier document of 1888, or, in other words, that their powers of settlement were only over the property to the extent that they had an interest which they could create and limit. It is not of the least importance what I think would be a wise and a proper construction. I have to take the Act as it stands, and the statute says that in this Act "settlement," unless the context otherwise requires, shall include a compound settlement if such exists. The documents of 1888 and 1914, with certain others, unquestionably create a compound settlement, and when the Act says that any additional or larger powers conferred by a settlement—that is, additional or larger powers than those created by the Act—shall be construed as if they were conferred by this Act, it seems to me that I am compelled so to construe the apparently clear words of the statute in this way: that in the present case there is a compound settlement, there is a settlor, there are additional powers granted and conferred, and there is nothing in the statute which I can find which requires me to limit that beyond what I have stated. In other words, there is no context requiring me to read the word "settlement" in connection with the clauses which are relevant in this case as confined to anything less than the compound settlement. Under s. 32 (1) it is provided that

"Persons who are for the time being trustee for the purposes of this Act of an instrument which is a settlement, or is deemed to be a subsisting settlement for the purposes of this Act, shall be the trustees for the purposes of this Act of any settlement constituted by that instrument and any instruments subsequent in date or operation."

The effect of that is that on the coming into force of this statute the trustees of the 1888 settlement became trustees for the purposes of the Act of the compound settlement, none such having previously existed. Notwithstanding the argument of counsel for the paramount interests, which I should have liked to give effect to, because it seems to me to be an eminently reasonable contention, I am of opinion that, having regard to the provisions of this statute, I am prevented from holding that the fourth earl is not under this compound settlement entitled to exercise the additional powers conferred by the 1888 and 1914 documents.

The matter is perhaps not very serious by reason of the safeguards which appear to exist under this statute. Before I deal with the safeguards I should say this, that it is not contended on behalf of the persons interested in these paramount interests that the fourth earl is not now, as the person having the powers of the tenant for life, entitled to exercise as such all the statutory powers conferred by the Act. The only question in dispute is whether he is entitled to exercise the powers additional to those powers conferred by the two documents in question. The safeguards to which I referred seem to be contained in ss. 101 and 107. Under s. 101 it is provided that

"Save as otherwise expressly provided by this Act, a tenant for life or statutory owner, when intending to make a sale, exchange, lease, mortgage, or charge or to grant an option (a) shall give notice of his intention in that behalf to each of the trustees of the settlement, by posting registered letters, containing the notice, addressed to the trustees severally, each at his usual or last known place of abode in the United Kingdom; and (b) shall give a like notice to the solicitor for the trustees."

So that no transaction of the character therein indicated can take place without the trustees being made aware of it; and by s. 107

"A tenant for life or statutory owner shall, in exercising any power under this Act [and that of course would refer to these additional powers by reason of the provisions that I have already referred to] have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties."

A Those who are interested in these paramount charges under the 1888 settlement are, of course, within the meaning of this section, persons entitled under the compound settlement and the powers can only be exercised in a fiduciary manner by a person in a fiduciary position; and, under s. 75,

B "Capital money arising under this Act shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into court at the option of the tenant for life and shall be invested or applied by the trustees"

as provided; and

C "The investment or other application by the trustees shall be made according to the direction of the tenant for life, and in default thereof according to the discretion of the trustees, but in the last-mentioned case subject to any consent required or direction given by the settlement with respect to the investment or other application by the trustees of trust money of the settlement, and any investment shall be in the names or under the control of the trustees."

The rule laid down in *Re Hunt's Settled Estates* (1) applies to the present Act, where it was held that

D "A tenant for life directing the investment of capital moneys under the Settled Land Act is in the same position as an ordinary trustee with a discretionary power of investment. The court will restrain a tenant for life from directing an investment which is not suitable for the investment of trust funds, though within the words of the power given by the Act, under the same circumstances under which it would so restrain an ordinary trustee."

E It is quite plain, I think, that if any additional power conferred by the 1914 settlement were to be taken advantage of by the fourth earl for the purpose of attempting thereunder to do anything to the prejudice of those interested under the 1888 settlement, there is sufficient protection given to those interests under the sections and under the authority that I have referred to. It seems, therefore, to me that the fourth earl is entitled in respect of this compound settlement to exercise the powers additional to, or larger than, those conferred by the Act given by both the 1888 and the 1914 settlements. With regard to the additional powers in respect of investments, s. 73 of the statute provides :

G "Capital money arising under this Act, subject to the payment of claims properly payable thereout and to the application thereof for any special authorised object for which the capital money was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes,"

the first of which is,

H "In investments in government securities, or in other securities in which the trustees of the settlement are by the settlement or by law authorised to invest trust money of the settlement, with power to vary the investments"

and so on. Reading, as I feel bound to read, "settlement" as including a compound settlement, I think the fourth earl is entitled to exercise the additional investment powers as well as the others in the way that I have attempted to state.

I With regard to the second question, whether capital moneys now subject to the trusts of the 1914 settlement and the investments for the time being representing the same can be invested or applied by the direction of the fourth earl in any manner authorised not only by the Act but by the 1888 and 1914 settlements, and if in any manner authorised by the 1914 settlement then whether the consent of the trustees of that settlement is necessary, the matter seems less difficult. Prior to the passing of this Act there were no trustees of this compound settlement, such trustees having come into existence by virtue of s. 32 (1). Therefore the moneys referred to in this question, that is, moneys arising under the 1914 settlement, must have been proceeds of the sale of unencumbered lands, in which case the capital

moneys were not responsible for the prior charges, the land remaining the security therefor. Such moneys, therefore, were payable to the 1914 trustees, and, in my opinion, those trustees were under an obligation to invest them as under the circumstances provided for. I think—and I do not think that this is really contested—that the consent of the 1914 trustees became necessary for all investments of such moneys. The answer to the second question will be; the capital moneys now subject to the trusts of the 1914 settlement and the investments representing them may be invested and applied by the direction of the fourth earl in manners sanctioned by the Act, the 1888 settlement and the 1914 settlement, but that in the case of the last settlement the consent of the trustees is required.

The third question is whether capital moneys now subject to the trusts of the 1888 settlement and the investments for the time being representing the same can be invested or applied by the direction of the fourth earl in any manner directed by the Act or by the two settlements. In my opinion that is the case, but where the 1914 settlement is invoked, then again the consent of the trustees of that settlement will be necessary. The fourth question is whether capital moneys hereafter to be received by the trustees of the 1888 settlement can be so invested. In my opinion they can, and exactly the same conditions relate to them. The last question which I have to answer is whether so long as the above-mentioned compound settlement continues to subsist the investments held under any document constituting that compound settlement ought to be held by the trustees of that settlement. In my opinion, all past moneys must be held by the appropriate trustees in the way that I have directed, whereas all fresh capital moneys which come into existence will have to be paid as from the passing of this Act to the trustees of the compound settlement so long as that settlement subsists.

Solicitors: *Collyer-Bristow & Co.*; *Waltons & Co.*

[*Reported by E. K. CORRIE, Esq., Barrister-at-Law.*]

A

GREER v. DOWNS SUPPLY CO.

[COURT OF APPEAL (Bankes, Scrutton and Lawrence, L.JJ.), November 15, 16, 1926]

[Reported [1927] 2 K.B. 28; 96 L.J.K.B. 534; 137 L.T. 174]

B

Agent—Undisclosed principal—Contract made by agent in own name—Contract made for reasons personal to agent—Ability of principal to sue on contract.

The defendant sold goods to G., a traveller for a firm of builders, for which he was not paid. While the debt was owing G. offered to sell some timber to the defendant saying that he had left his employment and set up as a timber merchant on his own account. The defendant, hoping to get payment for the debt by means of a set-off and honestly believing that he was making a contract with G. as a principal, agreed to buy timber on the terms that G.'s debt should be set off against the price. In fact, G. had not set up in business on his own account, but was employed by the plaintiff as an agent for sale on commission. In due course timber was delivered to the defendant and invoices and letters were sent to him bearing the name, address and description of the plaintiff, but G. told the defendant that those particulars were his trade name, address and description. The defendant throughout knew nothing about the plaintiff. There was no evidence whether or not the defendant had used the timber before he received the invoices and letters bearing the plaintiff's name. In an action by the plaintiff against the defendant in contract for the price of the timber,

C

D

E

Held: the defendant had made the contract with G. for reasons (the set-off) personal to G. to the exclusion of anyone else, and as he neither had actual notice of the plaintiff's existence until after the timber had been delivered, nor, as the doctrine of constructive notice had no application to purely commercial transactions, was he to be taken to have had constructive notice thereof, the claim failed.

F

Manchester Trust v. Furness (1), [1895] 2 Q.B. 539, applied. *Boulton v. Jones* (2) (1857), 2 H. & N. 564 approved.

Notes. As to when an undisclosed principal may not sue on a contract made by his agent, see 1 HALSBURY'S LAWS (3rd Edn.) 216. As to the application of doctrines of constructive notice, see 14 *ibid* 544; and as to mistake as to the identity of a party to a contract, see 26 *ibid*. 896; and for cases on these subjects, see 1 DIGEST 570-575, 20 DIGEST 317-319, and 35 DIGEST 97-99.

G

Cases referred to:

H

I

- (1) *Manchester Trust v. Furness*, [1895] 2 Q.B. 539; 73 L.T. 110; 44 W.R. 178; 8 Asp.M.L.C. 57; 1 Com. Cas. 39; 14 R. 739; sub nom. *Manchester Trust, Ltd. v. Turner Withy & Co., Ltd.*, 64 L.J.Q.B. 766; 11 T.L.R. 530, C.A.; 20 Digest 319, 659.
- (2) *Boulton v. Jones* (1857), 2 H. & N. 564; 27 L.J.Ex. 117; 157 E.R. 232; sub nom. *Boulton v. Jones*, 30 L.T.O.S. 188; 3 Jur.N.S. 1156; 6 W.R. 107; 12 Digest (Repl.) 671, 5186.
- (3) *Humble v. Hunter* (1848), 12 Q.B. 310; 17 L.J.Q.B. 350; 11 L.T.O.S. 265; 12 Jur. 1021; 116 E.R. 885; 1 Digest 639, 2606.
- (4) *Cornish v. Abington* (1859), 4 H. & N. 549; 28 L.J.Ex. 262; 7 W.R. 504; 157 E.R. 956; 1 Digest 348, 582.
- (5) *Ramazotti (Ramosotti) v. Bowring* (1859), 7 C.B.N.S. 851; 29 L.J.C.P. 30; 6 Jur.N.S. 172; 8 W.R. 114; 141 E.R. 1050; 1 Digest 377, 827.
- (6) *Cooke & Sons v. Eshelby* (1887), 12 App. Cas. 271; 56 L.J.Q.B. 505; 56 L.T. 673; 35 W.R. 629; 3 T.L.R. 481, H.L.; 1 Digest 572, 2149.
- (7) *Cundy v. Lindsay* (1878), 3 App. Cas. 459; 38 L.T. 573; 42 J.P. 483; 26 W.R. 406; 14 Cox, C.C. 93; sub nom. *Lindsay & Co. v. Cundy*, 47 L.J.Q.B. 481, H.L.; 35 Digest 98, 72.

- (8) *Derry v. Peek* (1889), 14 App. Cas.. 337; 58 L.J.Ch. 864; 61 L.T. 265; 54 J.P. 148; 38 W.R. 33; 5 T.L.R. 625; 1 Meg. 292, H.L.; 35 Digest 27, 185. **A**
- (9) *Mitchell v. Lapage* (1816), Holt, N.P. 253, N.P.; 35 Digest 98, 65.
- (10) *Pratt v. Willey* (1826), 2 C. & P. 350; 1 Digest 617, 2437.
- (11) *Wester Moffat Colliery Co. v. Jeffrey & Co.*, 1911 S.C. 346.

Appeal from a judgment of a Divisional Court.

The plaintiff, who was a timber merchant, carrying on business in Queen Victoria Street, London, brought an action against the defendant, whose name was Chandon, but who traded as the Downs Supply Co., and carried on business as a timber merchant at Brighton. The plaintiff's claim was for £29 2s. 6d. for timber alleged to have been supplied by the plaintiff to the defendant in April, 1925. The defendant denied that there was any contract as alleged between him and the plaintiff. If there was such a contract, the defendant counterclaimed a sum of £17 5s. mainly for goods (including timber) supplied to one Godwin, but including a sum of 3s. lent to Godwin. Godwin was a traveller for a firm of White & Co., who were builders, carrying on business at Brighton. In March, 1925, while these sums amounting to £17 5s. were still owing to the defendant, Godwin saw him and asked him for an order, telling him that he, Godwin, had left White & Co., of Brighton, which was true, and also that he had set up business on his own account in Queen Victoria Street, which was untrue. Godwin was in fact in the employment of the plaintiff as an agent for sale on commission. The defendant agreed to buy from Godwin certain timber, which he (Godwin) had to sell, at a price which, after certain allowances, came to £29 2s. 6d., but he stipulated that the only money to be paid by the defendant should be the difference between the sum of £17 5s., which Godwin owed the defendant and the price of the timber. On Mar. 23, 1925, the defendant gave Godwin an order for part of the timber, and on Mar. 27 Godwin, by way of a reply to the order of Mar. 23, sent to the defendant a letter signed by himself as though he were a principal, but written on paper bearing the name and address of the plaintiff, "W. MacGregor Greer, English Timber Merchant, 63, Queen Victoria Street, London, E.C. 4," with two telephone numbers, one in the City of London and one at Brighton, and a sketch or impression representing railway trucks and trunks of trees. A few days afterwards the defendant saw Godwin and asked him why the name of W. MacGregor Greer appeared at the head of the letter, and Godwin said that W. MacGregor Greer was his trade name and that he carried on business in Queen Victoria Street under that name. On Mar. 30 the defendant gave Godwin a further order for timber, making up the total quantity which he had bought from him, and the action was brought by the plaintiff to recover the price. During April invoices and letters were received by the defendant bearing the name of the plaintiff. In June the plaintiff wrote to the defendant, demanding payment of the account, and in October the action was started. **B**

The learned county court judge who tried the action gave judgment for the plaintiff for the amount claimed. He found that the defendant honestly believed what Godwin had told him, and believed that he was dealing with Godwin as a principal, but that the defendant was put on inquiry by the letter of May 27, and that had he made further investigations as he ought to have done, he would have found out, and therefore had notice, that Godwin was not a principal but an agent only. The defendant appealed to the Divisional Court and that court (ROCHE and TALBOT, JJ.) reversed the judgment of the learned judge and entered judgment for the defendant. They held that Godwin had no authority to make the contract relied on by the plaintiff, and there was no claim for conversion, or on an implied contract from acceptance and user of the plaintiff's goods by the defendant. The plaintiff appealed. **C**

B. L. O'Malley for the plaintiff. **D**

W. A. Barton and C. H. Grundy for the defendant. **E**

The following authorities were referred to: *Humble v. Hunter* (3), *Cornish v.* **F**

A *Abington* (4), *Ramazotti* (*Ramosotti*) v. *Bowring* (5), *Manchester Trust* v. *Furness* (1), *Boulton* v. *Jones* (2), *Cooke & Sons* v. *Eshelby* (6), *Cundy* v. *Lindsay* (7), *Derry* v. *Peek* (8), *Mitchell* v. *Lapage* (9), *Pratt* v. *Willey* (10), *Wester Moffat Colliery Co.* v. *Jeffrey & Co.* (11).

B **BANKES, L.J.**—This is an appeal from the decision of a Divisional Court setting aside a judgment of the learned judge of the Mayor's and City of London Court. It is necessary to bear in mind that in these appeals we are bound by the findings of fact in the county court, and are precluded from deciding the case on any point to which the attention of the learned county court judge was not directed. The inference from the facts is the matter in dispute in this case.

C The plaintiff is a timber merchant. He had in his employ a traveller named Godwin who had formerly been in the employ of Messrs. White & Co., builders in Brighton. While he was there Godwin had bought timber from the defendant, whose name was Chandon, but who carried on business as the Downs Supply Co., and he had had other small dealings with him, the result of which was that Godwin owed the defendant in all about £17. Godwin left White & Co. and went into the plaintiff's employment still owing the defendant the £17. He then went D to the defendant and asked him for an order for timber and the defendant, believing that he was dealing with Godwin as a principal, for Godwin never mentioned his employer, consented to give him two orders on condition that he should be allowed to set off Godwin's debt of £17 against the price of the timber. Godwin having obtained these orders passed them on to his employer, the plaintiff, who E delivered the goods to the defendant, thinking that he was executing orders obtained by his traveller Godwin. His case is that he was dealing direct with the defendant, while the defendant asserts that he for his part was dealing with Godwin and only in order that by giving him the orders he might get payment of his debt. The judge who tried the case has found that the defendant honestly believed Godwin's story that he carried on business under the name of the plaintiff. Now the plaintiff, if he could have proved that the defendant had used or converted F the goods after he had actual knowledge that they were the goods of the plaintiff, might have founded an action upon a contract to be implied from those facts; but in order to do that he must have proved more than he proved before the learned judge, and as he did not base his action on that ground he cannot use it as a ground for appealing.

G The judge decided on a different ground. He held that the defendant, when he received the letter of Mar. 27, was put upon inquiry, and that the defendant having had what was at the best constructive notice, must be taken to have had actual notice that the goods were the plaintiff's goods, and therefore that he ought to pay for them. I cannot agree with this view. There is authority for saying that in commercial matters the court should be loth to take constructive notice as a substitute for actual notice. *BRAMWELL, B.*, in *Boulton v. Jones* (2), correctly states the law on this point. There the defendants gave to one Brocklehurst, with H whom they had a running account, an order for goods of which he had been a manufacturer. Boulton had been his foreman and manager, but had bought his stock, fixtures, and business. When the order came Boulton sent the goods and afterwards an invoice. The defendants declined to pay for the goods on the ground that they knew nothing of Boulton. *BRAMWELL, B.*, said (2 H. & N. at I p. 566):

"The admitted facts are, that the defendants sent to a shop an order for goods, supposing they were dealing with Brocklehurst. The plaintiff, who supplied the goods, did not deceive them. If the plaintiffs were now at liberty to sue the defendants, they would be deprived of their right of set-off against Brocklehurst. When a contract is made, in which the personality of the contracting party is or may be of importance, as a contract with a man to write a book, or the like, or where there might be a set-off, no other person can interpose and adopt the contract. As to the difficulty that the defendants

need not pay anybody, I do not see why they should, unless they have made a contract either express or implied. I decide the case on the ground that the defendants did not know that the plaintiff was the person who supplied the goods, and that allowing the plaintiff to treat the contract as made with him would be a prejudice to the defendants."

There one of the grounds on which the plaintiff could not recover was that the defendants did not know that he was the person supplying the goods. That is adopted as the law in *BENJAMIN ON SALE* (6th Edn.) p. 121:

"Where an offer is addressed to one person, and another attempts to accept it, as by supplying goods ordered, there is no contract; and if the offerer, thinking the goods were sent by the first person, consumes them, he is not bound to pay for them. But if the offerer discovers the facts and afterwards consumes the goods, a contract to pay for them will be implied,"

citing *Mitchell v. Lapage* (9) and *Boulton v. Jones* (2) where CHANNELL, B., said (27 L.J.Ex. at p. 119):

"Without saying that the plaintiff might not have had a right of action on an implied contract, if the goods had been in existence, here the defendant had no notice of the plaintiff's claim, until the invoice was sent to him, which was not until after he had consumed the goods, and when he could not, of course, have returned them. Without saying what might have been the effect of the receipt of the invoice before the consumption of the goods, it is sufficient to say that in this case the plaintiff clearly is not entitled to sue and deprive the defendant of his set-off."

In the circumstances the plaintiff has fallen short of proving what is necessary to entitle him to recover, because first, the judge has found that the defendant did not, in fact, know, when the goods were delivered, that the plaintiff was the vendor; and secondly, there was no evidence whether the defendant, when he did become aware of the plaintiff, could or could not have returned the goods. For these reasons the appeal must be dismissed.

SCRUTTON, L.J.—I am of the same opinion. If this court could review the findings of fact by the learned judge, or find facts for itself, there might be more to be said for the plaintiff. But this is a county court appeal in which we are bound by the findings of fact at the trial and cannot hear argument on points not raised there. The facts are that the defendant, a man of foreign extraction, carried on business as the Downs Supply Co. He had sold goods to one Godwin and had not been paid for them and was out of pocket to the amount of £17. Godwin came to him and asked if he might sell him some timber, and the defendant, hoping to get payment by means of a set-off and honestly believing that he was making a contract with Godwin, agreed to buy certain timber on the terms that he should only pay the difference between the price of the timber and £17. Then came an invoice bearing upon it the name of W. MacGregor Greer, which is the name of the plaintiff, on receipt of which the defendant, when he next met Godwin, asked him who W. MacGregor Greer was, and Godwin said it was his own trade name and that he was W. MacGregor Greer. The defendant believed what he was told. As the timber was not paid for the appellant sent an account upon a form which showed that he was not Godwin but was somebody else. There is no evidence to show whether or not the goods had been consumed by the time that account reached the defendant. Then the plaintiff brought an action against the defendant on the footing that he had through his agent Godwin made a contract of sale with the defendant. He might possibly have sued the defendant for conversion of the goods, as was done in *Cundy v. Lindsay* (7). He might, for all we know, have proved that the defendant still had the goods in his possession when it became clear to him that the plaintiff was the real vendor, and that he had used the goods with that knowledge, in which case we should have had to consider certain dicta in *Boulton v. Jones* (2). But neither of these cases was made at the

A trial. The plaintiff issued a plaint for goods sold and delivered, and the original orders given by the defendant to Godwin were furnished as particulars of the contract of sale. When a plaintiff claims as an undisclosed principal the question sometimes arises whether the contract was made with the agent for reasons personal to the agent which induced the other party to contract with the agent to the exclusion of his principal or anyone else. When the learned judge at the trial found that the defendant knew nothing about the plaintiff and honestly believed he was contracting with Godwin, and when it was proved that he was contracting with Godwin because Godwin was his debtor, there was an end of the case for the plaintiff at the trial. The learned judge did find those facts; but he went on to find that although the plaintiff did honestly believe he was dealing with Godwin, yet he had notice which ought to have put him on inquiry. Now that finding could only be relevant if the doctrine of constructive notice, whereby a person is deemed to have known that which he might have discovered upon inquiry, can properly be applied in purely commercial transactions. On this question I would refer to the classical judgment of LINDLEY, L.J., in *Manchester Trust v. Furness* (1), where he says ([1895] 2 Q.B. at p. 545):

“As regards the extension of the equitable doctrines of constructive notice to commercial transactions, the courts have always set their faces resolutely against it. The equitable doctrines of constructive notice are common enough in dealing with land and estates, with which the court is familiar; but there have been repeated protests against the introduction into commercial transactions of anything like an extension of those doctrines, and the protest is founded on perfect good sense. In dealing with estates in land title is everything, and it can be leisurely investigated; in commercial transactions possession is everything, and there is no time to investigate title; and if we were to extend the doctrine of constructive notice to commercial transactions we should be doing infinite mischief and paralysing the trade of the country.”

These words of LINDLEY, L.J., met with the full approval of LOPES, L.J., and RIGBY, L.J.; and in my opinion if one party to a purely commercial transaction makes a contract with another in ignorance of the fact that the latter is an agent merely and in the honest belief that he is a principal, it is generally of no use to say he was negligent in entertaining his honest belief. The proposition that negligence might be equivalent to fraud was negatived in *Derry v. Peek* (8) and the proposition that in commercial transactions a man is taken to know what he has the means of knowing is discountenanced in *Manchester Trust v. Furness* (1), and therefore the learned judge, having found that the defendant honestly believed that he was contracting with Godwin, was wrong in thinking that he could annul the effect of that finding because there was matter which might have put the defendant on inquiry. In the result the claim fails, for there is no evidence of a purchase by the plaintiff from the defendant. No case was made on any implied contract until the parties reached this court, and so we cannot deal with any such point. If there had been a real counterclaim for £17 that must have failed also, but that sum seems to have been treated as a set-off. The judgment of the Divisional Court must be affirmed and the appeal must be dismissed.

LAWRENCE, L.J.—I agree. The plaintiff based his claim on a contract which was in fact made between the defendant and Godwin and of which one of the terms was that the defendant should be allowed to set off £17 against the contract price. The plaintiff suing on that contract is of course bound by the terms of the set-off unless he can show that the defendant is estopped from relying on it, or has so conducted himself that a contract of sale and purchase arose between himself and the plaintiff free from any right of the purchaser to set-off. The plaintiff contends that the defendant is so estopped because he had constructive notice that Godwin was not the real vendor of the goods, but that contention cannot prevail in view of the judgment of LINDLEY, L.J., in *Manchester Trust v. Furness* (1) that it is most undesirable that the doctrine of constructive notice should be

extended to ordinary commercial transactions. The result is that the defendant, who bona fide believed that he was contracting with Godwin, is not to be treated as having contracted with the plaintiff merely because further inquiries might have disclosed the plaintiff as the real vendor.

Appeal dismissed.

Solicitors: *W. Allin Ford; Gordon Gardiner, Carpenter & Co.*

[*Reported by T. W. MORGAN, Esq., Barrister-at-Law.*]

Re WALERAN SETTLED ESTATES

[CHANCERY DIVISION (Clauson, J.), November 18, 1926]

[Reported [1927] 1 Ch. 522; 96 L.J.Ch. 209; 136 L.T. 605;

70 Sol. Jo. 1242]

Settled Land—Person having powers of tenant for life—Person entitled to income of settled land for fixed term if he so long lives—Settled Land Act, 1925 (15 Geo. 5, c. 18), s. 20 (1) (viii).

A person entitled in possession under a settlement to the income of the settled land for a fixed term, if he so long lives, is "a person entitled to the income of land under a trust or direction for payment thereof to him during his own . . . life . . . or until . . . determination by any means of his interest therein," within the meaning of s. 20 (1) (viii) of the Settled Land Act, 1925, and so he has the powers of a tenant for life under the settlement and is entitled to have a vesting deed executed in his favour by the trustees of the settlement.

Notes. As to persons having the powers of a tenant for life, see 29 HALSBURY'S LAWS (3rd Edn.) 674-681; and for cases see 40 DIGEST (Repl.) 796-806. For the Settled Land Act, 1925, s. 20 (1) (viii), see 23 HALSBURY'S STATUTES (2nd Edn.) 58.

Cases referred to:

- (1) *Napper v. Sanders* (1632), Hut. 118; 123 E.R. 1142; 38 Digest 703, 482.
- (2) *Re Hazle's Settled Estates* (1885), 29 Ch.D. 78; 54 L.J.Ch. 628; 52 L.T. 947; 33 W.R. 759, C.A.; 40 Digest (Repl.) 798, 2787.

Originating Summons taken out under s. 93 of the Settled Land Act, 1925, by the plaintiff, Charlotte Margaret Lothian Adams, the wife of Commander H. W. A. Adams (retired), claiming to be the person having the powers of a tenant for life under a settlement dated Sept. 13, 1906, and the respondents were the trustees of the settlement, and the Right Hon. William George Hood Baron Waleran of Trinity College, Oxford, who also claimed to be tenant for life under the settlement. The plaintiff also asked that the trustees be directed to execute a vesting deed in her favour.

Under the trusts declared in the settlement the then Baron Waleran conveyed to the trustees the manor, mansion house, and lands known as the "Bradfield Estate," to hold the same unto the trustees and their heirs, as to certain specified parts thereof to the use of the baron during his life, and subject thereto as to the whole of the said estate to the use of the trustees, their executors, administrators, and assigns for the term of ninety-nine years if Lionel Walrond (who was the only surviving son of the baron) and Charlotte M. L. Walrond, his wife, or the survivor, should so long live upon the trusts thereafter declared, and from and after the expiration or determination of the term and in the meantime, subject thereto and to the trusts thereof, to the use of William George Hood Walrond (the infant

A son of Lionel Walrond and Charlotte his wife) during his life, with remainder to the use of his first and every other son of William George H. Walrond successively in tail male, with divers remainders over. The trusts of the term were that the trustees should (subject to the life estate of the baron) enter into possession or receipt of the rents and profits of the Bradfield Estate, and during the continuance of the term manage the same, and during the joint lives of Lionel Walrond and Charlotte, his wife, pay one moiety of the net rents and profits to Lionel Walrond and the other moiety to his said wife, and in the event (which happened) of Charlotte, his wife, surviving her said husband, pay the whole thereof to her during the remainder of her life; and it was agreed that the trustees might with the consent of George Coats, a party to the settlement, and after his death, if required by Lionel Walrond and his said wife, or by the survivor of them so to do, permit them to occupy and enjoy rent free the mansion house and grounds. On Nov. 2, 1915, Lionel Walrond died, and on June 7, 1920, his widow married Henry W. A. Adams. On May 17, 1925, Baron Waleran died, and his grandson, William G. H. Walrond, thereupon became the present Baron Waleran, and on Mar. 29, 1926, attained the age of twenty-one years.

D *C. P. Sanger* for the plaintiff referred to *FEAME ON CONTINGENT REMAINDERS* (10th Edn.), p. 21, and to *Napper v. Sanders* (1). [CLAUSON, J.—If you have a term of eighty years so long as A.B. lives that is in substance a life interest in A.B. But you must say, to bring the applicant within s. 19 (1), that that section includes a person who has not a freehold interest and that would be asking me to decide that there is no difference between a chattel interest and freehold, and I cannot possibly do that, so that s. 19 (1) is of no assistance to you. I cannot accept the argument on that section.] Counsel then referred to *Re Hazle's Settled Estates* (2).

E *J. Bradley Dyne* for the trustees of the settlement.

Henry Johnston for the present baron.

CLAUSON, J.—In the circumstances of this case the plaintiff has, in my judgment, succeeded in bringing herself within s. 20 (1) (viii) of the Settled Land Act, 1925; in other words, she has succeeded in showing that she is a person entitled to the income of land under such a trust as that which is set out in sub-cl. (viii) of that subsection. For that purpose it is not, in my opinion, essential that the trust should have been framed so as to follow slavishly the form of the trust or direction stated in sub-cl. (viii)—that is to say, it is not necessary that the trust should take the form of a trust to pay the income of the settled land to a beneficiary during his life, until the determination of his interest by the particular means indicated in the present case, by the expiration of the term of years. It is sufficient to bring a case within the sub-clause, if the trust be so framed (as in the present case it is) as to entitle a person during a fixed term of years, if he should so long live, to receive the income of the land. By virtue of the trusts of the term vested in the trustees, the plaintiff is a person entitled to the income of the land, until the determination of her interest by means of the term expiring during her lifetime. The means by which the interest may be determined are in no respect restricted, the words in the sub-clause being, “determination by any means,” and are wide enough to include the determination of the interest by means of the effluxion of the term during the lifetime of the plaintiff. The trusts declared by the settlement in her favour are, in my opinion, but a reproduction in substance, although in a somewhat different form, of the trust stated in sub-cl. (viii). Her interest under the settlement trusts is neither greater nor less, but an equivalent of the interest she would have taken if those trusts had been framed precisely on the lines indicated in sub-cl. (viii), with the result that the plaintiff is a person having the powers of a tenant for life under the settlement within the meaning of s. 20 (1) (viii) of the Settled Land Act, 1925, and the trustees ought to execute a vesting deed in her favour.

Solicitors: *T. F. Peacock, Fisher, Chavasse & O'Meara; Linklaters & Paines.*

[Reported by GEOFFREY P. LANGWORTHY, Esq., Barrister-at-Law.]

Re LAMPLUGH IRON ORE CO., LTD.

[CHANCERY DIVISION (Eve, J.), November 30, 1926]

[Reported [1927] 1 Ch. 308; 96 L.J.Ch. 177; 136 L.T. 501;

[1927] B. & C.R. 61]

Company—Winding-up—Preferential creditor—Payment by director of rates which would have been preferential debt.

Guarantee—Right of surety who pays creditor to stand in creditor's place—Payment by surety of debt which would have been preferred in winding-up of debtor company—Subsequent winding-up of debtor company—Priority of surety to claim in winding-up—Mercantile Law Amendment Act, 1856 (19 & 20 Vict., c. 97), s. 5.

In September, 1925, a company, which was a going concern and had issued outstanding debentures for £30,000, was summoned for non-payment of a rate of £1,276 and £414 arrears. As the company was unable to pay, a director gave a guarantee for, and on Nov. 18, 1925, paid, these amounts. In December, 1925, the company went into voluntary liquidation, and the assets, after payment of preferential debts, were insufficient to satisfy the debentures. By the Companies Act, 1908, s. 209, rates which had become due and payable within the twelve months prior to the commencement of the winding-up were entitled to priority of payment over the other debts of the company. By the Mercantile Law Amendment Act, 1856, s. 5, a surety who has paid a debt is entitled "to stand in the place of the creditor, and to use all the remedies . . . of the creditor . . . to obtain from the principal debtor . . . indemnification for the advances made and loss sustained by the person who shall have so paid such debt . . . and such payment . . . so made by such surety shall not be pleadable in bar of any such action or other proceeding by him. . . ."

Held: the effect of s. 5 of the Act of 1856 was that a surety seeking to enforce his remedy should be in the same position as if he were the original creditor still unpaid, and so the director was entitled to the priority in the liquidation in respect of his claim to be repaid the £1,276 which the rating authority would have had in respect of the rate, had it not been paid, and, therefore, was entitled to be paid the £1,276 in priority to the debenture holders.

Notes. The provision of the Companies Act, 1948, corresponding to s. 209 of the repealed Act of 1908 is s. 319 (i) (a).

As to subrogation of a guarantor who has paid a preferential debt in the winding-up of a company, see 6 HALSBURY'S LAWS (3rd Edn.) 667; and for cases see 9 DIGEST (Repl.) 496. As to a guarantor's right to enforce satisfied securities against the estate of an insolvent debtor, see 18 HALSBURY'S LAWS (3rd Edn.) 470-471. For the Mercantile Law Amendment Act, 1856, s. 5, and the Companies Act, 1948, s. 319 (i) (a), see 3 HALSBURY'S STATUTES (2nd Edn.) 698.

Cases referred to:

- (1) *Swire v. Redman* (1876), 1 Q.B.D. 536; 35 L.T. 470; 24 W.R. 1069; 26 Digest 130, 941.
- (2) *Re M'Myn, Lightbown v. M'Myn* (1886), 33 Ch.D. 575; 55 L.J.Ch. 845; 55 L.T. 834; 35 W.R. 179; 26 Digest 116, 823.
- (3) *Re Lord Churchill, Manisty v. Churchill* (1888), 39 Ch.D. 174; 58 L.J.Ch. 136; 59 L.T. 597; 36 W.R. 805; 26 Digest 130, 936.
- (4) *Food Controller v. Cork*, [1923] A.C. 647; 92 L.J.Ch. 587; 39 T.L.R. 699; 67 Sol. Jo. 788; 130 L.T. 1; [1923] B. & C.R. 114, H.L.; 10 Digest (Repl.) 992, 6829.

Motion in a winding-up.

The above-named company went into voluntary liquidation with a debt, among others, of £1,690 for unpaid rates, £1,276 for 1925 and £414 for arrears demanded

A in 1924. A director of the company paid those rates while it was a going concern, and subsequently during the liquidation the liquidator took out a summons before the registrar asking whether the amount of £1,276, being the amount owing within twelve months of the winding-up, was to be allowed to him in priority to the claim of the debenture holders. The original capital of the company which started in 1910 was £5,000 and this was subsequently increased. Later on two series of
 B debentures were issued of £15,000 each. A summons was issued against the company in September, 1925, for non-payment of the rates, and it having no assets for that purpose, one of the directors, in order to prevent a distress being levied, gave a guarantee for the amount and later paid it in November of the same year. On
 C Dec. 21, by an extraordinary resolution, it was resolved that the company should be wound-up voluntarily and a liquidator and receiver for the debenture holders was appointed. The assets were insufficient, after payment of preferential debts, to meet the claims of the debenture holders. In these circumstances the registrar, on Oct. 18, 1926, held that the director was not so entitled to priority. This motion was then brought to discharge the registrar's order.

Potts, for the director, the surety who had paid the debt, referred to s. 5 of the Mercantile Law Amendment Act, 1856, s. 209 of the Companies Act, 1908; *Swire v. Redman* (1), *Re M'Myn* (2), *Re Lord Churchill* (3) and *Food Controller v. Cork* (4).

E. W. Sutton for the debenture-holders.

Lavington for the liquidator.

EYE, J.—In my opinion the surety is entitled to the priority he claims. By s. 5 of the Mercantile Law Amendment Act, 1856, it is provided that a surety who has paid a debt shall be entitled

“to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding, at law or in equity, in order to obtain from the principal debtor . . . indemnification for the advances made and loss sustained by the person who shall have so paid such debt . . . and such payment . . . so made by such surety shall not be pleadable in bar of any such action or other proceeding by him. . . .”

It is true that when the payment was made on Nov. 18, 1925, there did not subsist the remedy which the surety is now asserting, for at that time the company was still a going concern and no question as to priority in respect of debts could arise, but within a month of the payment there accrued by reason of the winding-up a new remedy which I think was available to the surety should he elect to enforce it. By s. 209 of the Companies Act, 1908, the rates so paid in so far as they had become due and payable within twelve months prior to Dec. 21, 1925 (the date of the commencement of the winding-up), were entitled to priority of payment over the other debts of the company, and I am unable to see on what ground it could be held that this remedy which would have accrued to the original creditor if he had not already been paid is not available. So to hold would be to treat payment of the debt as a bar to the remedy. But that appears to me to be contrary to the statute which provides in substance that when the surety seeks to enforce his remedy he shall be in the same position as if he were the original creditor still unpaid. There is nothing, I think, to preclude the surety from asserting the right to priority given to a particular creditor by the statute, and, in my opinion, he is entitled to such priority to the amount of £1,276.

Solicitors: *Beachcroft, Hay & Ledward*, for *Brown, Auld & Brown*, Whitehaven.

[Reported by A. W. CHASTER, ESQ., Barrister-at-Law.]

Re CLAYTON'S SETTLED ESTATES

[CHANCERY DIVISION (Russell, J.), February 3, 4, 1926]

[Reported [1926] Ch. 279; 95 L.J.Ch. 169; 134 L.T. 568;
70 Sol. Jo. 427]

Settled Land—Vesting deed—Comprising different parcels in separate principal vesting deeds—Vesting deed as to capital moneys—Interpretation Act, 1889 (52 & 53 Vict., c. 63), s. 1 (1)—Settled Land Act, 1925 (15 Geo. 5, c. 18), Sched. 2, para. 1 (2).

There appearing no contrary intention in the Settled Land Act, 1925, by virtue of the Interpretation Act, 1889, s. 1 (1), the expression "vesting deed" in Sched. 2, para. 1 (2), to that Act includes the plural. In the case of a settlement subsisting at the date of the commencement of the Act of 1925, it is not necessary, therefore, that the whole of the settled land should be comprised in a single principal vesting deed. Different parcels of land may be comprised in separate principal vesting deeds. No principal or other vesting deed is required to be made in respect of capital moneys subsisting at the date of the coming into force of the Settled Land Act, 1925, as that Act contemplates only a vesting deed with regard to land, and capital moneys are not land within the meaning of the Act.

Notes. As to principal vesting deeds, see 29 HALSBURY'S LAWS (2nd Edn.) 534 et seq.; and for cases see 40 DIGEST (Repl.) 850 et seq.

Adjourned Summons.

Nathaniel Clayton, who died in 1895, had by his will settled property, which consisted of land in various parts of the country and also of tithe rentcharges, mines and minerals, and a large sum of money representing capital moneys. Some of this property was situate in Newcastle-on-Tyne and the trustees of the settlement had made arrangement to sell the Newcastle-on-Tyne property on Feb. 18, 1926, but were doubtful whether a separate vesting deed in respect of the property proposed to be sold could be executed under the provisions of cl. 2, of para. 1, of Sched. 2 to the Settled Land Act, 1925. If such a separate vesting deed could not be permitted under the terms of the Act the sale would not be able to take place on Feb. 18, 1926, as if the whole of the land subject to the settlement ought to be comprised in the principal vesting deed, great delay would be caused. In these circumstances the trustees issued this summons under s. 93 of the Settled Land Act, 1925, to determine (i) whether upon the execution of a principal vesting deed relating to the settled land pursuant to cl. 2, of para. 1, of Sched. 2 to the Settled Land Act, 1925, the whole of the land subject to the settlement ought to be comprised therein, or whether the different parts of the settled land could be comprised respectively in different principal vesting deeds; and (ii) whether any principal or other vesting deed required to be made in respect of capital moneys subsisting on Jan. 1, 1926. Section 37 of the Settled Land Act, 1925, provided that

"the transitional provisions set out in the Second Schedule to this Act shall have effect as regards settlements existing at the commencement of this Act."

Paragraph 1 of Sched. 2 provided :

"(1) A settlement subsisting at the commencement of this Act is, for the purposes of this Act, a trust instrument. (2) As soon as practicable after the commencement of this Act, the trustees for the purposes of this Act of every settlement of land subsisting at the commencement of this Act (whether or not the settled land is already vested in them), may, and on the request of the tenant for life or statutory owner shall, at the cost of the trust estate, execute a principal vesting deed (containing the proper statements and parti-

A culars) declaring that the legal estate in the settled land shall vest or is vested in the person or persons therein named (being the tenant for life or statutory owner and including themselves if they are statutory owners), and such deed shall (unless the legal estate is already so vested) operate to convey or vest the legal estate in the settled land to or in the person or persons aforesaid, and, if more than one, as joint tenants."

B Section 1 (1) of the Interpretation Act, 1889, provided as follows:

"In this Act and in every Act passed after the year 1850, whether before or after the commencement of this Act, unless the contrary intention appears . . . (b) words in the singular shall include the plural, and words in the plural shall include the singular."

C *J. M. Lightwood* for the trustees.

R. M. Pattison for the tenant for life.

RUSSELL, J.—This is the case of a settlement existing at the date of the commencement of the Settled Land Act, 1925, and the question which I have to determine depends entirely on what is the true construction of Sched. 2 to the Act, which deals with the transitional provisions affecting existing settlements and, in para. 1, with the provisions for vesting the legal estate in the tenant for life or statutory owner. Paragraph 1 and cls. 1 and 2 are as follows: [His Lordship read the clauses.] Taken literally the words of cl. 2 only refer to a single vesting deed, but the Interpretation Act, 1889, provides, in s. 1, that unless a contrary intention appears words in the singular shall include the plural. Unless, therefore, a contrary intention appears in the Settled Land Act the reference in Sched. 2 to "vesting deed" would include vesting deeds, and several principal vesting deeds may be executed, each comprising different portions of the settled land, and in cl. 2 the expression "settled land" would mean the land comprised in the particular vesting deed.

F The question I have to determine is: Does a contrary intention appear in the Settled Land Act, 1925? I have been referred to various sections of the Act and I have come to the conclusion that I can find no such contrary intention. The only provisions which create any difficulty or raise any question are the following. Schedule 1 contains forms of different instruments. The reference to them in the body of the Act is in s. 15, which enacts that "examples of instruments framed in accordance with the provisions of this Act are contained in Sched. 1 to this Act." C Form No. 1 is a form of a vesting deed for giving effect to a settlement subsisting at the commencement of this Act. The form there given is obviously a form intended and in terms expressed to include the whole of the land subject to the settlement. It is made between the trustee of the one part and the tenant for life of the other part, and after various recitals, the operative part proceeds as follows:

H "Now for giving effect to the requirements of the Settled Land Act, 1925, this deed witnesseth as follows: (1) The trustees as trustees hereby declare that—all and singular the hereditaments and premises respectively mentioned in the First and Second Schedules hereto and all other (if any) the premises capable of being vested by this declaration which are now by any means I subject to the limitations of the recited settlement are vested in the said tenant for life. . . ."

There is a note telling one to add the schedules, what hereditaments to put in each, and to give particulars of the freehold land, referring, if possible, to annexed plans, so that the vesting deed may ultimately become a convenient root of title. No doubt that shows that the draftsman had in mind that normally there would be a single vesting deed comprising the whole of the land subject to the settlement. After all, that is only given as an example, and there is nothing in that which is inconsistent with the view which I take as to the construction of Sched. 2, that

under it you may, if you choose, have more than one principal vesting deed. Then s. 10 and s. 35 and other sections were referred to, where the expression occurs: "the last or only principal vesting instrument," and it is suggested that the use of the word "only" in those sections necessitates that there should be only one principal vesting deed. The word "only" undoubtedly tends that way, but it is not, in my opinion, sufficient to exclude the application of the Interpretation Act, 1889, to Sched. 2. Again reference was made to s. 110, and that was pointed out as another indication that one single principal vesting deed was contemplated by the Act. That point turns on the words of the proviso in that section, which contains the expression:

"Provided that, as regards the first vesting instrument executed for giving effect to—(a) a settlement subsisting at the date of the commencement of this Act."

There, again, I do not find that is a strong enough indication to prevent the application of the Interpretation Act to Sched. 2.

In my opinion, there is nothing in the Settled Land Act, 1925, which would justify me in saying that the Interpretation Act, 1889, does not apply to Sched. 2; and accordingly, I hold and decide that in the case of a settlement subsisting at the commencement of the Act, it is not necessary that the whole of the settled land should be comprised in one single principal vesting deed, but that it is open to the parties to execute more than one principal vesting deed, each such deed comprising different parcels of the settled land.

As to the second question raised in the summons—viz., whether any principal or other vesting deed requires to be made in respect of capital moneys subsisting on Jan. 1, 1926—it is quite clear that no vesting deed is required. The Act only contemplates a vesting deed with regard to land, and capital moneys are not land within the meaning of this Act.

Order accordingly.

Solicitors: *King, Wigg & Brightman* for Clayton & Gibson, Newcastle-upon-Tyne.

[Reported by GEOFFREY P. LANGWORTHY, Esq., Barrister-at-Law.]

A

Re EGERTON SETTLED ESTATES

[CHANCERY DIVISION (Eve, J.), March 12, 18, 1926]

[Reported [1926] Ch. 574; 95 L.J.Ch. 153; 135 L.T. 105]

B

Settled Land—Tenant for life—General power of appointment—Power to charge settled land for own purposes—Power to create legal mortgage—Settled Land Act, 1925 (15 Geo. 5, c. 18), s. 16 (1) (iii).

C

On Jan. 1, 1926, land stood limited (subject to overriding annuities) to such uses as E. should by deed appoint, and subject thereto to the use of E. during his life, with remainders over. The principal vesting deed was executed on Jan. 27, 1926. E. wished to raise money for his own purposes on the security of the settled land. On the question whether E. had power to demise the settled land by way of legal mortgage,

Held: E. had the necessary power under the Settled Land Act, 1925, s. 16 (1) (iii).

D

Notes. As to the enforcement of equitable rights against the estate owner, see 29 HALSBURY'S LAWS (2nd Edn.) 629 et seq.; and for cases see 35 DIGEST 277 et seq. For the Settled Land Act, 1925, s. 16, see 23 HALSBURY'S STATUTES (2nd Edn.) 45.

Adjourned Summons.

E

On Jan. 1, 1926, the Egerton settled estates, of which the hereditaments and premises to which this summons related formed part, stood limited subject to certain overriding annuities to such uses as Lord Egerton should by deed appoint, and subject thereto to the use of Lord Egerton for life, with remainders over. On Jan. 27, 1926, the principal vesting deed under s. 37 of the Settled Land Act, 1925, and s. 1 (2) of para. 1 of Sched. 2 thereto was duly executed. Lord Egerton was desirous of raising a sum of money for his own purposes on the security of the settled land, and the question arose whether he could create such legal estate or charge by way of legal mortgage as was required by the proposed mortgagees before they would consent to advance the money.

F

Gover, K.C., and A. L. Ellis for Lord Egerton.

Vaisey, K.C., and P. M. Walters for the trustees of the settlement.

Cur. adv. vult.

G

Mar. 18. **EVE, J.**, stated the facts and continued: By the Settled Land Act, 1925, s. 16 (1) (iii) it is enacted—I am only reading the words which are clearly applicable to the case in point—as follows:

H

“Where (a) any principal sum is required to be raised on the security of the settled land . . . by any person . . . who under the settlement . . . has . . . a general power of appointment over the settled land . . . the estate owner shall be bound, if so requested in writing, to create such legal estate or charge by way of legal mortgage as may be required for raising the money. . . .”

I

That language appears to me to be entirely appropriate to the circumstances here subsisting. Lord Egerton has under the settlement a general power of appointment over the settled land: he requires a principal sum to be raised on the security of the settled land; and those who are prepared to advance the money require a legal estate to be created by way of security. If the transaction is to be completed, Lord Egerton must, on the written request of the mortgagees, create the required legal estate. Why should not effect be given to this language?

It is said that so to do might put the estate owner in a position of difficulty in that as trustee of the settled land upon such trusts as may be requisite for giving effect to the equitable interests and powers affecting the settled land (s. 16 (1) (i)) it will be incumbent on him under sub-s. (2) of the same section to see that the mortgage is made expressly subject to all the equitable interests and powers subsisting under the settlement and having priority to his interests or powers, and

that this obligation may create a position in which his duty and interest may conflict. This may be so to some extent, but even so it hardly seems a sufficient reason for eliminating him, of all persons, from the class of individuals entitled to have a legal estate created to secure principal sums required to be raised on the security of the settled land. Nor do I think the transaction involves the absurdity of the estate owner serving a written request on himself to create the legal mortgage. The individual, by or on behalf of whom the money is required to be raised, is not the same person as the one who requires the creation of the legal estate to secure the advance, and in cases where the estate owner is borrowing for his own purposes the request in writing must, in my opinion, be regarded as one coming from the lender. In other cases, such, for example, as one of money being required to be raised by virtue of any trust, the request, it seems to me, might be made by the trustees or the beneficiaries or the lender. The construction of s. 16 is not without difficulty, for example, what provision in para. (iii) of sub-s. (1) calls for the inclusion of sub-s. (3)? But the conclusion I have arrived at is that the words I have read from para. (iii) do expressly provide for the creation of a legal mortgage by an estate owner who, under the settlement, has a general power of appointment over the settled land.

Order accordingly.

Solicitors: *Ellis, Peirs & Co.*

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

Re LEIGH'S SETTLED ESTATES

[CHANCERY DIVISION (Tomlin, J.), June 2, 1926]

[Reported [1926] Ch. 852; 95 L.J.Ch. 511; 136 L.T. 395;
70 Sol. Jo. 758]

Settled Land—Powers of tenant for life—Beneficiary entitled to rents until sale, subject to annuities—Vesting of legal estate—Order made before 1926 giving leave to exercise powers under s. 7 of Settled Land Act, 1884—"Immediate binding trust for sale"—Settled Land Act, 1925 (15 Geo. 5, c. 18), s. 20 (1) (viii), Sched. II, para. 1—Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 205 (1) (xxix).

The expression in s. 205 (1) (xxix) of the Law of Property Act, 1925, "an immediate binding trust for sale," refers to land which is the total subject-matter of the settlement and is subject to a trust for sale which operates in relation to the whole subject-matter of the settlement and is immediately exercisable, it being immediately exercisable "whether or not it is exercisable at the request or with the consent of any person." Where the subject-matter of a settlement is the whole unincumbered fee simple there is no immediate binding trust for sale so long as there is not a trust for sale which is capable of overriding all prior charges. Where, therefore, under a compound settlement a beneficiary was entitled to receive the rents of the settled property until sale, subject only to paying certain annuities, she was a person having the powers of a tenant for life under s. 20 (1) (viii) of the Settled Land Act, 1925, and *prima facie* the person in whom the legal estate should be vested by a vesting deed made pursuant to para. 1 of Sched. II to the Act. The fact that before the coming into operation of the Acts of 1925 an order had been made under s. 7 of the Settled Land Act, 1884, giving her leave to exercise the powers

- A conferred by s. 63 of the Settled Land Act, 1882, did not affect the conclusion arrived at with regard to the effect of the Acts of 1925.

Notes. Distinguished and doubted: *Re Parker's Settled Estates*, *Parker v. Parker*, [1927] All E.R.Rep. 546. Referred to: *Re Sharpe's Deed of Release*, *Sharpe v. Fox*, [1938] 3 All E.R. 449.

- B As to powers under the Settled Land Act, 1925, see 29 HALSBURY'S LAWS (2nd Edn.) 668 et seq.; and for cases see 40 DIGEST (Repl.) 802 et seq. For Law of Property Act, 1925, and Settled Land Act, 1925, see HALSBURY'S STATUTES (2nd Edn.), vol. 20, p. 427, and vol. 23, p. 15, respectively.

Case referred to:

- C (1) *Re Lady Francis Cecil's Settled Estates*, [1926] W.N. 262; 40 Digest (Repl.) 814, 2934.

- D **Originating Summons** to determine whether a vesting deed ought to be executed for giving effect to the settlement of the estates dealt with by the testator in his will subsisting at the commencement of the Settled Land Act, 1925, and whether the orders made under s. 7 of the Settled Land Act, 1884, giving to the testator's granddaughter power to exercise all the powers of a tenant for life of the settled estates were still in force under the Law of Property Act, 1925, s. 29 (4), and whether she could continue under that section to exercise the powers of a tenant for life, or whether the trustees for sale must exercise them.

- E The testator, who died in 1861, by his will, dated May 22, 1860, devised his freehold estates to the use of his son for life, with remainder to the use of the son's first and every other son successively in tail with remainder to the use of his first and every other daughter successively in tail. In 1921 the son died, having had one son, who died in 1908 at the age of fifteen years, and one daughter, Mrs. Tenison, and having, by a deed dated Jan. 7, 1885, exercised a power conferred by the will to appoint a jointure rentcharge of £1,500 per annum to his wife Mrs. Hanbury, who still lived. In 1923 Mrs. Tenison, a minor, with the consent and under the authorisation of the court, executed a disentailing deed and conveyed the settled lands (subject to Mrs. Hanbury's jointure) to trustees on trust for sale (with power to postpone) and to stand possessed of the net proceeds of sale and the rents and profits until sale on the trusts of a settlement of even date under which were payable life annuities of £5,000 to Mrs. Tenison, £1,000 to Mr. Tenison, and £3,500 to Mrs. Hanbury, the balance being payable to Mrs. Tenison during her life.

- G *H. T. Methold* for the trustees.
Gavin Simonds, K.C., and *Tillard* for Mrs. Tenison.
J. V. Nesbitt for Mrs. Hanbury, Mr. Tenison, and a trustee of the testator's will.

- H **TOMLIN, J.**—In this case land, I will not say is settled, because I hesitate to use a phrase which may not mean what I think it means, but which is the subject-matter of a number of instruments. The first is a will dated in 1860 by which the property was settled on the testator's son with remainder to his issue in tail, subject to a jointure rentcharge of £1,500 a year in favour of the son's widow who is still alive. The son had a daughter, Mrs. Tenison, who succeeded as tenant in tail and who disentailed in December, 1923. That is the second instrument which affects the land. About that date the daughter married, and, being then under age, a settlement was approved by this court of her interest in the land. That took the form of two instruments, the first a conveyance on trust for sale in which the annuitant, the son's widow, concurred and contracted with the trustees that she would join in releasing her rentcharge when they wanted to sell, on the footing that it was transferred to the proceeds of sale; and a further settlement whereby the proceeds of sale of the land were settled upon what were, I suppose, the ordinary marriage settlement trusts, subject only to the income being payable in this way. After provision was made for the £1,500 a year the wife was to take £5,000 a year, then there was to be £1,000 a year paid to her husband, £3,500 was payable to the annuitant in addition to the £1,500 annuity, and the balance, which

is a very considerable sum, was payable to the wife herself for life with various trusts with which I need not concern myself. In April, 1924, an application was made to me for an order that the wife might be let into possession on the footing of her being an equitable tenant for life, and an order was made by me letting her into possession upon the undertakings which are usual in such cases. Further, by an order, the persons who had been appointed trustees, for the purpose of the Settled Land Acts, of the compound settlement created by the instruments to which I have referred were ordered to deliver over to the applicant the counterparts of leases and so on. By the same order they were appointed trustees of the compound settlement, and then there was a further direction that, pursuant to s. 7 of the Settled Land Act, 1884, it was ordered that the powers conferred upon the tenant for life by ss. 6 to 13 of the Settled Land Act, 1882, having regard to s. 63 thereof, be exercised by the applicant. Those are the powers in relation to leasing and so on. On Jan. 20, 1925, there was made an order which extended the leave to exercise powers to cover all the powers of the Settled Land Acts. Pursuant to s. 7 of the Act of 1884 it was ordered that the applicant be at liberty to exercise with respect to the settled estate the power of sale and other powers conferred upon the tenant for life by the Act of 1882 in addition to those already exercisable by her under the earlier order.

That was the condition of affairs when the Law of Property Act, 1925, and the Settled Land Act, 1925, came into force on Jan. 1, 1926. The Settled Land Act, 1925, s. 1, defines a settlement for the purposes of that Act, and it seems quite plain from the language employed in sub-s. (1) that the testator's will, the disentailing deed, the conveyance on trust for sale, and the settlement of the proceeds of sale, which together comprise the legal estate in the unincumbered fee simple of the land, constitute a settlement within the meaning of that section, more especially as there is a proviso that where land is the subject of a compound settlement references in the Act to the settlement shall be construed as meaning such compound settlement, unless the context otherwise requires. Section 19 (1) of the Act provides:

"The person of full age who is for the time being beneficially entitled under a settlement to possession of settled land for his life is for the purposes of this Act the tenant for life of that land and the tenant for life under that settlement."

Section 20 (1) deals with other limited owners having the powers of the tenant for life and provides:

"Each of the following persons being of full age shall, when his estate or interest is in possession, have the powers of a tenant for life under this Act, namely . . . (viii) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether or not subject to expenses of management or to a trust for accumulation of income for any purpose, or until sale of the land, or until forfeiture, cesser or determination by any means of his interest therein, unless the land is subject to an immediate binding trust for sale."

In s. 117 (xxx) under "trust corporation," it is discoverable that "trust for sale," "trustees for sale," and "power to postpone a sale" have the same meanings as in the Law of Property Act, 1925. That brings in the definition of trust for sale in s. 205 (1) (xxix) of the Law of Property Act, which is in these terms:

"'Trust for sale,' in relation to land, means an immediate binding trust for sale, whether or not exercisable at the request or with the consent of any person, and with or without a power at discretion to postpone the sale . . ."

So I suppose that in s. 20 (1) (viii) of the Settled Land Act, 1925, "unless the land is subject to an immediate binding trust for sale," must mean unless the land is subject to such a trust for sale as is defined by s. 205 (1) (xxix) of the Law of Property Act, 1925.

- A The question is what is meant by "an immediate binding trust for sale." Of course, an immediate trust for sale is an intelligible conception where "immediate" is used as distinct from "future"; a binding trust for sale in its simplest form would be something the opposite of one that was not binding, but it is difficult to suppose that this is the contrast which was intended to be indicated by the use of this phrase. There must be, it seems to me, some significance in the word
- B "binding" here. It is incredible that the word should have no meaning. It has presumably been inserted for some definite purpose, and it is the duty of the court to attribute to it some intelligible meaning. The expression, "unless the land is subject to an immediate binding trust for sale" must, I think, mean "unless the land that is the total subject-matter of the settlement is subject to a trust for sale which operates in relation to the whole subject-matter of the settlement and is
- C immediately exercisable," although, possibly, with the limitation that it is treated as immediately exercisable "whether or not exercisable at the request or with the consent of any person." If that be the meaning of the phrase, it may well be that, where the subject-matter of the settlement is the whole unincumbered fee simple, there is no immediate binding trust for sale so long as there is not a trust for sale which is capable of overriding all prior charges. In the present case there is no
- D trust for sale capable of overriding all prior charges. The trust for sale under the conveyance of December, 1923, is not capable of overriding the annuity which arose under the will of 1860. It is true that the annuitant entered into a special contract with the trustees of that conveyance that in connection with any sale under the trust for sale she would, if desired, concur to release her annuity, but the trust for sale itself is not a trust for sale which overrides that annuity.
- E If the view I have suggested be correct, then in considering whether under the settlement created by the four instruments in question there is within the meaning of the Settled Land Act, 1925, a tenant for life, I am able to apply s. 20 (1) (viii) to this case, as being a case where there is no immediate binding trust for sale. The question then is whether Mrs. Tenison who is entitled to receive, as things stand, the rents of the property until sale, subject only to paying certain annuities,
- F is within para. (viii) and is, therefore, a person having the powers of a tenant for life under the Act. It makes, I think, no difference that her right to receive the rent is subject to certain prior charges. I see no reason to think that in that respect this subsection differs from s. 58 (1) (ix) of the Act of 1882, and I think, therefore, that if the case is not a case where there is an immediate binding trust for sale she comes within the language of this paragraph.
- G It follows that, having held upon the construction of the phrase "immediate binding trust for sale" that there is no immediate binding trust for sale, I must come also to the conclusion that Mrs. Tenison is a person having the powers of a tenant for life and, as such *primâ facie* the person in whom the legal estate should be vested by a vesting deed made pursuant to the provision in para. 1 of Sched. II to the Settled Land Act, 1925, headed "Provisions for vesting legal estate in tenant for life or statutory owner." I say *primâ facie* because it has been suggested that some other consequence may result from the fact that before these Acts came into force I had made an order giving Mrs. Tenison leave to exercise the powers of a tenant for life under s. 7 of the Act of 1884. I have come, however, to the conclusion that for the moment the existence of that order does not in any way affect—
- H and, indeed, I do not see how it could affect—the conclusion at which I have arrived in regard to the effect of the new Acts apart from those orders. Moreover, while it is true that under the Act of 1882, s. 58 (1) (ix) seems to have been treated as inapplicable to the case of a person entitled to rents and profits pending a sale under a trust for sale, the considerations which arise here by reason of the phrase "an immediate binding trust for sale," did not enter into the matter, and the problem to be solved under s. 20 (1) (viii) of the Settled Land Act, 1925, is altogether different. It is necessary to bear that in mind, and also that, under s. 63 of the Act of 1882, where there was a trust for sale the person entitled to the
- I

income of the proceeds of sale or the rents of the land until sale was the person to exercise the powers of the Settled Land Act, and that it was only at a later date, when it was found that there would result from that condition of affairs a conflict between the powers of the tenant for life and those of the trustees, that s. 7 of the Act of 1884 was passed, whereby the tenant for life's powers were only to be exercised with the consent of the court. Bearing those matters in mind, it is plain that the effect of the order made by me before the new Acts came into force was merely to sanction the exercise by the tenant for life of those powers which under s. 63 she would have been entitled to exercise but for the prohibition contained in the Act of 1884. It may be true that having had that permission the tenant for life could, under the old law, as soon as there were trustees appointed of the compound settlement, exercise her powers so as to override the prior charges, and that the powers that she then exercised were the powers which she had obtained leave to exercise and not some higher power vested in her as tenant for life of the compound settlement. Or the true view may be that she could only sell so as to override the prior charges by virtue of the higher powers vested in her as tenant for life of the compound settlement. I do not think it is necessary for me to decide which is the right view in that regard.

However that may be, it seems clear to me that on the true construction of the new Acts Mrs. Tenison is, as I have already held, a person having the powers of a tenant for life under a compound settlement, and is entitled to have the legal estate in the whole unincumbered fee simple of the land vested in her; but it may be that when the prior rentcharge falls so that the will ceases to have any operation, a different position of affairs will arise and Mrs. Tenison will then be in the position contemplated by s. 29 (4) of the Law of Property Act, 1925, and entitled to exercise the powers conferred on her by the orders made under the Settled Land Act, 1884, s. 7, in the names and on behalf of the trustees for sale. Section 29 is a remarkable section. Under the first subsection the trustees for sale are authorised to delegate certain leasing and the like powers, but not to delegate their trust for sale. Subsection (2) provides:

"Any power so delegated shall be exercised only in the names and on behalf of the trustees delegating the power."

Subsection (3) relieves persons delegating their powers from liability, and sub-s. (4) provides:

"Where, at the commencement of this Act, an order made under s. 7 of the Settled Land Act, 1884, is in force, the person on whom any power is thereby conferred shall, while the order remains in force, exercise such power in the names and on behalf of the trustees for sale in like manner as if the power had been delegated to him under this section."

Any power of sale, of course, could not have been delegated under this section, but I have already held in *Re Lady Frances Cecil's Settled Estates* (1) that s. 29 (4) includes such a power. I think the concluding words of the subsection really mean "if the power had been a power capable of being delegated under this section, and had been so delegated." Here the trustees have no power by virtue of their trust for sale to override the annuity or jointure; and it may be—I do not know—that the position differs from that under the old law in that, if under the old law there were trustees of this compound settlement the person having the powers of a tenant for life might have overridden the jointure upon any exercise of her powers under the leave conferred on her by the order. However, I am not concerned with that. I think that it is enough for me to say that if hereafter on the cesser of the existing compound settlement by reason of the falling of the annuity, the settlement then consists of the two instruments comprising the marriage settlement, then, if the order made by me before the Act came into force is relied upon to enable the lady who receives the rents under those settlements to exercise the powers of the

A Act, I see no reason to think that that order will not be in force, and a good order, although the power exercised under it must be exercised in the names of and on behalf of the trustees.

Solicitors: *Foyer, White, Borrett & Black.*

[*Reported by L. MORGAN MAY, Esq., Barrister-at-Law.*]

B

C

Re CRAVEN SETTLED ESTATES

[CHANCERY DIVISION (Astbury, J.), July 23, 1926]

[Reported [1926] Ch. 985; 95 L.J.Ch. 559; 136 L.T. 121;
70 Sol. Jo. 1111]

D

Settlement—Statutory owner—Release of powers—Settled Land Act, 1925 (15 Geo. 5, c. 18), s. 23 (1) (b), s. 24 (1), s. 104 (1), s. 117 (1) (xxvi), (xxviii)—Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 155.

E

A person who is a "statutory owner" within the meaning of the Settled Land Act, 1925, s. 117 (1) (xxvi), can, by virtue of the Law of Property Act, 1925, s. 155, release his powers.

F

C. was entitled under a re-settlement to a protected life interest, but in 1921, when his interest would have fallen into possession, he was an undischarged bankrupt, and, accordingly, he became an object of the discretionary trust. The re-settlement provided that if C.'s life estate should fail or determine during his lifetime, all the powers thereby or by statute conferred on him should continue to be exercisable by him. In 1923 the court declared that, notwithstanding his bankruptcy, C. had all the powers of a tenant for life under the re-settlement. On Jan. 1, 1926, under the Settled Land Act, 1925, the re-settlement, together with the original settlement and a disentailing deed, constituted a compound settlement. C. desired to divest himself of the powers of a tenant for life, and vest them in the trustees of the compound settlement.

G

Held: (i) C. was not a "tenant for life" within the Settled Land Act, 1925, s. 117 (1) (xxviii), but a "statutory owner" within s. 117 (1) (xxvi); while, therefore, there was no jurisdiction to make an order under s. 24 (1) of that Act authorising the trustees to exercise the powers of the tenant for life, the prohibition in s. 104 (1) against the assignment or release by a tenant for life of his powers did not apply; and C. could release his powers under the Law of Property Act, 1925, s. 155, whereupon the trustees would become entitled to exercise those powers by virtue of s. 23 (1) (b) of the Settled Land Act, 1925.

H

Notes. As to the inalienability of powers of tenant for life, see 29 HALSBURY'S LAWS (2nd Edn.) 693 et seq.; and for cases see 40 DIGEST (Repl.) 794 et seq.

Adjourned Summons.

I

By a settlement dated April 13, 1893, and made between William, fourth Earl of Craven, of the first part, Cornelia Martin (afterwards Countess of Craven) of the second part, and certain persons as trustees of the third part, the Craven estates were settled to the use of the fourth earl and his assigns during his life with remainder to the use that Cornelia Martin if she should survive him should receive during her life a yearly rentcharge of £2,500, and subject thereto to the use of trustees for a term of two hundred years, and subject thereto to the use of the first and other sons of the fourth earl in tail male with remainders over. By a disentailing deed dated Feb. 10, 1919, and made between the fourth earl of the

first part, Viscount Uffington, now the fifth Earl of Craven, the eldest son of the fourth earl of the second part, and Beresford Remington Heaton of the third part, the Craven settled estates were disentailed and limited to such uses upon such trusts and generally in such manner as the fourth earl and Viscount Uffington should jointly appoint. By a re-settlement dated Feb. 11, 1919, and made between the fourth earl of the first part, Viscount Uffington of the second part, and trustees of the third part, the fourth earl and Viscount Uffington appointed the Craven settled estates to the use of the fourth earl during his life without impeachment of waste by way of restoration and confirmation of his life estate under the settlement of 1893, with remainder to the use of the trustees during the life of Viscount Uffington upon trust to allow Viscount Uffington to enjoy the rents and profits during such time or times as he had not done anything to forfeit or alienate his right to the same, and in the event of or during such alienation the trustees were to resume possession, and to have full powers of management, and were to hold the rents and profits for the benefit of one or more of them, Viscount Uffington, his wife, children or issue, as the trustees in their discretion should decide—in other words, Viscount Uffington was given a protected life interest—and there were remainders over, with an ultimate remainder to Viscount Uffington. The re-settlement went on to declare that if the life estate of Viscount Uffington under those trusts should fail or determine during his lifetime, all the powers thereby or by statute conferred upon him should continue to be exercisable by him notwithstanding such failure or determination, and in the re-settlement expressions referring to a tenant for life should—unless repugnant to the context—include Viscount Uffington during the whole of his life, notwithstanding the provisions thereinbefore contained for the failure or determination of his life interest. The re-settlement contained a number of provisions extending the powers of a tenant for life additional to or larger than the powers conferred by the Settled Land Acts, and also additional powers for the investment of capital moneys by direction of the tenant for life. The trustees were appointed trustees of the re-settlement for all the purposes of the Settled Land Acts, and for the purposes of any compound settlement consisting of the re-settlement, and any instrument to be executed thereafter. Viscount Uffington was adjudicated bankrupt on Sept. 24, 1919, and was still an undischarged bankrupt. The fourth Earl of Craven died in 1921, and Viscount Uffington thereupon became fifth earl. On June 22, 1923, LAWRENCE, J., decided that, notwithstanding his bankruptcy, the fifth earl had all the powers of a tenant for life under the Settled Land Acts then in force. Upon the Settled Land Act, 1925, coming into force the settlement of 1893, the disentailing deed, and the re-settlement of 1919 constituted a compound settlement. The present trustees of the compound settlement and of the re-settlement of 1919 were Viscount Curzon and Mr. Alexander Charles Harris. The fifth earl desired, as he was mainly residing abroad, and for other reasons, to divest himself of the powers of a tenant for life under the re-settlement and, if it were possible, to vest the same in the trustees. He therefore issued this summons, to which his eldest son, Viscount Uffington, an infant, and the trustees were parties, asking (i) that he might be discharged from the office or offices of statutory owner or tenant for life within the meaning of the Settled Land Act, 1925, and of trustee within the meaning of the Trustee Act, 1925, of the compound settlement and the re-settlement, and that the trustees might be appointed to such office or offices in his place. (ii) Alternatively, that an order might be made under s. 24 of the Settled Land Act, 1925, authorising the trustees to exercise in his name and on his behalf all the powers of a tenant for life under the said Act. (iii) Alternatively, that upon him by deed releasing the powers of a tenant for life conferred upon him by the compound settlement and the re-settlement, it might be declared, pursuant to s. 23 (a) of the Settled Land Act, 1925, that the trustees would have the powers of a tenant for life during such period as there was no tenant for life. (iv) Alternatively, that his retirement from the office of statutory owner and the appointment in his place of the trustees as statutory owners during his life, under the compound settlement

A and re-settlement might be authorised as a transaction within the meaning of s. 64 of the Settled Land Act, 1925.

Jenkins, K.C., and Dighton Pollock for Lord Craven.

Archer, K.C., and Beebee for the trustees.

Topham, K.C., and Tillard for the infant tenant in tail.

B **ASTBURY, J.**—This is a summons relating to the Craven settled estates which are subject to a compound settlement set out in the title to the summons. The applicant is the present Lord Craven who, at the present time, is an undischarged bankrupt.

Under the re-settlement of Feb. 11, 1919, referred to in the title, Lord Craven is no longer, or is not, tenant for life; but there is a discretionary trust, under which the trustees of the settlement may apply the rents and profits of the estates in the manner therein stated. There is a provision, however, in the re-settlement that, if the estate of the tenant for life shall fail or determine during his lifetime, all the powers thereby or by statute conferred on the tenant for life shall continue to be exercisable by him, notwithstanding such failure or determination. By an order of LAWRENCE, J., dated June 22, 1923, the court declared that according to the true construction of the re-settlement Lord Craven has now, and will during the remainder of his life, have over the settled estates, excluding a certain portion of them, the same or the like powers of sale and powers of every description as he would have had over and in respect of the same under the Settled Land Acts, 1882 to 1890, if tenant for life in possession. For reasons which it is unnecessary to state, it is desired by Lord Craven and all persons interested in the settled estates, that the powers lastly referred to should be exercised in the future by the settlement trustees, if that can be effected. Whether this can be brought about or not depends apparently upon a number of sections in the Settled Land Act, 1925, and upon s. 155 of the Law of Property Act of the same year.

Under s. 20 of the Settled Land Act certain persons therein referred to, whose estate or interest is in possession, are given the powers of a tenant for life, they all being people having an estate or interest in them as therein set out. By s. 23 (1) it is provided :

“Where under a settlement there is no tenant for life nor, independently of this section, a person having by virtue of this Act the powers of a tenant for life, then (a) any person of full age on whom such powers are by the settlement expressed to be conferred, and (b) in any other case the trustees of the settlement, shall have the powers of a tenant for life under this Act.”

Section 104 provides that the powers under the Act of a tenant for life shall not be capable of assignment or release, and that any contract by a tenant for life not to exercise them shall be void; but by s. 24 (1) the following provision is made :

“If it is shown to the satisfaction of the court that a tenant for life, who has by reason of bankruptcy, incumbrance, or otherwise ceased to have a substantial interest in his estate or interest in the settled land or any part thereof, has unreasonably refused to exercise any of the powers conferred on him by this Act, or consent to an order under this section, the court may, on the application of any person interested in the settled land or the part thereof affected, make an order authorising the trustees of the settlement to exercise in the name and on behalf of the tenant for life, any of the powers of a tenant for life under this Act in relation to the settled land or the part thereof affected, either generally and in such manner and for such period as the court may think fit, or in a particular instance, and the court may by the order direct that any documents of title in the possession of the tenant for life relating to the settled land be delivered to the trustees of the settlement.”

So it is quite plain that, although the powers given to a tenant for life by the statute cannot be released or got rid of, the court may, if (inter alia) a tenant for life is bankrupt, make an order within s. 24. The difficulty, if there be one, in

the present case exists by reason of the definitions of "tenant for life" and "statutory owner" in s. 117 (1) of the Act. By sub-cl. (xxviii) of that subsection it is enacted:

" 'Tenant for life' includes a person (not being a statutory owner) who has the powers of a tenant for life under this Act. . . ."

Sub-clause (xxvi) of the same subsection enacts that:

" 'Statutory owner' means the trustees of the settlement or other persons who, during a minority, or at any other time when there is no tenant for life, have the powers of a tenant for life under this Act."

At first sight it seems a little difficult to determine exactly what is intended by those two sub-clauses. I do not think that there is any question that "tenant for life," under the Act, unless the context otherwise requires, means a tenant for life proper, or a person having the powers of a tenant for life under the Act, who is not a "statutory owner." "Statutory owner," however, means (inter alia) a person who, when there is no tenant for life, has the powers of a tenant for life under the Act, and it may be that the true clue to the meaning of some of these sections is that the policy of the Act is to deal with tenants for life proper, and other persons such as those referred to in s. 20, who, interested in the estate, are given the powers of a tenant for life, as distinct from people, not in either of those categories, who are nevertheless "statutory owners" within the definition clause.

Turning back to s. 24, the only person referred to in that section is a tenant for life, and that means, if I am right in my construction of the definition clauses which I have read, a tenant for life or person having the powers of a tenant for life, as, for instance, those referred to in s. 20, provided that the person in question is not a statutory owner. The effect of that would be that tenants for life proper, and persons having the powers of a tenant for life in the full sense are intended to be referred to, as distinct from persons who have powers of tenants for life, but have no estate at the moment, who are termed statutory owners. This, I think, is the true construction of s. 24, and, therefore, it is impossible for the court under that section to make this order in the present case, because the applicant is not a tenant for life and is not a person, other than a statutory owner, having the powers of a tenant for life.

Section 104 seems to me a section to which a similar construction must be given. It provides that the powers under the Act of a tenant for life are not capable of assignment or release. Reading in the definition, that means that no tenant for life or person having the powers of a tenant for life under the Act, not being a statutory owner, may release or assign his powers, but there is not the same reason, apparently why any such prohibition should affect a person who is a statutory owner within the meaning of the definition. That that is a construction to which one is driven, or which one ought to adopt, is exemplified by the different language of s. 107. Section 107 (1) provides:

"A tenant for life or statutory owner shall, in exercising any power under this Act, have regard to the interests of all parties."

So that, where the statute desires to include a statutory owner, who may have the powers of a tenant for life, as well as tenants for life proper and tenants for life other than statutory owners, the matter is so stated. In other words, ss. 24 and 104 refer to tenants for life other than statutory owners, but where a statutory owner is intended to be included in the section he is referred to as such in addition to the tenants for life. Now if that be the true construction, as I believe it to be, there is no prohibition in this statute against the release by a statutory owner of his powers, and there seems little reason why this should be so. In the absence of such prohibition a statutory owner would seem to be a person falling within s. 155 of the Law of Property Act, 1925, to whom any power, whether coupled with an interest or not, is given, and such person may under that section by deed release or contract not to exercise the powers.

- A** For these reasons, I am of opinion that the present applicant can release his powers as statutory owner, and on doing so s. 23 (1) (b) provides that in that case the trustees of the settlement shall have the powers of a tenant for life under the Act, because in that event, there being no tenant for life, nor any person on whom the powers of a tenant for life are by the settlements expressed to be conferred and operative, sub-s. (1) (b) appears to apply. The proper order in the circumstances
- B** seems to me to declare that on the applicant by deed releasing the powers of a tenant for life expressed to be conferred on him by the compound settlement and re-settlement, during such period as there is no tenant for life thereof, the trustees of the compound settlement and re-settlement will have the powers of a tenant for life during such period in relation to their settled estates.

Order accordingly.

- C** Solicitors: *Rider, Heaton, Meredith & Mills.*

[Reported by E. K. CORRIE, Esq., Barrister-at-Law.]



